No. _____

IN THE
Supreme Court of the United States

JOE FERNANDEZ,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(1)(A), a district court has broad discretion to reduce the term of imprisonment in any case if it finds that "extraordinary and compelling reasons warrant such a reduction." The sole limitation Congress placed on that discretion is found in 18 U.S.C. § 994(t), which provides that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." In reversing the district court's grant of compassionate release to Joe Fernandez, the Second Circuit held that it was an abuse of discretion for the court to have considered evidence bearing on Fernandez's potential innocence as well to have found a disparity in sentences between Fernandez and several of his co-defendants who were cooperating witnesses. That decision was contrary to decisions of the First and Ninth Circuits, which have each held that district courts are not restricted with respect to matters they may consider under 18 U.S.C. § 3582(c)(1)(A) other than as set forth by Congress. The question presented is:

Whether the Second Circuit erred in recognizing extra-textual limitations on what information a court may consider when determining whether there exist extraordinary and compelling reasons warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

PARTIES TO THE PROCEEDING

Petitioner Joe Fernandez was the defendant-appellee below.

Respondent United States of America was the plaintiff-appellant below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States of America v. Joe Fernandez*, No. 22-3122-cr (2d Cir. Dec. June 11, 2024)
- *United States of America v. Joe Fernandez*, No. 10 Cr. 863 (S.D.N.Y. Nov. 17, 2022)
- *Joe Fernandez v. United States of America*, No. 20 Civ. 5539 (S.D.N.Y. Nov. 3, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joe Fernandez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. 1a-25a) is reported at 104 F.4th 420 (2d Cir. 2024). The order of the Second Circuit Court of Appeals vacating the district court's order granting compassionate release (App. 26a-27a) is unreported. The opinion of the United States District Court for the Southern District of New York (App. 28a-39a) is unreported and available at 2022 WL 17039059 (S.D.N.Y. Nov. 12, 2022). The order of the Second Circuit Court of Appeals denying the petition for rehearing *en banc* (App. 40a-41a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on June 11, 2024. The Second Circuit's order denying the petition for rehearing *en banc* was entered on August 15, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

18 U.S.C. § 3582 provides in pertinent 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

STATEMENT

In deciding an issue of first impression in the Second Circuit, the court below ignored the plain meaning of 18 U.S.C. § 3582(c)(1)(A) by recognizing extra-textual limitations to the matters a court may consider when determining whether to reduce a criminal sentence. That decision was not only wrong on the law, it also undermined Congress's express intention in passing the First Step Act of "Increasing the Use and Transparency of Compassionate Release." First Step Act of 2018, Public Law 115-391, Tit. VI, § 603(b), 132 Stat. 5238. In so doing, the court knowingly entered a circuit split that threatens to restrict the availability of federal compassionate release in a way not envisioned by Congress.

Petitioner Joe Fernandez is currently serving a mandatory life sentence for two murders that occurred in 2000, which he maintains he did not commit. The convictions were based predominantly on a cooperating witness's purported firsthand knowledge of Fernandez's involvement, notwithstanding the witness's history of lying to the government, his motivation to lie in this case to protect his brother and his testimony's inconsistency with the physical evidence adduced at trial. The court sentenced the cooperating witness to 30 years in prison and sentenced Fernandez's other three co-defendants to 25 years, 15 years and 2 years, respectively. The defendant who was sentenced to 2 years was alleged by the same witness who testified against Fernandez to have been the getaway driver, yet was allowed by the government to plead to a narcotics offense for which he received a far-lower

sentence than any other alleged participant in the murder conspiracy.

In November 2021, Fernandez moved in the trial court to reduce his sentence under 18 U.S.C. § 3582(c)(1)(A). After rejecting Fernandez's argument that health concerns during the Covid-19 pandemic justified his release, the court granted the motion based on two factors that it considered to be "extraordinary and compelling." *First*, the court concluded that there were significant reasons to question the jury's verdict and noted in detail its "strong concerns" regarding the sufficiency and reliability of the government's evidence at trial. *Second*, the court concluded that the large disparity between Fernandez's mandatory life sentence and the sentences of his co-defendants—three of whom received lower sentences in connection with plea agreements or cooperation with the government—weighed in favor of reducing the sentence. Although the court recognized that neither of these circumstances called into question the *legality* of Fernandez's verdict or sentence, it determined that they supported his application for compassionate release under the First Step Act.

On the government's appeal, the Second Circuit reversed the grant of compassionate release, holding that the district court was categorically forbidden from considering Fernandez's potential innocence under the compassionate release statute. That subject, the court reasoned, is only cognizable in habeas proceedings or on direct appeal challenging the validity of a conviction or sentence, and can therefore never even be considered as relevant information on a motion for compassionate release.

The Second Circuit further held that absent "unusual circumstances," the disparity of sentences between co-defendants could not be considered extraordinary and compelling. The Second Circuit subsequently denied Fernandez's petition for rehearing *en banc*.

The Second Circuit's decision improperly recognized two extra-textual limitations on a district court's broad discretion in modifying criminal sentences. Not only does this conflict with this Court's uniform precedent rejecting any such barriers to what district courts are permitted to consider in sentencing proceedings, *see, e.g.*, *Concepcion v. United States*, 597 U.S. 481 (2022); *Dean v. United States*, 581 U.S. 62 (2017); *Pepper v. United States*, 562 U.S. 476 (2011); *Koon v. United States*, 518 U.S. 81 (1996); *United States v. Tucker*, 404 U.S. 443 (1972), it also diverges from recent decisions in the First and Ninth Circuits that specifically address sentencing discretion under 18 U.S.C. § 3582(c)(1)(A)'s compassionate release provision, *see United States v. Roper*, 72 F.4th 1097 (9th Cir. 2023); *United States v. Trenkler*, 47 F.4th 42 (1st Cir. 2022). Furthermore, the decision opens the door for other courts to manufacture limitations on the matters district court judges may consider at sentencing, based on nothing more than what those courts perceive to be the appropriate province of a different statute or procedure. That approach is contrary to the text of 18 U.S.C. § 3582, Congress's express intentions in passing the First Step Act and the historically robust discretion district court judges have exercised in matters of sentencing.

BACKGROUND

A. Trial and Sentencing

On February 6, 2013, Joe Fernandez was charged with conspiring to commit murder-for hire resulting in two deaths, and with using a firearm in furtherance of that conspiracy. App. 5a. The charges arose from murders occurring 13 years earlier of two members of a Mexican drug cartel, Ildefonso Vivero Flores and Arturo Cuellar. App. 4a. Flores and Cuellar traveled to New York to collect payment for a shipment of cocaine the cartel had delivered to drug kingpin Jeffrey Minaya. *Id.* Minaya did not pay Flores and Cuellar what he owed for the cocaine, instead hiring Patrick Darge to murder them. *Id.* According to Darge's testimony at trial, Darge enlisted Fernandez as a backup shooter and Luis Rivera as the getaway car driver. *Id.*

Fernandez maintained his innocence and proceeded to trial. App. 5a-6a. At trial, the government relied primarily upon the testimony of Darge—the sole witness testifying to firsthand knowledge of Fernandez's involvement. App. 6a. Darge testified that he brought a .380 handgun (provided by Rivera), while Fernandez carried a "much bigger" gun. Tr. 307-08. Darge testified that after he shot one victim with a single bullet, his gun jammed and he fled the scene, App. 4a, hearing two or three more shots as he left, Tr. 328.

Darge also testified that when previously cooperating with the government in a different case, "he lied to the government, agents, and judge for his own personal benefit" about his involvement in prior

murders (including one at issue in this case), his history of credit card fraud, the extent of his drug dealing (including that his brother, Alain, dealt drugs with him), and Alain's history of "shooting people." App. 6a.

The government introduced bullets and casings retrieved from the crime scene into evidence, *id.*, but neither of the alleged murder weapons. A detective testified that the crime scene evidence included "one nine-millimeter cartridge casing," "one nine-millimeter bullet," "14 .380 caliber cartridge casings," six ".380 caliber class bullets" and two bullets of an "unknown caliber class." Tr. 768, 770. He also opined that the "one nine-millimeter cartridge casing was fired from a different firearm than" the 14 .380 caliber cartridge casings, which were all "fired from the same firearm." Tr. 772. As Fernandez argued to the district court in his compassionate release motion, this evidence directly contradicted Darge's testimony that he fired only one shot with the .380 before it jammed and that Fernandez fired the remaining shots. App. 36a.

The jury convicted Fernandez on both counts, App. 6a, and the district court sentenced Fernandez to a mandatory life sentence on the murder conspiracy charge and to a consecutive life sentence on the firearm charge. App. 7a. Fernandez's co-defendants received sentences of 30 years (Darge), 25 years (Reyes), 15 years (Minaya) and 2 years (Rivera). *Id.* Fernandez's firearm conviction was later vacated due to the conspiracy conviction no longer qualifying as a predicate "crime of violence" under 18 U.S.C. § 924(c)(3). App. 7a-8a.

B. Motion to Vacate; Direct Appeal; Habeas Petition

Prior to sentencing, Fernandez moved to vacate the jury's verdict because (among other things) the cooperating witness's testimony "was so rife with holes and inconsistencies that the jury verdict should be set aside." A58. The district court denied the motion, holding that "it was for the jury to determine whether Darge's testimony was credible, and having found him to be so, I will not disturb that finding. Darge's testimony, in combination with the other evidence presented in the case, was sufficient [to] convict Fernandez of the two charges against him." *Id.* The Second Circuit affirmed. *See United States v. Fernandez*, 648 F. App'x 56, 59-60 (2d Cir. 2016).

In a federal habeas petition filed several years later, Fernandez argued that the jury instructions failed to adequately explain aiding and abetting liability under the relevant statute. A151. In analyzing whether Fernandez was procedurally barred from raising this ground under § 2255, the district court considered whether Fernandez had made a sufficient "showing of actual innocence." A155. The court ruled that he had not: "The evidence introduced at trial established petitioner's guilt beyond a reasonable doubt . . . . This is not an 'extraordinary case' that warrants application of the actual innocence doctrine." *Id.* (citation omitted).

C. Motion for Compassionate Release

In November 2021, Fernandez moved to reduce his sentence under 18 U.S.C. § 3582(c)(1)(A)—the so-called "compassionate release" statute. App. 8a. The

district court granted the motion based on two circumstances that it determined were "extraordinary and compelling" reasons warranting a sentence reduction. App. 36a-38a.

First, the court concluded there were "strong concerns" about the sufficiency and reliability of the evidence upon which Fernandez was convicted. App. 37a. Among other reasons: Darge had motive to lie to the government (and at trial) and had previously done so; the ballistics evidence contradicted Darge's testimony; Darge and his brother fled the country immediately after the murders, while Fernandez did not; and the government did not charge the getaway driver, Rivera, in the conspiracy despite Darge's testimony directly supporting his involvement, App. 36a-37a; Tr. 308—from which the court inferred that the government itself doubted Darge's reliability, App. 37a.

Second, the court believed the significant disparities between the length of Fernandez's sentence and the lengths of his co-defendants' sentences weighed in favor of granting a sentence reduction. App. 37a-38a. Because Fernandez proceeded to trial and was convicted on a charge carrying a mandatory life sentence, the court had no discretion to impose a sentence in line with the sentences of his co-defendants, all of whom either pleaded to lesser charges or were given lower sentences for cooperating with the government. App. *Id.* With the newfound discretion to reduce sentences under the First Step Act, the Court determined it could now consider and remedy this disparity. App. 38a.

In evaluating Fernandez's motion, the court acknowledged the validity of the jury's verdict and Fernandez's sentence. *See, e.g.*, App. 36a ("[T]here is factual support for the jury's verdict and the verdict has been affirmed[.]"); App. 37a ("The jury verdict is not being vacated or declared an improper verdict. But jury verdicts, despite being legal, also may be unjust."). Nevertheless, it concluded that questions about Fernandez's innocence, together with the stark disparity in sentences received by Fernandez and his co-defendants, constituted extraordinary and compelling circumstances that warranted a sentence reduction. App. 37a-38a. The court therefore imposed a reduced sentence of time served (approximately 132 months), which it determined was sufficient, but not greater than necessary, to achieve the sentencing objectives outlined in 18 U.S.C. § 3553(a). App. 38a.

D. Second Circuit Opinion

The government appealed the district court's grant of compassionate release, arguing that the court abused its discretion as a matter of law by (i) considering circumstances that called into question Fernandez's guilt, Gov't Br. 36, and (ii) considering the sentencing disparities between Fernandez and his co-defendants, Gov't Br. 38. Although the Second Circuit acknowledged that district courts have broad discretion under 18 U.S.C. § 3582(c)(1)(A) to consider the "full slate" of extraordinary and compelling reasons that might support a motion for compassionate release, App. 20a, the panel went on to recognize two categorical exceptions to what district court's are permitted to consider.

First, the court characterized Fernandez's potential innocence arguments as "in substance" attacking the legality of his conviction. App. 23a. Based on that premise, it held that because "challenges to the validity of a conviction must be made under the section 2255, they cannot qualify as 'extraordinary and compelling reasons' under section 3582(c)(1)(A)." App. 19a.

Second, the court held that, absent "unusual circumstances," a sentencing disparity that "results from a co-defendant's decision to plead guilty and assist the government" can be neither extraordinary nor compelling. App. 16a & n.4. The court did not address the disparity between Fernandez's sentence and the sentence given to Rivera, who did not cooperate with the government and received only two years in prison.

REASONS FOR GRANTING THE PETITION

This petition presents a fundamental question, upon which the circuit courts have disagreed, concerning which matters a district court is prohibited from considering when ruling on a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), as modified by the First Step Act.

I. Review Is Warranted Because There Is a Conflict Among the Federal Courts Regarding What Information, If Any, Courts May Not Consider When Deciding Motions for Compassionate Release.

The Second Circuit's decision warrants this Court's review because it deepens confusion in the

circuits concerning the discretion that district court judges may exercise when considering whether to reduce a sentence under the federal compassionate release statute. If not corrected by the Court, the Second Circuit's decision could open the door for other courts improvidently to expand the categories of topics off-limits for consideration under 18 U.S.C. § 3582(c)(1)(A) when no such extra-textual limitations are warranted under the law.

A. This Court Has Repeatedly Rejected Limitations on the Types of Information District Courts May Consider in Sentencing.

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon*, 518 U.S. at 113. For that reason, this Court repeatedly has held that district court judges enjoy broad discretion in the types of information they may consider when imposing or modifying criminal sentences. *See, e.g.*, *Concepcion*, 597 U.S. at 501; *Dean*, 581 U.S. at 56; *Pepper*, 562 U.S. at 488; *Tucker*, 404 U.S. at 466. Indeed, the "only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution." *Concepcion*, 597 U.S. at 494. These principles apply no less forcefully in the context of 18 U.S.C. § 3582(c)(1)(A)'s compassionate release provision, particularly in light of the First Step Act's stated purpose of "Increasing the Use and

Transparency of Compassionate Release." First Step Act of 2018, Public Law 115-391, Tit. VI, § 603(b), 132 Stat. 5238.

1. As this Court has emphasized, a federal trial judge's discretion at sentencing is "largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Tucker*, 404 U.S. at 446. This approach reflects a long and durable tradition of "latitude allowed sentencing judges" that dates back to before the nation's founding. *Williams v. People of State of N.Y.*, 337 U.S. 241, 246 (1949); *Concepcion*, 597 U.S. at 491. Permitting courts to consider all available information in crafting an appropriate sentence also acknowledges the practical differences between the trial phase and the sentencing phase. *See Williams*, 337 U.S. at 246-47. Moreover, "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information." *Id.* This discretion is no less applicable to proceedings for modifying sentences, as the trial court's "responsibility to sentence the whole person before them" is also "carrie[d] forward to later proceedings that may modify an original sentence." *Concepcion*, 597 U.S. at 491.

2. In *Concepcion v. United States*, this Court was asked to decide whether a district court adjudicating a motion for a reduced sentence under the First Step Act may consider intervening changes of law or fact, even if the changes are "unrelated" to the statutory basis upon which the sentence-modification proceeding was permitted. *Id.* at 486, 493-94; *see also id.* at 503 (Kavanaugh, J., dissenting). The Court

began its analysis by reiterating that "[t]he only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution." *Id.* at 494. Because the First Step Act did "not so much as hint that district courts are prohibited from considering" the matters at issue, the district court was permitted to consider them. *See id.* at 496, 500.

Importantly, this Court rejected any suggestion that Congress intended to prohibit consideration of a matter by omitting it from the statute, stating that "'[d]rawing meaning from silence is particularly inappropriate' in the sentencing context, 'for Congress has shown that it knows how to direct sentencing practices in express terms.'" *Id.* at 497 (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)). In short, "[n]othing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion." *Id.* at 495.

Although at issue in *Concepcion* was the First Step Act's crack-cocaine sentencing provision—not its compassionate release provision—the Court's reasoning was expressly applicable to "First Step Act motions" in general. *See id.* at 498 ("Consistent with this text and structure, district courts deciding First Step Act motions regularly have considered evidence of postsentencing rehabilitation and unrelated Guidelines amendments when raised by the parties."); *id.* at 499 ("Likewise, when deciding whether to grant First Step Act motions and in deciding how much to reduce sentences, courts have looked to postsentencing evidence of violence or

prison infractions as probative."). Moreover, the Court provided instructive commentary regarding compassionate release under 18 U.S.C. § 3582(c)(1)(A) when it provided an example of how Congress "expressly cabined district courts' discretion" in the compassionate release context: "by requiring courts to abide by the Sentencing Commission's policy statements." *Id.* at 495.

3. A consistent application of these sentencing principles under 18 U.S.C. § 3582(c)(1)(A)'s compassionate release provision is critical, particularly in light of the First Step Act's goal, reflected in its title, of "Increasing the Use and Transparency of Compassionate Release." Public Law 115-391, Tit. VI, § 603(b), 132 Stat. 5238. In passing the First Step Act, Congress amended § 3582 to permit convicted defendants to file their own motions for a sentence reduction. The First Step Act "effected a paradigm shift in how compassionate release would function," *United States v. Ruvalcaba*, 26 F.4th 14, 22 (1st Cir. 2022), including by "expand[ing]" and "expedit[ing]" its application, 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of bill co-sponsor Sen. Ben Cardin). Since the First Step Act's passage in 2018, over 4,700 prisoners have received reduced sentences under its compassionate release provision.[1] The wide availability of this statute necessitates a uniform interpretation to limit confusion and prevent inconsistent results.

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[1] First Step Act, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/. (last visited Nov. 11, 2024).

B. The Second Circuit's Imposition of Extra-Textual Limitations on the Types of Information Courts May Consider Under 18 U.S.C. § 3582(c)(1)(A) Conflicts with Decisions of Other Circuits.

In contravention of this Court's clear instructions on matters of sentencing, the plain meaning of the federal compassionate release provision and the principles animating the First Step Act's passage, the Second Circuit recognized at least two extra-textual limitations on the information a trial court is permitted to consider under 18 U.S.C. § 3582(c)(1)(A). That decision also directly conflicts with decisions of the First and Ninth Circuits.

1. The Supreme Court's reasoning in *Concepcion* could not be clearer: Section 3582(c)(1)(A) vests courts with the discretion to consider *any* reason that may be extraordinary and compelling. *See Concepcion*, 597 U.S. at 496 ("By its terms, [the First Step Act] does not prohibit district courts from considering any arguments in favor of, or against, sentence modification."). The only limit to this discretion is found under 28 U.S.C. § 994(t), which provides that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." In the district court's judgment, both Fernandez's potential innocence and the sentencing disparities between Fernandez and his co-defendants constitute extraordinary and compelling reasons in support of compassionate release. *See* App. 36a-38a. Because neither of these grounds was prohibited from consideration by

Congress, the district court judge was within his discretion to take them into account.

The Second Circuit rejected this plain meaning approach, and held that merely the consideration of these matters was an abuse of discretion. With respect to Fernandez's actual-innocence argument, the Second Circuit concluded that, by application of the "general/specific cannon," section 2255's specific habeas provisions superseded the First Step Act's more general compassionate release framework. *See* App. 18a ("If Congress had intended to permit defendants to circumvent the strictures of 28 U.S.C. § 2255 by making challenges to the validity of a conviction cognizable on a compassionate release motion, it would surely have said so."). That analysis ignored this Court's direct warning not to draw "meaning from silence . . . in the sentencing context." *Concepcion*, 597 U.S. at 497. Indeed, it turned the interpretative burden applicable to sentencing on its head, *requiring* Congress to fill the silence.

With respect to Fernandez's sentencing-disparity argument, the Second Circuit held that the disparity to which Fernandez pointed could not be "extraordinary and compelling" under the "plain meaning of the statute" because "it should be expected[] that a defendant who proceeds to trial and is convicted receives a longer sentence than his co-defendants who plead guilty to different crimes, accept responsibility, and assist the government by cooperating." App. 14a-15a. But whether sentencing disparities, in and of themselves, are extraordinary and compelling is a separate matter from whether a court should be able to consider them. That is especially so because courts are permitted to

evaluate multiple circumstances that, together, could constitute extraordinary and compelling reasons. *See* 28 U.S.C. § 994(t) ("Rehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason." (emphasis added)).

2. The decision below furthers the confusion in compassionate release jurisprudence between those circuits (such as the First and Ninth) that allow district courts to consider *any* matter supporting extraordinary and compelling circumstances for release—in harmony with the plain meaning of 18 U.S.C.§ 3582(c)(1)(A) and this Court's decision in *Concepcion*—and those circuits (such as the Fifth and Tenth) that do not.

The First Circuit has been clear that "a district court, reviewing a prisoner initiated motion for compassionate release in the absence of an applicable policy statement, may consider any complex of circumstances raised by a defendant as forming an extraordinary and compelling reason warranting relief." *Ruvalcaba*, 26 F.4th at 28. The First Circuit applied this position most recently in *United States v. Trenkler*, a case in which the defendant raised numerous grounds for compassionate release, including "questions surrounding his guilt; the fundamental unfairness of his conviction; the fact that his co-defendant received a lesser sentence; and an error that occurred at his sentencing in 1994, resulting in an unlawfully imposed life sentence." 47 F.4th at 45. The district court ultimately concluded that the sentencing error constituted an extraordinary and compelling reason to grant compassionate release—although it was unclear whether this was in conjunction with some of

the other grounds raised by the defendant. *Id.* at 46, 50. On appeal, the government contended that the court was not permitted to consider the sentencing error under 18 U.S.C. § 3582(c)(1)(A) because that argument is only cognizable as a habeas claim. *See id.* at 47-48. The First Circuit disagreed, holding that "district courts have the discretion to review prisoner-initiated motions by taking the holistic, any-complex-of-circumstances approach." *Id.* at 49. The court further held that "habeas and compassionate release are distinct vehicles for relief," with section 2255 addressing "the legality and validity of a conviction" and section 3582(c)(1)(A) addressing "whether to exercise leniency based on an individualized review of a defendant's circumstances." *Id.* at 48. Either way, the defendant's argument was cognizable within the compassionate release framework.[2]

The Ninth Circuit likewise recognizes that, in ruling on motions for compassionate release, district courts may consider any information except for the matters Congress has expressly prohibited. In *United States v. Roper*, the court addressed whether,

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[2] A separate question raised by the government was whether the claim of an invalid or illegal sentence, standing alone, could ever *constitute* an extraordinary and compelling reason for release even if the district court had the discretion to consider that information. *See Trenkler*, 47 F.4th at 48. The court declined to answer that question, but observed in dicta that "correct application of the 'extraordinary and compelling' standard for compassionate release naturally precludes classic post-conviction arguments, without more, from carrying such motions to success. . . . It is the 'extraordinary and compelling' criteria for compassionate release that promises this general rule will not be superseded by the exception." *Id.* at 48-49.

under 18 U.S.C. § 3582(c)(1)(A), a judge could consider changes in statutory sentencing law that post-dated the defendant's conviction. 72 F.4th at 1101, The court held that the judge could consider that information because "a district court's discretion in sentence modifications is limited only by an express statement from Congress" and, here, "Congress has not adopted a categorical bar to considering decisional law." *Id.* at 1101-02. In addressing whether this reasoning would impermissibly "circumvent habeas," the Ninth Circuit held that a "court's disposition of a compassionate release motion is discretionary, not mandatory," and so "granting such a motion does not imply that the original sentence was unlawful." *Id.* at 1102-03 (citations omitted).

Opposing this view, the Fifth and Tenth Circuits have reached decisions similar to the one the Second Circuit issued in this case. *See United States v. Escajeda*, 58 F.4th 184 (5th Cir. 2023); *United States v. Wesley*, 60 F.4th 1277 (10th Cir. 2023). Both of these decisions involved defendants who applied for compassionate release on the basis that their convictions were invalid (for ineffective assistance of counsel and prosecutorial misconduct, respectively). As expressed by the Fifth Circuit: "[A] prisoner cannot use § 3582(c) to challenge the legality or the duration of his sentence; such arguments can, and hence *must*, be raised under [the habeas statute]." *Escajeda*, 58 F.4th at 187.

Notably, the district court in *Wesley* considered the defendant's two arguments based on sentencing disparity. *See* 60 F.4th at 1279-80, 1279 n.1. That court ultimately rejected both arguments as not

sufficiently extraordinary or compelling to support release, *id.*, and the Tenth Circuit explained that if the defendant were successful in its appeal, the district court would need to reconsider "all asserted 'extraordinary and compelling reasons'" together (including the sentencing disparity), *id.* at 1279 n.1. Thus, the Tenth Circuit splits with the Second Circuit (and agrees with Fernandez's position) with respect to sentencing disparities being a legitimate matter for consideration under 18 U.S.C. § 3582(c)(1)(A).

3. The decision below demonstrates the unpredictability that results from application of the "general/specific cannon" to 18 U.S.C. § 3582(c)(1)(A). The Second Circuit determined that Fernandez's actual-innocence argument was appropriately construed as a habeas claim, *i.e.*, a request to "'vacate, set aside or correct the sentence' where the prisoner's 'sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack.'" App. 17a (quoting 28 U.S.C. § 2255(a)). However, Fernandez's argument was substantively *not* an attack on the validity of his conviction or sentence. Indeed, in evaluating Fernandez's motion, the district court judge acknowledged the legality of the jury's verdict, App. 36a, but concluded that the unjust circumstances of Fernandez's trial nonetheless demonstrated "extraordinary and compelling circumstances for his release," App. 37a. The Second Circuit shrugged off this mismatch, explaining that "[w]hat counts for application of the general/specific canon is not the *nature* of the provisions'

prescriptions but their *scope*. App. 18a (citation omitted).

This determination of whether a particular argument for compassionate release falls within the "scope" of a different statute is an exercise fraught with uncertainty. This case presents a clear example: The Second Circuit's decision was expressly animated by its assumption that the district court was permitting Fernandez to "circumvent the strictures of 28 U.S.C. § 2255 by making challenges to the validity of a conviction[.]" App. 18a-19a. But the Second Circuit overlooked the fact that Fernandez's claim on compassionate release was not cognizable on habeas. Section 2255 does not contemplate the argument that a totality of circumstances presents an extraordinary and compelling reason for release, nor does it provide courts with a discretionary remedy to impose a reduced sentence in consideration of unjust—but still legal—circumstances. Again, the district court had on several occasions rejected the suggestion that Fernandez's conviction or sentence was invalid, including when it denied Fernandez's post-trial motion to vacate the jury's verdict, A58, and when it denied Fernandez's habeas petition, A149, demonstrating that the district court was not persuaded by that argument alone.

Moreover, as the First Circuit noted in *Trenkler*, the availability of habeas will preclude most applicants from credibly arguing that their actual innocence constitutes an "extraordinary and compelling" reason for relief under 18 U.S.C. § 3582(c)(1)(A). *See* 47 F.4th at 48-49. However, the combination of factors in this case met that standard

in the eyes of a judge who clearly understood the "scope" of habeas. Whether that was an abuse of discretion *on the facts* is a different matter that should be decided on a case-by-case basis. Whatever utility the general/specific interpretive canon has in other contexts, it simply is not a workable rule for the purposes of sentencing, where a court's "discretion is bounded only when Congress or the Constitution *expressly* limits the type of information a district court may consider in modifying a sentence." *Concepcion*, 597 U.S. at 491 (emphasis added).

II. This Case Is an Ideal Vehicle To Resolve This Circuit Split.

This case presents an ideal fact pattern to resolve the circuit split over whether, under 18 U.S.C. § 3582(c)(1)(A), courts are forbidden from considering any matters other than those expressly proscribed by Congress. The Second Circuit acknowledged both that courts are permitted to consider the "full slate" of reasons that could support compassionate release and that Congress has not expressly prohibited consideration of actual innocence. App. 20a. Nevertheless, it held that any consideration of Fernandez's potential innocence was an abuse of discretion. The legal question at issue is therefore clearly presented here.

Furthermore, the Second Circuit's reasoning in imposing the limitation was based solely on the application of the "general/specific" cannon of statutory interpretation, *i.e.*, that the existence of a statute addressing a specific subject will preclude consideration of that subject under a more general

statute. As applied here, the Second Circuit held that because the scope of 28 U.S.C. § 2255 encompasses proceedings to attack the validity of a conviction, the district court's consideration under 18 U.S.C. § 3582(c)(1)(A) of circumstances that undermine the reliability of Fernandez's conviction was an abuse of discretion as a matter of law. *See* App. 17a-19a. The Second Circuit's focused reasoning presents a clean and crystalized question for this Court to address.

Finally, the consequences of the Second Circuit's decision in this case are permanent and severe in light of Fernandez's mandatory life sentence. This case thus presents a concrete, significant and well-defined scenario for this Court to consider.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

November 13, 2024

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2023

(Argued December 4, 2023 Decided June 11, 2024)

Docket No. 22-3122-cr

UNITED STATES OF AMERICA,

Appellant,

v.

JOE FERNANDEZ,

Defendant-Appellee,

MANUEL ALADINO SUERO, JOSE GERMAN RODRIGUEZ-MORA, ALSO KNOWN AS GORDO, LUIS RIVERA, ALBERTO REYES, ALSO KNOWN AS ZAC, PATRICK H. DARGE,

Defendants.

Before: SACK, LOHIER, and KAHN, *Circuit Judges.*

The government appeals from a judgment entered on November 17, 2022, in which the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *Judge*) granted federal prisoner Joe Fernandez's motion for a sentence reduction pursuant to

18 U.S.C. § 3582(c)(1)(A), reduced his sentence to time served, and ordered his release from custody. The district court based its decision on two grounds: Fernandez's possible innocence in light of the questionable credibility of the government's key witness, and the fact that Fernandez received a far longer sentence than his co-defendants. On appeal, the government argues that the district court abused its discretion because potential innocence is never a permissible "extraordinary and compelling reason[]" for reduction of a sentence within the meaning of 18 U.S.C. § 3582(c)(1)(A), and Fernandez's sentencing disparity is not an "extraordinary and compelling reason[]" for a sentence reduction on the facts of this case. For the reasons set forth below, we agree, and therefore

REVERSE the judgment of the district court.

SACK, *Circuit Judge*:

This appeal raises questions as to which claims and arguments a district court is permitted to consider as "extraordinary and compelling reasons" in support of a motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A), commonly known as a motion for "compassionate release." Defendant-Appellee Joe Fernandez, then imprisoned in a federal penitentiary, filed this compassionate-release motion seeking a reduction of the mandatory life sentence he was serving for his conviction of murder for hire, in violation of 18 U.S.C. § 1958.

Patrick Darge had hired Fernandez as a "backup shooter" in a scheme to murder two Mexican drug cartel

members who had come to New York City to collect payment for more than 270 kilograms of cocaine the cartel had sold to local drug trafficker Jeffrey Minaya. While Darge (and several other co-defendants implicated in the scheme) pleaded guilty to various narcotics, firearms, and murder charges and cooperated with the government, Fernandez went to trial and was convicted.

In 2021, Fernandez filed the instant motion for compassionate release in the district court arguing, in relevant part, that two "extraordinary and compelling reasons" warranted his release: (1) his potential innocence in light of the questionable credibility of Darge, the government's key witness at trial, and (2) the significantly lower sentences imposed on Fernandez's co-defendants. The United States District Court for the Southern District of New York (Alvin K. Hellerstein, *Judge*) granted the motion on these grounds, reduced Fernandez's sentence to time served, and ordered his release.

The government appealed, arguing that the district court abused its discretion because potential innocence is never a permissible "extraordinary and compelling reason[]" for a sentence reduction within the meaning of 18 U.S.C. § 3582(c)(1)(A), and that Fernandez's sentencing disparity is not an "extraordinary and compelling reason[]" for a sentence reduction on the facts of this case. We agree with the government that a compassionate release motion is not the proper vehicle for litigating the issues Fernandez has raised, irrespective of whether his mandatory life sentence is unjust. We therefore reverse the judgment of the district court.

Appendix A

BACKGROUND

I. Factual Background

A. Fernandez's Offense Conduct

It was established at Fernandez's trial that, in early 2000, Arturo Cuellar and Idelfonso Vivero Flores, two members of a Mexican drug cartel, traveled to New York City to collect payment for 274 kilograms of cocaine their cartel had delivered to Minaya, the leader of a New York drug ring. Minaya, who owed the cartel approximately $6.5 million for the drugs, decided not to pay Cuellar and Flores, and instead hired Patrick Darge to kill them. Darge, in turn, hired Fernandez as his backup shooter and Luis Rivera as the getaway car driver.

In the morning of February 22, 2000, Darge and Fernandez waited for their intended victims in a dark area of the lobby of 3235 Parkside Place, an apartment building in the Bronx. Alberto Reyes, another participant in the scheme, ushered in Cuellar and Flores, called an elevator, gave the "sign" to Darge and Fernandez, and left. As Cuellar and Flores stood waiting for the elevator, Darge emerged from the shadows and shot Cuellar in the back of the head. Darge then turned to shoot Flores, but Darge's gun jammed. He ran out of the lobby to the getaway car, where Rivera was waiting. Fernandez, however, remained in the lobby and fired fourteen shots, nine of which hit either Cuellar or Flores. Having confirmed that both victims were dead, Fernandez returned to the getaway car and he, Darge, and Rivera fled the scene. Darge paid Fernandez $40,000 for his participation in the scheme.

On October 13, 2011, eleven years after the shooting, law enforcement officers came searching for Fernandez at an address in Woodbury, New York, but found only his wife there. That same day, Fernandez met with his cousins Christian Guzman and Alain Darge (Patrick Darge's brother) at Guzman's residence to consult Alain on what to do next. Five days later, on October 18, 2011, Fernandez surrendered to the police.

B. Fernandez's Trial, Conviction, and Post-Trial Proceedings

On February 6, 2013, Fernandez was indicted on one count of participating in a murder-for-hire conspiracy resulting in two deaths, in violation of 18 U.S.C. § 1958, and one count of aiding and abetting the use of a firearm to commit two murders during and in relation to a crime of violence (the murder-for-hire conspiracy in count one), in violation of 18 U.S.C. §§ 924(j)(1) and 2. Unlike Darge, Reyes, and Minaya, who were also charged but pleaded guilty,[1] Fernandez maintained his innocence and went to

1. Darge pleaded guilty to one count of using a firearm in connection with a drug trafficking crime resulting in death, in violation of 18 U.S.C. § 924(j)(1); one count of murder in connection with a drug trafficking crime, in violation of 21 U.S.C. § 848(e)(1)(A) and 18 U.S.C. § 2; another count of murder in connection with a drug trafficking crime, in violation of 21 U.S.C. § 848(e)(1)(A); and one count of murder for hire, in violation of 18 U.S.C. § 1958.

Reyes pleaded guilty to two counts of participation in murder in connection with a conspiracy to distribute cocaine, in violation of 21 U.S.C. § 848(e); and two counts of conspiracy to use interstate commerce facilities in the commission of a murder for hire, in violation of 18 U.S.C. § 1958.

trial. The evidence included bullets and shell casings from the crime scene; photographs of the scene and relevant individuals; and phone records. The evidence also included testimony of four law enforcement officers (one of whom was a ballistics expert), one doctor from the Office of the Chief Medical Examiner, and six cooperating witnesses. The government's key cooperating witness was Darge, the only one attesting to first-hand knowledge of Fernandez's participation in the shooting.

On cross-examination, Darge admitted that, as a cooperating witness in a different case, he lied to the government, agents, and judge for his own personal benefit. Those lies related to (1) his involvement in two prior murders (including one at issue in this case), (2) his history of credit card fraud, (3) the extent to which he dealt drugs, (4) his brother Alain Darge's involvement in his drug dealing business, and (5) Alain Darge's history of "shooting people." Tr. at 405. Despite these admissions, the jury convicted Fernandez on both counts on March 7, 2013.

Minaya pleaded guilty to two counts of murder in connection with conspiracy to distribute cocaine, in violation of 21 U.S.C. § 848(e)(1)(A) and 18 U.S.C. § 2; and one count of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 846, 841(b)(1)(A).

Rivera pleaded guilty to one count of conspiracy to distribute heroin, in violation of 21 U.S.C. § 841(b)(1)(C). The conduct underlying this guilty plea was separate from the murder-for-hire scheme in which Fernandez and Rivera participated, and it appears that Rivera was never convicted of any crimes relating to that conduct.

Fernandez thrice argued to the district court (twice in post-trial motions and once at his sentencing) that the evidence was insufficient to sustain his conviction because Darge's testimony was unreliable. Each time, the court rejected his argument.

On October 7, 2014, the district court sentenced Fernandez to a mandatory life sentence on the first count (participating in a murder-for-hire conspiracy resulting in two deaths, in violation of 18 U.S.C. § 1958), and a non-mandatory life sentence, running consecutively on the second count (aiding and abetting the use of a firearm to commit two murders during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(j)(1) and 2). Separately, the district court sentenced Darge to 30 years' imprisonment; Reyes (who brought the victims into the lobby and gave the sign to shoot) to 25 years; Minaya (the drug lord who ordered the murders) to 15 years; and Rivera (the getaway driver) to two years. *See supra* note 1.

Fernandez appealed his conviction, arguing again "that Darge's testimony was insufficient to sustain his conspiracy conviction because it was uncorroborated." *United States v. Fernandez*, 648 F. App'x 56, 60 (2d Cir. 2016) (summary order), *cert. denied*, 583 U.S. 925, 138 S. Ct. 337, 199 L. Ed. 2d 225 (2017). On May 2, 2016, this Court affirmed. *Id.*

Fernandez then pursued collateral challenges to his conviction and sentence, pressing claims other than his potential innocence. On November 3, 2021, the district court vacated Fernandez's conviction for aiding and

abetting the use of a firearm in connection with murder for hire in light of the Supreme Court's intervening ruling in *United States v. Davis*, 588 U.S. 445, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), holding, as relevant here, that 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague. *Id.* at 470. This left Fernandez to serve the remaining mandatory life sentence for his murder-for-hire conviction. The court denied the other collateral challenges. Fernandez appealed those denials, and this Court affirmed. *Fernandez v. United States*, 757 F. App'x 52 (2d Cir. 2018) (summary order), *cert. denied*, 140 S. Ct. 337, 205 L. Ed. 2d 190 (2019).

C. Fernandez's Motion for a Sentence Reduction Under 18 U.S.C. § 3582(c)(1)(A)

On November 30, 2021, Fernandez filed a *pro se* motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), which was supplemented by counsel on February 14, 2022. Fernandez argued that four extraordinary and compelling reasons warranted a reduction of his sentence: (1) his potential innocence in light of Patrick Darge's non-credible testimony, *see* Supp. App'x at 57 (asserting that "there is a strong basis to question the correctness of the verdict"); (2) the considerably lower sentences imposed on Darge, Reyes, Minaya, and Rivera; (3) the harsh conditions of his confinement resulting from the COVID-19 pandemic; and (4) his rehabilitation while incarcerated.

The district court rejected the third ground; it did not address the fourth. Nonetheless, persuaded by Fernandez's assertion of his potential innocence

and sentencing disparity, the district court granted Fernandez's motion on November 17, 2022.

As to Fernandez's potential innocence, Judge Hellerstein explained that "[a]lthough there is factual support for the jury's verdict and the verdict has been affirmed, a certain disquiet remains." App'x at 164 (citation omitted). That "disquiet" over Fernandez's potential innocence arose from at least six considerations: (1) Patrick and Alain Darge had fled to the Dominican Republic immediately after the two murders while Fernandez had not; (2) in the eleven years between the murders and his arrest, Fernandez had earned an honest living and had no record of violence; (3) Patrick Darge, as a witness against Fernandez, had a motive to lie to the government and had done so in the past; (4) the trial evidence was inconsistent as to whether Darge fired the first shot and Fernandez fired the rest, or Fernandez fired the first shot and Darge the rest; (5) more effective cross-examination of Darge may have exposed his desire to protect his brother Alain as a motive to lie; and (6) the government had chosen not to charge the getaway car driver Rivera for his participation in the murder scheme, instead accepting his guilty plea for an unrelated narcotics charge.

As to the disparity between Fernandez's and his co-defendants' sentences, the district court relied on *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020), for the proposition that "the First Step Act enables [a district court] to consider this disparity as part of the extraordinary and compelling circumstances that justify a lower sentence for Fernandez." App'x at 165-66.

Based on those two grounds, and after determining that the factors set forth under 18 U.S.C. § 3553(a) counseled in favor of a reduction, the district court granted Fernandez's compassionate release motion, reduced his sentence to time served, and ordered his release.

On December 12, 2022, the government timely appealed. On January 4, 2023, this Court denied the government's motion to stay Fernandez's release pending this appeal.

STANDARD OF REVIEW

"We review the denial of a motion for compassionate release for abuse of discretion." *United States v. Amato*, 48 F.4th 61, 64 (2d Cir. 2022) (per curiam) (internal quotation marks omitted), *cert. denied sub nom. Orena v. United States*, 143 S. Ct. 1025, 215 L. Ed. 2d 191 (2023) (internal quotation marks omitted). "A district court has abused its discretion if it has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions." *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016) (internal quotation marks omitted). Abuse-of-discretion review "incorporates de novo review with respect to questions of statutory interpretation," *Amato*, 48 F.4th at 64-65 (internal quotation marks omitted), and "the district court's interpretation of the scope of § 3582(c)(1)(A)" is such a question of statutory interpretation subject to *de novo* review, *United States v. Ferguson*, 55 F.4th 262, 270 (4th Cir. 2022), *cert. denied*, 144 S. Ct. 1007, 218 L. Ed. 2d 172 (2024).

Appendix A

DISCUSSION

I. Legal Standard

"Pursuant to 18 U.S.C. § 3582(c)(1) as modified by the First Step Act, a district court may reduce a term of imprisonment upon motion by a defendant." *United States v. Halvon*, 26 F.4th 566, 568 (2d Cir. 2022) (per curiam) (citation omitted). "[Section] 3582(c)(1) permits a district court to reduce a term of imprisonment if 'after considering the factors set forth in 18 U.S.C. § 3553(a) to the extent that they are applicable, it finds that extraordinary and compelling reasons warrant such a reduction.'" *Id.* (quoting 18 U.S.C. § 3582(c)(1)(A)(i)) (alterations omitted). District courts may "consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them." *Brooker*, 976 F.3d at 237. The burden of showing that the circumstances warrant a sentence reduction is on the defendant. *See United States v. Jones*, 17 F.4th 371, 375 (2d Cir. 2021).

II. Analysis

On this appeal, the government argues that the district court abused its discretion by impermissibly considering Fernandez's claims of his potential innocence and the disparity between his and his co-defendants' sentences as "extraordinary and compelling reasons" under 18 U.S.C. § 3582(c)(1)(A). A potential-innocence claim challenges the validity of the underlying conviction, and a sentencing disparity claim challenges the validity of the sentence imposed. But the validity of a conviction or sentence can be challenged only on direct appeal or collateral review,

which have specifically calibrated procedural limitations. *See, e.g.*, 28 U.S.C. § 2255. Permitting such challenges as cognizable "extraordinary and compelling reasons" on a motion for compassionate release would circumvent the procedural limitations of direct and collateral review, and, according to the government, risk scuttling that framework altogether.

In the alternative, the government argues that the district court abused its discretion because a sentencing disparity between a defendant who went to trial and co-defendants who pleaded guilty to other crimes and cooperated with the government are not "extraordinary and compelling reasons" under the plain meaning of section 3582(c)(1)(A)(i).[2]

A. Fernandez's Sentencing Disparity Claim

Turning to Fernandez's sentencing-disparity claim first, we begin with a construction of the statutory

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2. In deciding Fernandez's original appeal of his sentence, we noted by way of summary order that in sentencing a convicted defendant such as Fernandez, where "a district court does consider disparities among confederates, 'the weight to be given such disparities, like the weight to be given any § 3553(a) factor, is a matter firmly committed to the discretion of the sentencing judge and is beyond our appellate review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented.'" *Fernandez*, 648 F. App'x at 60 (quoting *United States v. Florez*, 447 F.3d 145, 158 (2d Cir. 2006)). The issue before us today, by contrast, is whether any disparity between Fernandez's sentence and those of his co-defendants may satisfy the "extraordinary and compelling" requirement posed by Fernandez's motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

language "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A).[3] Because Congress did not define those terms, we "consider the ordinary, common-sense meaning of the words," *United States v. Dauray*, 215 F.3d 257, 260 (2d Cir. 2000), "at the time [it] enacted the statute," *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113, 139 S. Ct. 532, 202 L. Ed. 2d 536 (2019) (internal quotation marks omitted); *see also Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 76 (2d Cir. 2015). Our sister circuits have observed, and we agree, that an "extraordinary" reason is "'most unusual,' 'far from common,' . . . 'having little or

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3. The statute provides in relevant part:

> The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the [district] court, . . . 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 [sentencing] factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction
>
> . . .
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]
>
> 18 U.S.C. § 3582(c)(1)(A).

no precedent,'" *United States v. Jenkins*, 50 F.4th 1185, 1197, 459 U.S. App. D.C. 235 (D.C. Cir. 2022) (quoting *United States v. Hunter*, 12 F.4th 555, 562 (6th Cir. 2021)), "'beyond or out of the common order,' 'remarkable,' and synonymous with 'singular,'" *United States v. Escajeda*, 58 F.4th 184, 186 (5th Cir. 2023) (quoting *Webster's Second New Int'l Dictionary* 903 (1950)). A "compelling" reason "is both powerful and convincing." *United States v. Canales-Ramos*, 19 F.4th 561, 567 (1st Cir. 2021) (citing *Webster's Third New Int'l Dictionary: Unabridged* 462 (1981)); *see also Hunter*, 12 F.4th at 562 ("'Compelling' mean[s] 'forcing, impelling, driving.'" (quoting *Webster's Third New Int'l Dictionary: Unabridged* 463 (1971))), *cert. denied*, 142 S. Ct. 2771, 213 L. Ed. 2d 1008 (2022).

Fernandez argues that under this Court's reasoning in *Brooker*, district courts have discretion to consider "any reason that fits within the ordinary meaning of 'extraordinary and compelling,'" Appellee Br. at 28—save for rehabilitation alone, *see* 28 U.S.C. § 994(t). Sentencing disparity claims, he argues, fall within that range of permissible reasons.

Under the circumstances of this case, Fernandez's sentencing disparity is not an "extraordinary and compelling reason[]" to reduce his sentence under the plain meaning of the statute. Fernandez concedes that, "[i]n contrast to all of his co-defendants," he did not plead guilty or cooperate with the government, but "maintained his innocence, proceeded to trial, and received a [mandatory] life sentence." Appellee Br. at 49. It is not "extraordinary" (indeed, it should be expected) that a defendant who proceeds to trial and is convicted

receives a longer sentence than his co-defendants who plead guilty to different crimes, accept responsibility, and assist the government by cooperating. The Supreme Court has observed that our "system of pleas . . . . often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial." *Missouri v. Frye*, 566 U.S. 134, 143-44, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (internal quotation marks omitted). And lower sentences for cooperating defendants are explicitly contemplated by the sentencing statute, *see* 18 U.S.C. § 3553(e), and the Sentencing Guidelines, *see* U.S.S.G. § 5K1.1. Such practices are hardly "'most unusual,' 'far from common,'" or with "'little or no precedent.'" *Jenkins*, 50 F.4th at 1197.

Nor is a disparity between Fernandez's sentence and those of his co-defendants a "compelling" reason to reduce a sentence. "Disparities between the sentences of coconspirators can exist for valid reasons, such as . . . the offenses of conviction, or one coconspirator's decision to plead guilty and cooperate with the government." *United States v. Conatser*, 514 F.3d 508, 522 (6th Cir. 2008). This Court, too, has recognized that "a reasonable explanation" for a sentencing disparity was "readily apparent" where there were "varying degrees of culpability and cooperation between the various defendants," and where, unlike the defendant-appellant in that case, all co-defendants "cooperated and pled guilty." *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006), *cert. denied*, 549 U.S. 1274, 127 S. Ct. 1483, 167 L. Ed. 2d 244 (2007); *see also United States v. Gahagen*, 44 F.4th 99, 113 (2d Cir. 2022) (same).

In sum, "[t]here is nothing 'extraordinary' or 'compelling' about a sentence disparity that results from a co-defendant's decision to plead guilty and assist the government." *Hunter*, 12 F.4th at 572 (holding that the district court abused its discretion in granting a compassionate release motion based in part on the sentencing disparity between the movant and his co-defendant).[4]

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4. We cannot foreclose the possibility that significant sentencing disparities, even between a defendant who went to trial and a co-defendant who pleaded guilty and cooperated, might, in some unusual circumstances, warrant a finding of "extraordinary and compelling" reasons to grant a sentence reduction. The case at bar simply does not involve any such circumstances. Indeed, Judge Hellerstein implicitly acknowledged the legitimacy of the disparity between Fernandez's life sentence and his co-defendants' lower sentences by imposing a non-mandatory life sentence on Fernandez for the now vacated section-924(j) count. To be sure, Fernandez asserts that unusual circumstances justifying a finding of "extraordinary and compelling" reasons are present here in light of his possible innocence. But we reject that argument for the reasons articulated *infra* in Section III.B.

We therefore need not, and do not, resolve the parties' disagreement over whether a sentencing disparity claim categorically amounts to a challenge of the validity of a sentence, must therefore always be brought on direct or collateral review, and is therefore always barred on a motion for compassionate release. *Compare* Appellee Br. at 43 (Fernandez arguing that his sentencing disparity claim does not challenge the legal validity of his sentence, but contends simply that the disparity is "unjust" because it far exceeds that of his co-defendants), *with* Appellant Br. at 38 (arguing that Fernandez's sentencing disparity claim *is* an attack on the sentence's validity). Here, we simply assume without deciding that *Fernandez*'s sentencing disparity claim is not a challenge to the validity of

B. Fernandez's Potential-Innocence Claim

We next turn to Fernandez's potential-innocence claim. Like his sentencing disparity claim, Fernandez insists that, in light of *Brooker* and the broad ordinary meaning of the statutory terms "extraordinary and compelling," the district court was permitted to consider his potential-innocence claim as part of his compassionate release motion. The government counters that section 3582(c)(1)(A) is limited by 28 U.S.C. § 2255, the habeas statute pursuant to which federal prisoners can "move the court which imposed the sentence to vacate, set aside or correct the sentence" where the prisoner's "sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). According to the government, the scope of section 2255 is more specific than that of section 3582(c)(1)(A), which means that all claims cognizable under section 2255 *must* be brought under section 2255. The government maintains that Fernandez's potential-innocence claim is such a claim falling under the ambit of section 2255. We agree.

Because "[r]epeal by implication is disfavored[,]" *Garfield v. Ocwen Loan Servicing, LLC*, 811 F.3d 86, 89 (2d Cir. 2016), "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment," unless there is a "clear intention otherwise,"

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his sentence, and conclude that Fernandez's claim cannot be an "extraordinary and compelling reason[]" to reduce his sentence under the plain meaning of the statutory terms.

Morton v. Mancari, 417 U.S. 535, 550-51, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *see also United States v. Wesley*, 60 F.4th 1277, 1284 (10th Cir. 2023) (explaining that, when construing the scope of section 3582(c)(1)(A)'s "extraordinary and compelling reasons," "we must keep in mind the canon of statutory construction that specific controls over general"). "What counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 648, 132 S. Ct. 2065, 182 L. Ed. 2d 967 (2012) (emphasis in original).

We conclude that 28 U.S.C. § 2255 is more specific in scope than 18 U.S.C. § 3582(c)(1)(A). "[Section] 2255 places explicit restrictions on" the timing of a habeas petition and the permissibility of serial petitions. *Wesley*, 60 F.4th at 1284. Neither of these restrictions apply to a section 3582 motion, which an incarcerated defendant can file as soon as the defendant has exhausted his "administrative options" with the Bureau of Prisons, "or 30 days pass, 'whichever is earlier.'" *Brooker*, 976 F.3d at 236 (quoting 18 U.S.C. § 3582(c)(1)(A)); *see also Escajeda*, 58 F.4th at 186-87 (concluding that section 2255's scope is more specific than that of section 3582(c)(1)(A)); *Hunter*, 12 F.4th at 566-67 (same); *Ferguson*, 55 F.4th at 270 (same). It stands to reason that "[i]f a prisoner could avoid the strictures Congress imposed [in section 2255] by bringing their release-from-confinement claims under a different, more general, and more permissive statute, he obviously would." *Escajeda*, 58 F.4th at 187. If Congress had intended to permit defendants to circumvent the strictures of 28 U.S.C. § 2255 by making challenges to the validity of a

conviction cognizable on a compassionate release motion, it would surely have said so. Absent such a clear declaration of intent, we conclude that since challenges to the validity of a conviction must be made under section 2255, they cannot qualify as "extraordinary and compelling reasons" under section 3582(c)(1)(A). Compassionate release is not a channel to habeas relief or an end run around the limitations of section 2255.

Indeed, we foreshadowed our conclusion today in *United States v. Amato* and *United States v. Jacques*. In *Amato*, we held that "arguments challenging the validity of an underlying conviction cannot be raised in a § 3582 motion as part of the § 3553(a) sentencing factors." 48 F.4th at 65. To be sure, the analysis of whether "extraordinary and compelling reasons" for a sentence reduction exist is separate from the question of whether the section 3553(a) sentencing factors warrant a sentence reduction. But *Amato* derived its conclusion from the principle that

> [i]f a defendant contends his conviction by a federal court is invalid, Congress has provided a vehicle to raise such a challenge through a motion pursuant to 28 U.S.C. § 2255, which imposes particular procedural limitations. A defendant cannot evade this collateral review structure by attacking the validity of his conviction through § 3582.

Id. That reasoning applies here: Challenging the validity of a conviction under the extraordinary-and-compelling-reasons prong of section 3582 would permit a defendant to

"evade [the] collateral review structure" of section 2255, a result in tension with *Amato*.

In *United States v. Jacques*, we concluded that attacks on the validity of the defendant's conviction were not cognizable on a section 3582 motion for compassionate release—either under the section 3553(a) prong or the extraordinary-and-compelling-reasons prong. *See* No. 20-3276, 2022 U.S. App. LEXIS 8388, 2022 WL 894695, at *2 (2d Cir. Mar. 28, 2022) (summary order). There too we reasoned that "[p]ermitting a [defendant] to make actual innocence arguments in this manner would enable him to pursue habeas relief through a compassionate release motion and thereby evade the procedural limitations on bringing habeas claims." *Id.* Fernandez contends that *Jacques* is a summary order and therefore not binding on this Court. True enough, but that reasoning persuaded us in *Jacques*, and it persuades us now. Indeed, we have observed that "[d]enying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases." *United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010) (internal quotation marks omitted).

Fernandez's reliance on *Brooker* is unavailing. While it is correct that district courts have the discretion "to consider the *full slate* of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release," 976 F.3d at 237 (emphasis added), *Brooker* did not discuss or decide the scope of that "full slate." *See also Amato*, 48 F.4th at 66 ("Nothing in [*Brooker*] permits defendants to circumvent

the procedural limitations of § 2255 by repackaging actual innocence arguments into the § 3553(a) factors."). And where, as here, the straightforward application of canons of statutory construction removes certain claims from that slate, a district court may not consider them.[5]

Our conclusion today that challenges to the validity of a conviction are not cognizable as "extraordinary and compelling reasons" under section 3582(c)(1)(A) joins a near-unanimous consensus among our sister circuits. *See United States v. Holland*, No. 23-2166, 2023 U.S. App. LEXIS 25404, 2023 WL 6249910, at *2 (3d Cir. Sept. 26, 2023) (summary order) (affirming denial of compassionate release motion because the defendant's arguments, "[a]lthough couched as arguments in support of compassionate release, . . . attack the legal validity of his convictions . . . , which is the heart of habeas corpus" (internal quotation marks omitted)); *Ferguson*, 55 F.4th at 270 (4th Cir.) ("Because § 2255 is the exclusive method of collaterally attacking a federal conviction . . . , a criminal defendant is foreclosed from the use of another mechanism, such as compassionate release, to sidestep § 2255's requirements."); *Hunter*, 12 F.4th at 567-68 (6th Cir.) ("There is no 'clear intention' that Congress intended to allow prisoners to avoid the specific *habeas* restrictions

5. Fernandez's reliance on *Concepcion v. United States*, 597 U.S. 481, 142 S. Ct. 2389, 213 L. Ed. 2d 731 (2022), is unavailing for the same reason. True, "[*b*]*y its terms*, [the First Step Act] does not prohibit district courts from considering any arguments in favor of, or against, sentence modification." *Id.* at 496 (emphasis added). But that has no bearing on whether a *separate, more specific statute* limits the range of permissible arguments. Section 2255 is such a statute.

by resorting to compassionate release. . . . Therefore, we will not read § 3582(c)(1)(A)'s general permission in a way that would swallow the more specific prohibition or permission for *habeas* relief." (internal quotation marks omitted)); *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022) ("Crandall cannot avoid the restrictions of the post-conviction relief statute [in his challenge that his conviction was legally erroneous] by resorting to a request for compassionate release instead."), *cert. denied*, 142 S. Ct. 2781, 213 L. Ed. 2d 1018 (2022); *United States v. Lillard*, No. 20-30256, 2022 U.S. App. LEXIS 16754, 2022 WL 2167795, at *1 (9th Cir. June 16, 2022) (summary order) ("Lillard's motion [for compassionate release] was actually a collateral challenge to his conviction and thus procedurally improper." (internal quotation marks omitted)); *Wesley*, 60 F.4th at 1284, 1289 (10th Cir.) (rejecting the assertion that "the compassionate release statute [could be used] to assert errors in a conviction or sentence" and "hold[ing] that an 18 U.S.C. § 3582(c)(1)(A)(i) motion may not be based on claims specifically governed by 28 U.S.C. § 2255"); *Jenkins*, 50 F.4th at 1202 (D.C. Cir.) (explaining that, because section 2255 "traditionally has been accepted as the specific instrument to obtain release from [unlawful] confinement[,] . . . an inmate may not rely on a generally worded statute to attack the lawfulness of his imprisonment, even if the terms of the statute literally apply" (internal quotation marks omitted)).

Only one circuit has stood against the weight of this authority. In *United States v. Trenkler*, the First Circuit held that section 3582's plain language permits a district court to consider any claim (other than rehabilitation alone) as a possibly extraordinary and compelling reason.

47 F.4th 42, 48 (1st Cir. 2022). *Trenkler*, however, has been considered and rejected by other circuits on the ground that it "fail[ed] to grapple with the reality that addressing a defendant's argument about the validity of his conviction . . . [on] a compassionate release motion . . . would have the practical effect of correcting a purportedly illegal sentence, a remedy that is exclusively within the province of § 2255." *Ferguson*, 55 F.4th at 272; *see also Wesley*, 60 F.4th at 1286 (rejecting *Trenkler* because its view "cannot prevail in light of § 2255's more-specific focus"). We agree with *Ferguson* and *Wesley*.

In the alternative, Fernandez argues that even if challenges to the validity of a conviction must be brought on a section 2255 petition, his innocence claim is not barred here because it is not, in fact, an attack on the legal validity of his conviction. Rather, Fernandez argues that his life sentence is "unjust" in light of Patrick Darge's unreliable testimony, even if it does not taint Fernandez's conviction with legal error. Appellee Br. at 43.

Again, we disagree. "[N]o matter how an inmate characterizes his request for relief, the substance of that request controls." *Ferguson*, 55 F.4th at 270. Whether Fernandez couches his claims in terms of legal validity or "justness," he is, in substance, attacking his conviction. And "[i]f in substance [an inmate] attacks his conviction . . . , his filing is subject to the rules set forth in § 2255." *Id.*[6] Otherwise, a defendant's artful presentation of his

6. Fernandez also raised Darge's questionable credibility in two post-trial motions and at his sentencing. Each time, Judge Hellerstein rejected that argument. Fernandez then raised the argument again on direct appeal, and this Court, too, rejected it.

claims would allow him to circumvent the procedural requirements of direct and collateral review—precisely what we rejected in *Amato*, 48 F.4th at 65. *See also, e.g., Wesley*, 60 F.4th at 1289; *Jenkins*, 50 F.4th at 1202; *Escajeda*, 58 F.4th at 187; *Hunter*, 12 F.4th at 566-67.

Finally, Fernandez argues that he could not have raised his potential-innocence claim on a section 2255 petition because such claims succeed only when coupled with a meritorious claim of constitutional error. *See Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) ("[A] claim of 'actual innocence' . . . is [only] a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."). Because he had no constitutional claim, Fernandez explains, he could not have raised his potential-innocence claim on habeas, which means it remains viable on the instant compassionate release motion. This argument fails, too. As Fernandez concedes, a potential-innocence argument would have been *cognizable* on a section 2255 petition. The fact that it would not have *succeeded* in that posture does not permit him to channel that claim into a section 3582 motion instead. To the contrary, this is precisely what the habeas regime prevents.

In sum, Fernandez cannot escape the principle espoused by the majority of our sister circuits and adopted by us today: Challenges to the validity of a conviction—including potential-innocence claims—cannot qualify as "extraordinary and compelling reasons" under section

3582(c)(1)(A) because they can (and therefore must) be brought in a section 2255 petition.

CONCLUSION

We have considered Fernandez's remaining arguments on appeal and conclude that they are without merit. We REVERSE the district court's order and judgment and REMAND for further proceedings consistent with this opinion and the order issued concurrently herewith.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JUNE 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of June, two thousand twenty-four.

Before: Robert D. Sack,
Raymond J. Lohier, Jr.,
Maria Araujo Kahn,
Circuit Judges.

Docket No. 22-3122

UNITED STATES OF AMERICA,

Appellant,

v.

JOE FERNANDEZ,

Defendant-Appellee,

MANUEL ALADINO SUERO, JOSE GERMAN RODRIGUEZ-MORA, AKA GORDO, LUIS RIVERA, ALBERTO REYES, AKA ZAC, PATRICK H. DARGE,

Defendants.

Appendix B

ORDER

In conjunction with the opinion issued today that determines this appeal, IT IS HEREBY ORDERED that the Court's January 4, 2023 order is VACATED. That order denied the Government's motion to stay pending appeal the district court's order granting Defendant-Appellee's compassionate release motion and reducing his sentence to time served. Defendant is directed to return to the custody of the United States Bureau of Prisons forthwith.

IT IS FURTHER ORDERED that a partial mandate in this appeal shall issue forthwith to enable the district court to secure Defendant's immediate return to custody pending the determination of rehearing petitions, if any are filed.

For the Court:

Catherine O' Hagan Wolfe,
Clerk of Court

/s/ Catherine O' Hagan Wolfe

APPENDIX C — ORDER AND OPINION GRANTING MOTION FOR REDUCTION OF SENTENCE OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 17, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

10 Cr. 863 (AKH)

UNITED STATES OF AMERICA,

-against-

JOE FERNANDEZ,

Defendant.

ORDER AND OPINION GRANTING MOTION FOR REDUCTION OF SENTENCE

ALVIN K. HELLERSTEIN, U.S.D.J.:

Defendant Joe Fernandez citing "extraordinary and compelling" circumstances because of his current health conditions and the COVID-19 pandemic, moves to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A). *See* ECF No. 248. The Government opposes, arguing Fernandez has not demonstrated that "extraordinary and compelling" circumstances exist, and that the 18 U.S.C. § 3553(a) sentencing factors weigh against a reduction in sentence, For the reasons discussed below, Fernandez's motion is granted.

Appendix C

BACKGROUND

On February 6, 2013, Petitioner Joe Fernandez was charged with one count of conspiracy to use interstate commerce facilities in the commission of murder for hire resulting in death in violation of 18 U.S.C. § 1958 (Count One), and one count of using a firearm in furtherance of a crime of violence resulting in death in violation of 18 U.S.C. §§ 924(j)(1)-(2) (Count Two). *See* ECF No. 74. The charges arose from the murders of Ildefonso Vivero Flores and Arturo Cuellar on February 22, 2000. Flores and Cuellar were couriers of a Mexican narcotics trafficking organization that had exported a 274-kilogram shipment of cocaine to Jeffrey Minaya, the leader of a New York drug ring. To avoid paying the suppliers the money owed, Minaya recruited Patrick Darge to kill Flores and Cuellar, the two narcotics couriers, in exchange for $180,000. Trial Tr. at 98-135. Darge, a cooperating witness, testified that he recruited his cousin, Petitioner Joe Fernandez, to back him up, in exchange for $40,000, and that he recruited Luis Rivera to obtain weapons, ammunition, and a car, and to act as the get-away driver, in exchange for $20,000.

Petitioner's trial commenced on February 19, 2013. The Government's key witness was Patrick Darge, the person hired to kill the Mexican couriers. Darge testified that he recruited Petitioner to back him up because Petitioner was his cousin, had a gun that could be used in the murders, and was trustworthy. Darge testified that he told Fernandez, in order to persuade him, that the Mexican gang had threatened members of their family and that it was necessary to kill the Mexican couriers. Darge

testified that he told Petitioner that he had been hired to murder the "two guys," and that he had a get-away driver. Darge testified that he offered Fernandez $20,000, agreed to Fernandez' counter-offer of $40,000, and instructed Petitioner to bring his gun. Trial Tr. at 276-77. The plan, according to Darge, was to have a member of the Minaya gang lure Cuellar and Flores to a Bronx apartment building where they stashed drugs and money and where they would be paid. Meanwhile, Darge and Fernandez would lurk behind a dark stairway, commit the murders, and run to a waiting get-away car a block-and-a-half away, A run-through was conducted February 21, 2000, and the murders and get-aways followed the day after.

Darge testified that, as planned, a Minayan gang member brought Cuellar and Flores to the lobby of the Bronx apartment building, where they waited for the elevator. Darge testified that he emerged behind the victims with Petitioner following. Darge testified that he shot one bullet into the back of the head of one of the Mexican couriers, that his gun jammed, and that he fled from the scene to the get-away car, a block-and-a-half away. Darge testified that he heard two or three shots while he ran.

Darge testified that the get-away driver, Luis Rivera, was parked in the designated spot, waiting for them. Darge entered the car, and Petitioner arrived minutes later saying, he "had to make sure they were both dead." *Id.* at 332. Rivera drove away on a pre-planned route. Cuellar and Flores, the Mexican couriers, were found dead in the lobby of the apartment building, lying in a pool of

their blood. Shell casings of spent bullets were scattered on the lobby floor. However, and inconsistent with Darge's testimony that he shot but one bullet, all but one of the fourteen casings found at the crime scene came from a .380 gun, the gun that Darge used. Darge testified that he was paid $180,000 for the murders later that day and gave $40,000 to Fernandez and $20,000 to Rivera.

On cross-examination, Darge admitted that he had lied during a previous cooperation with the Government and that his lies enabled him to receive a sentence of two years instead of a guideline sentence, the minimum of which would have been 12-and-a-half years. Re also admitted that he had failed to disclose to the Government numerous shootings in which his younger brother, Alain Darge, had participated and that he and his brother (but not Fernandez) fled to the Dominican Republic after the murders of Cuellar and Flores.

Fernandez did not testify. On March 7, 2013, after a nine-day jury trial, Petitioner was convicted of both Counts One and Two, the murder-for-hire conspiracy and the crime of using a firearm in furtherance of a crime of violence causing death to a person. On October 7, 2014, Petitioner was sentenced to two mandatory, consecutive life sentences.

As of this writing Petitioner has served approximately 132 months since his detention. He had been arrested in his home on October 18, 2011, based on statements by Darge.

Appendix C

Luis Rivera, who, according to Patrick Darge, procured the guns and drove the getaway car, was not called as a witness. On September 7, 2012, Rivera pleaded guilty, but only to conspiracy to distribute heroin. The Government dismissed the conspiracy to murder and the firearm charges against Rivera. Rivera was sentenced to 24 months' imprisonment. *See* ECF No. 60.

Prior Proceedings

Fernandez directly appealed his conviction and sentence claiming that: (i) the evidence adduced at trial was insufficient to prove beyond a reasonable doubt that he knowingly joined the conspiracy with the specific intent to commit murder for hire; and (ii) the Court improperly denied his motion for a new trial based on the Government's failure to disclose *Brady* material, and on newly discovered evidence concerning the credibility of Government witnesses. By Summary Order dated May 2, 2016, the Second Circuit affirmed Petitioner's convictions. *See United States v. Fernandez*, 648 Fed. App'x. 56 (2d Cir. 2016), *cert. denied*, 138 S. Ct. 337 (2017).

On June 27, 2017, Petitioner sought a writ of habeas corpus under 28 U.S.C. § 2255, challenging my jury instructions regarding aiding and abetting liability and the term "use" of a firearm under 18 U.S.C. § 924(c). Petitioner claimed also that his trial and appellate lawyers were constitutionally inadequate for not having raised these issues. I denied the petition but granted a certificate of appealability. *See* 17 Civ. 4806, ECF No. 6. By Summary Order on December 4, 2018, the Second Circuit denied

Petitioner's appeal. *See Fernandez v. United States*, 757 Fed. App'x. 52 (2d Cir. 2018), *cert. denied*, 140 S. Ct. 337 (2019).

On June 22, 2020, the Second Circuit granted Petitioner leave to file a successive habeas petition under 28 U.S.C. § 2255. *See* 20 Civ. 1130, ECF No. 9. Petitioner argued that his Count Two firearm conviction was no longer valid after *United States v. Davis* 139 S. Ct. 2319 (2019) because conspiracy is not a crime of violence. *See* 20 Civ. 1130, ECF No. 19. I granted that motion on November 3, 2021, and vacated Fernandez' life sentence on Count Two. *See* 10 Cr. 863, ECF No. 245.

Now, on the basis, *inter alia*, of his health and fear of contracting Covid in jail, Fernandez seeks a compassionate release. Having fully considered the briefs and argument of the parties, and for the reasons that follow, Fernandez' motion is granted. His life sentence is reduced to a term of time served followed by three years of supervised release.

DISCUSSION

I. Legal Standard

"A court may not modify a term of imprisonment once it has been imposed except pursuant to statute." *United States v. Gotti*, 433 F.Supp.3d 613, 614 (S.D.N.Y. 2020); *see also United States v. Brooker*, 976 F.3d 228, 237-38 (2d Cir. 2020). Section 3582 of Title 18 of the U.S. Code provides one such exception by permitting a court to modify a term of imprisonment "upon motion of the defendant"

if the defendant has exhausted certain administrative requirements. 18 U.S.C. § 3582(c)(1)(A). Under these circumstances, a court may reduce the defendant's sentence only if it finds that "extraordinary and compelling reasons warrant such a reduction" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i); *see also Concepcion v. United States*, 142 S.Ct. 2389, 2404 (2022) (holding that district courts have wide discretion to consider intervening changes of law or fact in reducing sentences under the First Step Act). In so doing, the Court must also consider "the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(1)(A). "Application of the § 3553(a) factors requires an assessment of whether the relevant factors 'outweigh the "extraordinary and compelling reasons" warranting compassionate release . . . [and] whether compassionate release would undermine the goals of the original sentence.'" *United States v. Daugerdas*, ––– F. Supp. 3d –––, 2020 WL 2097653, at *4 (S.D.N.Y. May 1, 2020) (alterations in original) (quoting *United States v. Ebbers*, 432 F. Supp. 3d 421, 430-31 (S.D.N.Y. 2020)).

In the Second Circuit, the policy statement issued by the U.S. Sentencing Commission pertaining to compassionate release, section 1B1.13 of the Sentencing Guidelines, "cannot constrain district courts' discretion to consider whether any reasons are extraordinary and compelling." *Brooker*, 976 F.3d at 236. "However, courts remain free—even after *Brooker*—to look to § 1B1.13 for guidance in the exercise of their discretion." *United States v. Burman*, 2021 WL 681401, at *5 (S.D.N.Y. Feb. 21, 2021)

(internal quotation marks omitted); *see also Concepcion*, 142 S.Ct. at 2404.

The relevant policy statement provides that a reduction is permitted if "[e]xtraordinary and compelling reasons warrant the reduction" and "defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13. In assessing whether extraordinary and compelling circumstances are present, district courts may consider a broad range of factors to determine whether a defendant carries the applicable burden. *See United States v. Piggott*, 2022 WL 118632, at *2 (S.D.N.Y. Jan. 12, 2022). Most recently, the Supreme Court has emphasized the broad discretion district courts possess under the First Step Act. As the Supreme Court noted, "[b]y its terms" the First Step Act "does not prohibit district courts from considering any arguments in favor of, or against, sentence modification." *Concepcion*, 142 S.Ct. at 2403. "In exercising its discretion, the court is free to agree or disagree with any of the policy arguments raised before it." *Id.* at 2404. Moreover, I "need not find a single dispositive circumstance to determine that 'extraordinary and compelling reasons' exist;" instead "'the totality of the circumstances' justify such a finding." *Piggott*, 2022 WL 118632, at *2.

II. A Sentence Reduction is Warranted for Fernandez

Fernandez' arguments that the difficulty of obtaining health care while in custody, and the possibility of contracting COVID are "extenuating circumstances" are

not persuasive. The prison system is well-equipped to give proper medical care to Fernandez, and concerns about COVID, in society generally, and in the federal prison system are much abated.

However, the conditions that can be "extraordinary and compelling" are not limited to concerns about health. They can arise from a broad range of factors: the circumstances of the case, questions about the adequacy of proofs and representation, and inequity and disparity of sentences.

A. There is Reason to Question the Verdict

Although there is factual support for the jury's verdict and the verdict has been affirmed, *United States v. Fernandez*, 648 Fed. App'x 56 (2d Cir. 2016), a certain disquiet remains. Did Patrick Darge sacrifice his cousin, Petitioner Fernandez, to save his brother, Alain Darge? Patrick and Alain ran to the Dominican Republic directly after the murders of Cuellar and Flores. Joe Fernandez did not. Fernandez was arrested 11 years after the murder, in his home, with his family. He was earning a living and had no record of violence. Patrick Darge had considerable motive to lie and had lied before to the Government in order to obtain more favorable treatment for himself and his brother. Additionally, the physical evidence indicated that all but one bullet fired at the scene of the crime came from a .380 caliber gun, which was the gun Darge used, despite the fact that Darge claimed Fernandez fired nearly all the shots. A more effective cross-examination of Patrick Darge, focused on motive to protect Alain Darge, might have changed the verdict.

Appendix C

The government's treatment of Luis Rivera, the get-away driver, also raises strong concerns. Rivera was as much a conspirator as allegedly Fernandez was. Yet, the government lacked the confidence in Patrick Darge's testimony to prosecute Rivera for joining a conspiracy to murder for hire, and Rivera was allowed to testify to a much more minor offense, conspiracy to distribute narcotics, producing a much lower sentence. Although I acknowledge the Government's position that it is not always possible to obtain a conviction against all participants in a crime, the disparate treatment of Rivera leads me to doubt that the jury's verdict was correct.

The sum of all this causes me to be unsure that Fernandez was Darge's back-up, or that he was a member of the conspiracy to kill Cuellar and Flores, or that he shot either or both of the two. The jury verdict is not being vacated or declared an improper verdict. But jury verdicts, despite being legal, also may be unjust. And this is the disquiet I feel, and the basis of my finding that Petitioner Joe Fernandez has shown extraordinary and compelling circumstances for his release.

Additionally, the disparity between Fernandez' life sentence and the sentences of the co-defendants weighs in favor of granting a reduction. While Fernandez co-defendants elected to enter plea agreements or cooperate with the Government, Fernandez maintained his innocence and proceeded to trial. Because the charges against Fernandez carried a mandatory minimum sentence of life imprisonment, I was bound to impose that sentence, which was far greater than the sentences Fernandez' co-

defendants received. However, the enactment of the First Step Act enables me to consider this disparity as part of the extraordinary and compelling circumstances that justify a lower sentence for Fernandez. *See also Brooker*, 976 F.3d at 235. Having considered the record, a sentence of time served, recognizing the approximately 132 months Fernandez has served, would reduce the disparity between Fernandez and his co-defendants and would be sufficient, but not greater than necessary to achieve the sentencing objectives set forth in 18 U.S.C. 3553(a).

Fernandez has served 132 months, or 11 years. He is 46 years old. He has been in custody for long enough. It is time for him to return to his family, and to become a productive member of society. His life before he was arrested shows that he does not present a danger to society. Mr Fernandez's disciplinary history involves no accusations of violence and does not undercut the significant steps towards rehabilitation Mr. Fernandez has taken or militate against compassionate release. Society will not lose its respect for the law because of this outcome after Fernandez' long term of custody. Nor is there an issue about deterrence. The factors of 18 U.S.C. 3553(a) are satisfied.

CONCLUSION

In sum, Fernandez's motion to reduce his sentence and be released from custody is granted. After release from custody, Fernandez will be subject to three years of supervised release. The Judgment shall be amended accordingly. *See* ECF Nos. 166 and 245. The Clerk shall

terminate ECF No. 248 and mail a copy of this order to Defendant.

SO ORDERED.

Dated: November 17, 2022
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of August, two thousand twenty-four.

Docket No: 22-3122

UNITED STATES OF AMERICA,

Appellant,

v.

MANUEL ALADINO SUERO, JOSE GERMAN RODRIGUEZ-MORA, AKA GORDO, LUIS RIVERA, ALBERTO REYES, AKA ZAC, PATRICK H. DARGE,

Defendants.

JOE FERNANDEZ,

Defendant-Appellee.

Appendix D

ORDER

Appellee, Joe Fernandez, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe