

No. _____

In The
Supreme Court of the United States

VINCENT GIATTINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of *Certiorari* To The
United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF *CERTIORARI*

John Vincent Saykanic, Esq.
New Jersey Attorney
ID #: 045801984
624 Grove Street
Clifton, New Jersey 07013
TEL: (973) 472-5863
FAX: (973) 614-0386
E-MAIL: JohnVincentEsq@aol.com
Pro Bono Attorney for
Petitioner Vincent Giattino

QUESTION PRESENTED

The novel question of national significance in criminal cases presented to this Court is:

1. Whether the lower courts erred in not finding that an “extraordinary reason” existed to provide sentencing relief under 18 U.S.C. Section 3582 based upon Petitioner’s five concurrent life sentences with a consecutive thirty year sentence after being offered a Pre-Guidelines pretrial plea deal of ten years (to serve 3 to 4 years) as an unconstitutional trial penalty was imposed in violation of the Sixth Amendment Right to Trial, Fifth and Fourteenth Amendment Right to Due Process and Eighth Amendment Prohibition Against Cruel and Unusual Punishment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page--the Petitioner Vincent Giattino and respondent United States of America.

RELATED PROCEEDINGS

U.S. District Court for the Eastern District of New York:

United States v. Vincent Giattino,
1:90-cr-424- (RR)

United States v. Vincent Giattino,
90-cr-424 (MKB) (November 19, 2020)
(First Compassionate Release Denial)

United States v. Vincent Giattino,
90-cr-424 (MKB) (July 26, 2022)
(Second Compassionate Release Denial)

United States v. Vincent Giattino,
90-cr-424 (MKB) (July 31, 2023)
(Third Compassionate Release Denial)

U.S. Court of Appeals for the Second Circuit:

United States v. Vincent Giattino,
104 F.3d 354 (2d Cir. 1996) (direct appeal)

United States v. Vincent Giattino,
31 Fed.Appx. 7 (2d Cir. 2002) (2255 appeal)

United States v. Vincent Giattino,
No. 23-6918-cr (2d Cir. 2024) (compassionate release appeal)

TABLE OF CONTENTS

	<u>Page No.</u>
QUESTION PRESENTED	i
INDEX TO APPENDICES	vi
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
A. Introductory Statement	5
1. Procedural History as to substantive offenses	7
2. Procedural History as to Motions for Compassionate Release	9
B. Statement of Facts Relevant to the Issues Presented for Review	11
1. Facts Relevant to Mr. Giattino's Medical Condition	11
2. Facts Relevant to the Underlying Case of Conviction	11
C. Summary of Relevant Evidence Since the Trial and PSR	12

REASONS FOR GRANTING THE PETITION	13
THE LOWER COURTS ERRED IN NOT RECOGNIZING THAT AN “EXTRAORDINARY REASON” EXISTED TO PROVIDE SENTENCING RELIEF UNDER 18 U.S.C. SECTION 3582 BASED ON AN UNCONSTITUTIONAL TRIAL PENALTY, WHERE PETITIONER WAS SENTENCED TO 5 LIFE TERMS WITH A CONSECUTIVE 30 YEAR TERM, AFTER BEING OFFERED A PRETRIAL PLEA DEAL OF 10 YEARS’ IMPRISONMENT (SERVE 3 TO 4 YEARS PRE-GUIDELINES), IN VIOLATION OF THE RIGHTS TO TRIAL BY JURY AND DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, AND THE EIGHTH AMENDMENT’S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT	13
CONCLUSION	24
PROOF OF SERVICE	25
CERTIFICATE OF COMPLIANCE	26

INDEX TO APPENDICES

APPENDIX A:

Summary Order/Mandate of the United States Court of Appeals
for the Second Circuit in *United States of America v. Vincent
Giattino*, Case No. 23-6918, filed December 27, 2024 1a-6a

APPENDIX B:

Order of the United States Court of Appeals for the Second
Circuit in *United States of America v. Vincent Giattino*, Case
No. 23-6918, denying the Petition for Rehearing or, in the
alternative, for rehearing *en banc*, filed December 19, 2024 7a

APPENDIX C:

Summary Order of the United States Court of Appeals for
the Second Circuit in *United States of America v. Vincent Giattino*,
Case No. 23-6918, affirming July 31, 2023 Order of the District
Court, filed October 25, 2024 8a-13a

APPENDIX D:

WestLaw Opinion, *United States v. Vincent Giattino*, Case
No. 23-6918, 2024 WL 4579342 (2d Cir. 2024), affirming
July 31, 2023 Order of the District Court, filed October 25,
2024 14a-17a

APPENDIX E:

Memorandum & Order (denying third compassionate release motion)
of the United States District Court for the Eastern District of New York
in *United States of America v. Vincent Giattino*, Case No. 90-CR-424
(MKB), 2023 WL 4867564 (E.D.N.Y. dec. Jul. 31, 2023) 18a-25a

APPENDIX F:

Summary Order (affirming denial of 2255 application) of the United States Court of Appeals for the Second Circuit in *United States of America v. Vincent Giattino*, Docket No. 01-2354, 31 Fed.Appx. 7 (2002), filed February 15, 2002 26a-28a

APPENDIX G:

Unpublished Opinion (direct appeal) of the United States Court of Appeals for the Second Circuit in *United States of America v. Vincent Giattino*, Docket No. 95-1503, 104 F.3d 354 (1996), filed November 5, 1996 29a-31a

APPENDIX H:

Transcript of oral argument before the United States Court of Appeals for the Second Circuit in *United States of America v. Vincent Giattino*, Case No. 23-6918, dated October 16, 2024 32a-38a

APPENDIX I:

Memorandum & Order (denying first compassionate release motion) of the United States District Court for the Eastern District of New York in *United States of America v. Vincent Giattino*, Case No. 90-CR-424 (MKB), filed November 19, 2020 39a-44a

APPENDIX J:

Memorandum & Order (denying second compassionate release motion) of the United States District Court for the Eastern District of New York in *United States of America v. Vincent Giattino*, Case No. 90-CR-424 (MKB), filed July 26, 2022 45a-57a

TABLE OF AUTHORITIES CITED

	Page Number
CASES	
<i>Bordenkitcher v. Hayes</i> , 434 U.S. 357 (1978)	13
<i>Garcia v. Herbert</i> , No. 02-CV-02052, 2018 WL 6272778 (E.D.N.Y. Nov. 30, 2018)	14
<i>Giattino v. United States</i> , 31 Fed.Appx. 7 (2d Cir. 2002)	8
<i>United States v. Amato</i> , 48 F.4 th 61 (2d Cir. 2022)	20
<i>United States v. Bennett</i> , 252 F.3d 559, 562 n.5 (2d Cir. 2001)	18
<i>United States v. Cruz</i> , 977 F.2d 732 (2d Cir. 1992)	18
<i>United States v. Cruz</i> , 156 F.3d 366, 374 (2d Cir. 1998)	18
<i>United States v. Devine</i> , 934 F.2d 1325 (5th Cir. 1991)	13
<i>United States v. Fernandez</i> , 104 F.4 th 420 (2d Cir. 2024)	20
<i>United States of America v. Vincent Giattino</i> , Docket No. 95-1503, 104 F.3d 354 (2d Cir. 1996)	vii,2,7-8
<i>United States v. Vincent Giattino</i> , Docket No. 01-2354, 31 Fed.Appx. 7 (2d Cir. Feb. 15, 2002)	vii,2,8

<i>United States of America v. Vincent Giattino</i> , Case No. 90-CR-424 (MKB), 2023 WL 4867564 (E.D.N.Y. dec. Jul. 31, 2023)	vi,6
<i>United States v. Vincent Giattino</i> , Case No. 23-6918, 2024 WL 4579342 (2d Cir. Oct. 25, 2024) (Summary Order)	vi,1,10-11
<i>United States v. Gozes-Wagner</i> , 977 F.3d 323 (5 th Cir. 2020)	14
<i>United States v. Jones</i> , 17 F.4 th 371 (2d Cir. 2021)	6
<i>United States v. Lorenzano</i> , No. 03-CR-1256, 2021 WL 734984 (S.D.N.Y. Feb. 24, 2021)	18

STATUTES AND RULES

18 U.S.C. § 2	7
18 U.S.C. §§ 924(c)	7
18 U.S.C. § 1952B	8
18 U.S.C. §§ 1952B(a)(1) and (5)	7
18 U.S.C. § 1962(c)	7
18 U.S.C. § 3553(a)	5-6
18 U.S.C. § 3582	v,13
18 U.S.C. § 3623	7
21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),(B), and (C)	7

21 U.S.C. § 846	7
28 U.S.C. § 1254(1)	3
OTHER	
U.S. Const. Amend. V	3
U.S. Const. Amend. VI	3
U.S. Const. Amend. VIII	4,13
U.S. Const. Amend. XIV	4
Article - " <i>Specter of Execution Hangs Over Murder Trial</i> ," <i>New York Times</i> (May 6, 1992)	11
Article - "Reputed Mobster Guilty in Six Narcotics Murders," <i>New York Times</i> (June 26, 1992)	11

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

Petitioner Vincent Giattino, denied compassionate release, was offered a pre-Guidelines plea bargain sentence of 10 years (to serve 3 to 4 years in prison) but after invoking his constitutional right to be tried by a jury was sentenced to five concurrent life terms plus 30 years--an unconstitutional trial penalty. The issue of a criminal sentencing penalty for proceeding to trial is a novel question of national significance which appears with great frequency in many federal criminal proceedings, and is an issue that should finally be litigated by this Court.

OPINIONS BELOW

The Summary Order/Mandate of the Second Circuit Court of Appeals affirming the denial of compassionate release of July 31, 2023, is not reported but is available electronically as *United States v. Vincent Giattino*, 23-6918 (2d Cir. Oct. 25, 2024) (Summary Order), and is attached to the Appendix hereto at Pet. App. 1a-6a (Exhibit A). The WestLaw Opinion, *United States v. Vincent Giattino*, Case No. 23-6918, 2024 WL 4579342 (2d Cir. 2024), affirming the July 31, 2023 Order of the District Court denying compassionate release, filed October 25, 2024 is at Pet. App. 14a-17a (Exhibit D).

The Memorandum & Order (denying the third compassionate release motion) of the United States District Court for the Eastern District of New York in *United*

States of America v. Vincent Giattino, Case No. 90-CR-424 (MKB), filed July 31, 2023 is at 18a-25a (Appendix E).

The Memorandum & Order (denying the first compassionate release motion) of the United States District Court for the Eastern District of New York in *United States of America v. Vincent Giattino*, Case No. 90-CR-424 (MKB), filed November 19, 2020 is at Pet. App. 39a-44a (Appendix I).

The Memorandum & Order (denying the second compassionate release motion) of the United States District Court for the Eastern District of New York in *United States of America v. Vincent Giattino*, Case No. 90-CR-424 (MKB), filed July 26, 2022 is at Pet. App. 45a-57a (Appendix J).

The Summary Order (affirming the denial of the 2255 application) of the United States Court of Appeals for the Second Circuit in *United States of America v. Vincent Giattino*, Docket No. 01-2354, 31 Fed.Appx. 7 (2002), filed February 15, 2002, is at Pet. App. 26a-28a (Appendix F).

The Unpublished Opinion (direct appeal) of the United States Court of Appeals for the Second Circuit in *United States of America v. Vincent Giattino*, Docket No. 95-1503, 104 F.3d 354 (1996), filed November 5, 1996, is at Pet. App. 29a-31a (Appendix G).

JURISDICTION

The Second Circuit entered its decision below denying the timely petition for panel rehearing, or, in the alternative, for rehearing *en banc* on December 19, 2024 (a copy of the Order denying rehearing appears at 7a; Exhibit B). Petitioner Giattino timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added).

The Sixth Amendment to the United States Constitution provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis added).

* * *

The Eighth Amendment to the United States Constitution provides that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
(Emphasis added).

* * *

Section 1 of the Fourteenth Amendment to the United States Constitution provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added).

STATEMENT OF THE CASE

A. Introductory Statement

Petitioner raised multiple issues on appeal in support of his argument that his third denial of compassionate release constitutes an abuse of discretion, including 1) Petitioner's advanced age (he will be 72 on April 14, 2025) and a host of very serious medical ailments, along with the still present COVID threat; 2) newly discovered information related to the murders of Burdi and Johnson; 3) new case law and Guidelines; 4) the "totality of the circumstances" including Petitioner's extraordinary rehabilitative efforts and good conduct in prison, along with his very strong and close familial ties and support; 5) the fact that a reduction in sentence to 35 years is consistent with the purposes and objectives of 18 U.S.C. § 3553(a); 6) the fact that other courts have reduced life sentences of those convicted of violent crimes and murders as part of organized crime and with far greater culpability than Petitioner; 7) sentencing disparities compel a reduction of sentence; and, most significantly and the focus of this petition, 8) the imposition of an improper and unconstitutional trial penalty.

The reason Petitioner has filed for *Certiorari* with this Court is because this is a novel issue which arises with great frequency in criminal cases. Most significantly, two of the three Panel judges appeared to agree with Petitioner's argument that the imposition of a sentence of 5 concurrent life sentences with a

consecutive 30 years' sentence following a jury trial conviction constitutes an unconstitutional trial penalty as Petitioner had been offered a pretrial plea bargain sentence of 10 years (under pre-Guidelines sentencing Petitioner would have served 3 to 4 years). The Government at oral argument conceded that Petitioner had, in fact, been offered this 10 year plea bargain.

However, in spite of the comments made during oral argument, the Panel, in its Summary Order filed on October 25, 2024 (Pet. App. 1a-6a; Appendix A), did not address the trial penalty issues and concluded:

We find no abuse of discretion in the District Court's decision. "[A] district court's reasonable evaluation of the Section 3553(a) factors is an alternative and independent basis for denial of compassionate release." *United States v. Jones*, 17 F.4th 371, 374 (2d 2021) (*per curiam*) (citation and quotation marks omitted). We therefore need not reach the question of whether Giattino presented extraordinary and compelling circumstances; we affirm based on the District Court's more than "reasonable evaluation of the Section 3553(a) factors." *Id.* (citation and quotation marks omitted). [Footnote omitted]. The District Court acted well within its broad discretion in denying Giattino's motion for compassionate release based on the section 3553(a) sentencing factors. The District Court appropriately considered "the nature and seriousness of Giattino's offenses," including "two heinous murders . . . committed in horrific manners"; the need for the sentence to reflect "the seriousness of the offense[s], promote[] respect for the law, and provide[] just punishment for the offense[s]; and the need to avoid unwarranted sentencing disparities. *Giattino*, 2023 WL 4867564, at *4 (citations and quotation marks omitted).

We have considered Giattino's remaining arguments on appeal and find them to be without merit. Pet. App. at 5a-6a (Appendix A).

The Second Circuit Panel did not address the trial penalty issue in its decision, in spite of the fact that two of the three panel judges expressed interest in the legitimacy of this argument and the Government conceded that the 10 year plea offer had been made. Accordingly, Petitioner now moves for *certiorari* as to the trial penalty issue.

1. Procedural History as to Substantive Offenses.

On June 1, 1990, Petitioner Vincent Giattino was charged with 15 others in a racketeering conspiracy which included multiple homicides. Petitioner was arrested on July 29, 1991 in Florida and later released on bail pending trial. Following a jury trial before the Honorable Reena Raggi, U.S.D.J., on November 5, 1992, Petitioner was convicted of racketeering, murder, narcotics, and firearms offenses in violation of 18 U.S.C. §§ 924(c), 1952B(a)(1) and (5), 1962(c), 3623, and 2; and 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A),(B), and (C) and 846. His conviction was based entirely on cooperator testimony; specifically, the testimony of Frank Gangi.

On February 26, 1993, Petitioner was sentenced to five concurrent life terms of imprisonment, two 10-year terms to be served concurrently with the life terms, and one 30-year term to be served consecutively to the other terms, to be followed by 23 years of supervised release, and he was ordered to pay a \$200,000 fine. *See*

United States v. Vincent Giattino, 104 F.3d 354 (2d Cir. 1996) (unpublished opinion is annexed at Pet. App. 29a-31a; Appendix G). Petitioner has been incarcerated since the jury's verdict on November 5, 1992.

On direct appeal, Petitioner contended that there was insufficient evidence under 18 U.S.C. § 1952B and that the Government failed to disclose *Brady* material. On November 5, 1996, the Second Circuit affirmed. *Ibid*.

Judge Raggi subsequently denied a Section 2255 motion dated April 16, 1997. However, Judge Raggi granted a certificate of appealability on both timeliness and ineffective assistance of counsel. *See Giattino v. United States*, 31 Fed.Appx. 7 (2d Cir. 2002). On February 15, 2002, the Second Circuit affirmed. Pet. App. 26a-28a (Appendix F).

Petitioner wishes to emphasize that, following his arrest, he was released on bail. He was offered a pre-Guidelines plea of 10 years' incarceration (perhaps three or four years of incarceration). As stated in the "Affirmation of James R. Froccaro, Esq." (Petitioner's trial and appellate attorney):

3. The Government made an oral plea offer to Mr. Giattino at some point prior to his trial. It was a pre-Guidelines offer of 10 years' imprisonment. I discussed it with Mr. Giattino, who ultimately declined it and proceeded to trial.

4. Prior to Mr. Giattino's trial, he was released on bail, and remained free without incident. He was ordered remanded upon the jury's verdict in 1992. He has been incarcerated

ever since. [Docket Entry No. 721-4; A196].¹

Petitioner's punishment was drastically different from what the Government offered him, and offered his co-defendants charged with murders. Additionally, it was grossly higher than the sentences imposed on his co-defendants by way of plea agreements. Aside from the lead and capital defendant Thomas Pitera, no defendant received more than 20 years, including those convicted of murders. Accordingly, due to the “trial penalty,” “extraordinary and compelling reasons” exist warranting “compassionate release” *or* a reduction in his sentence.

2. Procedural History as to Motions for Compassionate Release.

On June 22, 2020, following passage of the First Step Act of 2018, Petitioner requested a Compassionate Release/Reduction in Sentence to the Warden of FCI Allenwood-Medium due to his elderly status and medical condition. [A81]. On July 2, 2020, Warden Catricia L. Howard denied the request. [A98].

By way of *pro se* application (Docket Entry No. 711 filed on September 2, 2020), Petitioner moved for Compassionate Release and Home Confinement. [A79-137]. On October 19, 2020, the Government filed its opposition. [Docket Entry No. 719; A138-151]. On November 19, 2020, Judge Brodie in a "Memorandum &

¹ "A" denotes Appendix filed in the Second Circuit on January 9, 2024.

"SPA" denotes Special Appendix filed in the Second Circuit on January 9, 2024.

Order" denied the first motion for compassionate release. Pet. App. at 39a-44a (Appendix I). [Docket Entry No. 723; A216-221].

On February 14, 2022, Petitioner filed a "Renewed Motion for 'Compassionate Release' *or* Reduction of Sentence." [Docket Entry No. 726; letter brief at A222-241; Docket Entry No. 726-1; Exhibits at 242-253]. On July 26, 2022, Judge Brodie in a "Memorandum & Order" denied the second motion. Pet. App. at 45a-57a (Appendix J) [Docket Entry No. 734; SPA1; A273-285].

On November 25, 2022, Petitioner filed a "Renewed Motion for Reduction of Sentence" relying primarily on the recent November 2, 2022, decision of the Honorable Frederic Block related to the reduction of the life sentences for Anthony Russo and Paul Moore. [Docket Entry No. 735, brief at SPA7; A286-294; Exhibits at A295-325].

On July 31, 2023, Judge Brodie in a "Memorandum & Order" denied the third motion for compassionate release. Pet. App. at 18a-25a (Appendix E). [Docket Entry No. 746; SPA 20; A355-366].

Petitioner filed a timely Notice of Appeal. [Docket Entry No. 747; A367].

On October 25, 2024, the United States Court of Appeals for the Second Circuit affirmed the third denial of compassionate release of July 31, 2023 *See United States v. Vincent Giattino*, 23-6918 (2d Cir. Oct. 25, 2024) (Mandate and Summary Order), and is attached to the Appendix hereto at Pet. App. 1a-6a

(Appendix A).²

On December 19, 2024, the Second Circuit denied a timely petition for rehearing or, in the alternative, for rehearing *en banc*. Pet. App. at 7a (Appendix B).

B. Statement of Facts Relevant to the Issues Presented for Review:

1. Facts Relevant to Mr. Giattino's Medical Condition:

Petitioner, who will be 72 years old on April 14, 2025, has been continuously incarcerated for this case for over thirty years. As the Government concedes, he is a Care Level II inmate who requires chronic care and is also on a “High Risk Health List” at FCI Allenwood.

2. Facts Relevant to the Underlying Case of Conviction:

Petitioner was an associate of the Bonnano family and was accused of being part of a crew headed by an organized crime "captain"--Thomas Pitera (against whom the Government sought the death penalty).³ Petitioner was primarily involved

² The WestLaw Opinion, *United States v. Vincent Giattino*, Case No. 23-6918, 2024 WL 4579342 (2d Cir. 2024), affirming July 31, 2023 Order of the District Court, filed October 25, 2024 is at Pet. App. 14a-17a (Exhibit D).

³ As argued by the Government at his trial, "[Pitera] murdered almost everyone himself, taking delight in being the executioner and then the butcher of the victims' bodies." See "*Specter of Execution Hangs Over Murder Trial*," New York Times (May 6, 1992). [Docket Entry No. 721-5; A199-201]; PSR ¶ 18. On June 25, 1992, after a two-month capital trial, which included multiple acts of murder, narcotics trafficking, and various firearms offenses related to his leadership role in a racketeering conspiracy (the Pitera crew of the Bonanno family), Mr. Pitera was convicted. *Id.* and "Reputed Mobster Guilty in Six Narcotics Murders." New York

in the distribution of cocaine and marijuana. He has not, and never became, a “made man” – someone initiated into a crime family through the sponsorship of another “made man” and murdering someone. He also had a limited criminal history. According to the Government, he “took part” in the murders of Phyllis Burdi and Wilfred “Willie Boy” Johnson.

Petitioner never planned or actually committed either murder. Had Petitioner actually killed Burdi and or Johnson, he would likely have become a “made man.” However, that never happened. Additional and significant mitigating information related to the murders of both Burdi and Johnson has been presented.

C. Summary of Relevant Evidence Since the Trial and PSR:

Since the time of Petitioner's conviction and, in fact, within just the past year, significant new evidence has emerged as to the two murders (the Burdi and Johnson murders) of which he was convicted that substantially mitigate his involvement. Multiple interviews with former underboss or “second in command” of the Gambino family and Government cooperator, Salvatore “Sammy the Bull” Gravano, has yielded new facts reflected in his sworn declaration. (See Docket Entry No. 744; 349-350]. Simply put, Petitioner did not directly participate in either the murder of or shooting of Burdi or Johnson.

Times (June 26, 1992). [Docket Entry No. 721-5; A203-205].

REASONS FOR GRANTING THE PETITION

THE LOWER COURTS ERRED IN NOT RECOGNIZING THAT AN "EXTRAORDINARY REASON" EXISTED TO PROVIDE SENTENCING RELIEF UNDER 18 U.S.C. SECTION 3582 BASED ON AN UNCONSTITUTIONAL TRIAL PENALTY, WHERE PETITIONER WAS SENTENCED TO 5 LIFE TERMS WITH A CONSECUTIVE 30 YEAR TERM, AFTER BEING OFFERED A PRETRIAL PLEA DEAL OF 10 YEARS' IMPRISONMENT (SERVE 3 TO 4 YEARS PRE-GUIDELINES), IN VIOLATION OF THE RIGHTS TO TRIAL BY JURY AND DUE PROCESS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, AND THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Sixth Amendment gives criminal defendants "the right to a speedy and public trial." The Fifth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution provide that no person shall be deprived of "life, liberty, or property, without due process of law."

This Court has stated "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkitcher v. Hayes*, 434 U.S. 357 (1978). Thus, "a defendant cannot be punished by a more severe sentence because he unsuccessfully exercises his constitutional right to stand trial." *United States v. Devine*, 934 F.2d 1325, 1338 (5th Cir. 1991).

In *Garcia v. Herbert*, No. 02-CV-02052, 2018 WL 6272778 (E.D.N.Y. Nov. 30, 2018), the late Judge Jack B. Weinstein found petitioner's sentence of 125 years' imprisonment after trial grossly disproportionate to the sentence of 20 years offered by the State had he pled guilty to four separate robberies (“If [the plea offer of] 20 years could be said to fulfill legitimate penological goals (deterrence, incapacitation, retribution, and rehabilitation), then this sentence six times its promised length is excessive.”). *See United States v. Gozes-Wagner*, 977 F.3d 323, 335 (5th Cir. 2020) “[A] defendant cannot be punished by a more severe sentence because he unsuccessfully exercises his constitutional right to stand trial.”

The trial penalty issue was raised in Petitioner's Opening Brief ("due to the 'trial penalty,' 'extraordinary and compelling reasons' exist warranting 'compassionate release' *or* a reduction in his sentence" (Br. page 50)), and at oral argument before the Second Circuit Court of Appeals:

MR. SAYKANIC: Number two: the plea offer. When he was age 37, more than 34 years ago, he was offered 10 years, and that was pre-guidelines. So that was just three to four years. And that's in his attorney's affidavit. That's at A196. Bail was granted. Mr. Giattino was immediately granted bail with the government's consent, Your Honors. Again, how could he have been that dangerous of a person at age 37 if they gave him bail? And they gave him a . . . ten, which you'd only do three or four years.⁴ Pet. App. 35a (Appendix H; page

⁴ The transcript of the oral argument, based upon the audio on this Court's website, was transcribed by the transcription service "Transcription Puppy" (https://www.transcriptionpuppy.com/?gad_source=1&gclid=CjwKCAiArva5BhBiEiwA-

4) (Emphasis added).

The Government does not dispute a pre-Guidelines plea offer of no more than ten years:

JUDGE MERRIAM: . . . it sounds like you don't contest the idea that some plea was offered pre-trial in which Mr. Giattino could have expected his sentence to be no more than 10 years. The government doesn't contest that, that is true?

MS. PAK: That's correct, Your Honor. Pet. App. 38a (Appendix H; page 7).

As revealed by the questions and comments of both Judge Jacobs and Vilardo at the oral argument, these two jurists were disturbed by the trial penalty ramifications inherent in a life-plus-thirty years sentence following a plea offer of no more than ten years:

JUDGE DENNIS JACOBS: One of the . . . arguments that your friend makes is that there, there was a, a trial penalty imposed here and, and you offered him 10 years and he gets life plus 30 after he goes to trial. Is there any point where we should find that there's a trial penalty that, that, that by, by, by going to trial, it, it's, it's just so disparate, so different. The sentence that he gets, that, that it's, that it is in effect a penalty for exercising his right to go to trial?

MS. PAK: Yes, Your Honor. While this, circuit has not recognized the concept of the trial penalty in an abstract, perhaps it would be more persuasive that there was a trial penalty if there were defendants who were charged with the same crimes similarly situated in the case in terms of their culpability. And the only difference is that one, exercised his or her right to a trial and that another, took a guilty plea instead. Here, that's not what we have Your Honor. In your, in this case, I, I'll point to two of the co-

defendants that, the defendant focused on them is free...

JUDGE VILARDO: Excuse me, but I think you're talking about disparity rather than trial penalty.

MS. PAK: Yes, Your Honor.

JUDGE VILARDO: You're saying, you're comparing him with others, but why not compare him with, with himself prior to trial being offered 10 years?

MS. PAK: Yes, Your Honor. Um...

JUDGE VILARDO: ...with a sentence basically of life plus 30.

MS. PAK: Your Honor, it's, there is, there is nothing unusual about the fact that, what a defendant may be ultimately sentenced to after trial in which evidence is presented to both the presiding judge and jurors over, what would probably be multiple crimes if that is the case here[?]...

JUDGE VILARDO: No, I, I understand that, but the quest- the question I was trying to get at is, is, is does there come a point where, where it becomes a penalty for, for, I mean, you are from 10, 10 years versus life plus 30? I mean, that's just the, the, there's a huge difference there. And the only thing that in the, in the government's mind, the government knew all the evidence before they offered him 10 years. And the only thing that changed was he went to trial, he exercised his right to go to trial. So isn't life plus 30 a penalty for going to trial? And, and isn't there, isn't there a point at somewhere? So if, if he goes to, if he goes to trial and he gets 20 years versus 10 years, okay, I get it. But, but if, if a, a difference, isn't there some point at which an appellate court ought to find that there was a trial penalty imposed and that, that, that ought to factor into the analysis here?

MS. PAK: Perhaps in, in a certain, scenario, it would be appropriate

for this court to find that there was a trial penalty, if that is the court's finding. However, again, the standard that this court should consider is the abuse of discretion and whether the district court took a holistic look at both prongs that need to be satisfied for the granting of a compassionate release motion, both prongs being well, setting aside, an administrative exhaustion, which the government is cons, not fighting here, was there, are there extraordinary and compelling circumstances? And on balance of the 3553(a) factors, is a sentence reduction or release warranted. And here, while Judge Brody did not reach the extraordinary compelling analysis on the section 3553(a) factors alone, which as, Your Honor, Judge Vilardo, pointed out, consideration of a factor such as that can be taken into consideration by the district judge, but it is also not an abuse of discretion for the district judge to have considered other factors such as the nature and circumstances of the crime that the defendant [crosstalk].

JUDGE VILARDO: Did Judge Brodie address the trial penalty argument?

MS. PAK: She did not, Your Honor.

JUDGE VILARDO: Okay. Pet. App. 36a-37a (Appendix H; pages 5-6).

While AUSA Pak's answer is technically correct as Judge Brodie did not specifically address the trial penalty issue in her July 31, 2023 Memorandum & Order (the third denial) (SPA20-31), Judge Brodie did cite to her second denial: "The Court already addressed and rejected those arguments in its July 2022 decision (July

2022 Decision 8-12)" (SPA29), in which she, admittedly, did address the trial penalty issue.⁵ However, Petitioner submits that, although Judge Brodie considered the trial penalty argument in her second denial, this does not diminish his argument that this Court should now lay out firm parameters as to what constitutes an unconstitutional trial penalty (which certainly exists here).

As Judge Vilardo asked, "So isn't life plus 30 a penalty for going to trial? And, and isn't there, isn't there a point at somewhere? So if, if he goes to, if he goes to trial and he gets 20 years

⁵ Judge Brodie wrote in the second denial of July 26, 2022:

The Court is unpersuaded by Giattino's additional argument that he suffered a "trial penalty" for not accepting his plea bargain, (Def.'s Mot. 7); *see United States v. Bennett*, 252 F.3d 559, 562 n.5 (2d Cir. 2001) ("[T]he lower sentence after a guilty plea reflects a 'reduction from a sentencing norm ascertained independent of the procedure by which guilt is ascertained. A sentence imposed upon a defendant who stands trial is that norm; it is not an enhancement above the norm as a cost of standing trial.'" (quoting *United States v. Cruz*, 977 F.2d 732, 734 (2d Cir. 1992))); *United States v. Cruz*, 156 F.3d 366, 374 (2d Cir. 1998) (collecting cases supporting the practice of the Government offering a plea with a lower sentence); *United States v. Lorenzano*, No. 03-CR-1256, 2021 WL 734984, at *4 (S.D.N.Y. Feb. 24, 2021) (denying motion for compassionate release where the defendant asserted that "he was unfairly punished for exercising his right to a jury trial and refusing to plead guilty along with his co-defendants"). Pet. App. at 53a (Op. at 9; SPA15).

versus 10 years, okay, I get it. But, but if, if a, a difference, isn't there some point at which an appellate court ought to find that there was a trial penalty imposed and that, that, that ought to factor into the analysis here." Pet. App. 37a (Exhibit H, page 6) (Emphasis added).

The comments of Judge Vilardo, along with those of Judge Jacobs ("there any point where we should find that there's a trial penalty that . . . by . . . going to trial, it, it's, it's just so disparate, so different. The sentence that he gets, that . . . is in effect a penalty for exercising his right to go to trial"; Pet. App. 36a (Exhibit H, page 5), warrant a decision by this Court as to what, in fact, constitutes an impermissible trial penalty.

A resolution of this novel issue would safeguard criminal defendants' Fifth, Sixth, Eighth and Fourteenth Amendment rights and make the plea bargaining process not only more meaningful, but fair, as the defendant would have an actual idea as to what to expect following a guilty verdict. A consideration of the impermissible trial penalty, in the context of all of the 3553 factors, supports Petitioner's argument that the denial of compassionate release was an abuse of discretion.

Prior to his imprisonment, Petitioner was married to Shirley and was raising his daughter, Brigitte, who had just began walking. Now, over 71 years old and experiencing declining health, he is in his final years. He is extremely remorseful for his past actions and who he was, and lives with deep regret and guilt. Over the more-than-three decades of enduring a life sentence, he has stayed connected with

his supportive family, engaged in programming within prisons, encouraged and helped other inmates, helped raise Brigitte through daily calls and regular visits (experienced her birthdays, milestones and accolades in her life via telephone calls), and fought to keep alive his hope of one day being released.

As to the offenses, while the Government in its brief below and at oral argument points to the "gravity of the defendant's crimes," (Exhibit B; page 7) and that Petitioner "took part" in the murders of Phyllis Burdi and Wilfred "Willie Boy" Johnson, it is respectfully submitted that Petitioner never planned or actually committed either murder. Significant mitigating information related to the murders of Burdi and Johnson was presented to both the district court and Panel.⁶

Petitioner is now a *very old* 71-year-old with a myriad of ailments that include: (1) asthma, which requires the use of an albuterol inhaler; (2) high blood pressure,

⁶ The Second Circuit Panel rejected Petitioner's challenge to the convictions:

... it bears noting that "challenges to the validity of a conviction are not cognizable as 'extraordinary and compelling reasons' under section 3582(c)(1)(A)." *United States v. Fernandez*, 104 F.4th 420, 431 (2d Cir. 2024). Nor does a district court "have discretion to consider new evidence proffered for the purpose of attacking the validity of the underlying conviction in its balancing of the 18 U.S.C. §3553(a) factors." *United States v. Amato*, 48 F.4th 61, 63 (2d Cir. 2022) (per curiam)." Pet. App. 5a-6a (Exhibit A, pages 5-6).

which requires the prescription medication Lisinopril; (3) diabetes, type II with ophthalmic manifestations, 250.50; (4) a heart condition; (5) circulatory conditions; (6) morbid obesity, 278.01 with a BMI over 40; (7) hyperlipidemia, mixed, 272.2 (high cholesterol); and (8) the necessity of use of a C-Pac machine to aid in a normal sleep pattern. [Medical records dated April 20, 2020 through June 22, 2020; Document Entry No. 711 at A99-104]. Due to his declining health, which also includes the need for two knee replacements and early-stage Alzheimer's, "extraordinary and compelling" reasons exist. Petitioner has an ever-growing fear that he may die in prison--"death by incarceration."

The Government conceded that COVID-19 posed a serious threat to Petitioner if he became infected. [Docket Entry No. 719; A149]. Petitioner's trial and appellate attorney attested to the fact that "Mr. Giattino suffers from several serious medical conditions and is at "high risk" of death or serious health consequences if he becomes infected with COVID-19." [Docket Entry No. 721-4; A196].

Judge Brodie acknowledged Petitioner's tremendous rehabilitation and transformation over the past 31 years while he served a life sentence:

. . . the Court acknowledges and applauds Giattino's "rehabilitation in the fact of a life sentence" and his mentorship to other inmates, (Def.'s Reply 2-3), his good conduct in prison, (id.), his ability to maintain strong and close relationships with his family, particularly his daughter, (id.), and his support network and reentry plan, (id.). Pet. App. 54a. [Docket Entry No. 734; A282-283].

Petitioner has been rehabilitated and is a changed man. Despite serving a life sentence, he has used his time in prison to try and better himself, and also his prison community. He has participated in programs and classes. Letters from prison staff and inmates, who have spent considerable time with Petitioner, reveal a man who has transformed. He is “respectful” and a “gentleman,” someone with “the ability to become a productive member of society.” Counselor Joshua Newcomer recommends that Petitioner be released (he is the closest staff member to Petitioner and has had regular contact with him over the last 7 years). [Docket Entry No. 711; A129]. Recreation Specialist, B. Oberdorf, who has known Petitioner for the last 10 years, also recommends Petitioner's release. [Docket Entry No. 721-2; A186]. Other positive Allenwood letters are from Dr. Thomas E. Cullen; Jennifer Maris, HIT; and Tina Cioffi, RN [Docket Entry No. 721-2 at A187-189].

Petitioner's fellow inmates have also written in support of his release and describe him as someone trusted and relied upon for advice and guidance. [Docket Entry No. 721-1; A171-184].

As stated in the letter of Petitioner's older cousin John Raucci dated January 26, 2022 [A246], if released Petitioner would live with Mr. Raucci and his family and provided with a job in Mr. Raucci's electronic distribution business (North Star Micro Electronics) with a starting salary of \$52,000 per year. Petitioner thus has a strong support network upon release. See also Docket Entry No. 714; A400.

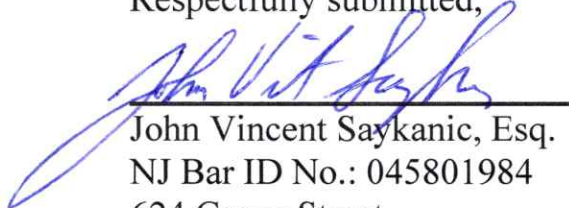
If not granted relief, Petitioner will surely die in prison. He respectfully requests that, to paraphrase Portia in Shakespeare's *Merchant of Venice*, the Courts should temper justice with mercy and bless not only Petitioner but the Court, as well, with a grant of mercy and compassionate release.

Certiorari should be granted due to the novel question of whether an unconstitutional "trial penalty" was imposed due to the Petitioner exercising his constitutional right to proceed to trial. After being found guilty, he was sentenced to five (5) concurrent life terms with a thirty (30) year consecutive term—this life-plus-thirty-year sentence was imposed in spite of a plea offer of ten (10) years (to serve 3 to 4 years). This unconstitutional trial penalty should have been a determinative factor in granting Petitioner compassionate release. This is an issue of national significance as trial penalties are constantly imposed upon criminal defendants as punishment for the exercise of the constitutional right to be tried by a jury of their peers.

CONCLUSION

For the foregoing reasons and authorities cited, Petitioner Vincent Giattino respectfully submits that the petition for a writ of *certiorari* should be granted.

Respectfully submitted,



John Vincent Saykanic, Esq.

NJ Bar ID No.: 045801984

624 Grove Street

Clifton, New Jersey 07013

TEL: 472-5863

FAX: (973) 614-0386

E-MAIL: JohnVincentEsq@aol.com

Pro Bono Attorney for Petitioner

Vincent Giattino

Dated: March 14, 2025

NO. __

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

VINCENT GIATTINO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PROOF OF SERVICE

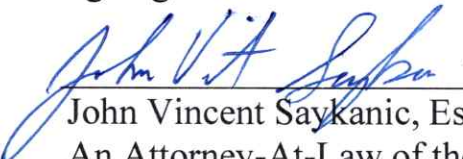
I, John Vincent Saykanic, Esq., do swear or declare on this date, March 14, 2025, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF *CERTIORARI* on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

AUSA Stephanie Pak
United States Attorney's Office
Eastern District of New York
271-A Cadman Plaza East
Brooklyn, New York 11201

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 14, 2025


John Vincent Saykanic, Esq.
An Attorney-At-Law of the

CERTIFICATE OF COMPLIANCE

NO. __

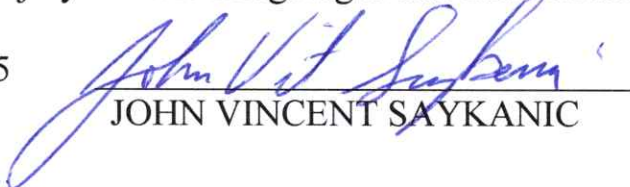
**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF *CERTIORARI***

VINCENT GIATTINO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of *certiorari* contains 5,831 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 14, 2025



JOHN VINCENT SAYKANIC