

IN THE SUPREME COURT OF THE UNITED STATES

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-556,
5 Fernandez versus United States.

6 Mr. Gruenstein.

7 ORAL ARGUMENT OF BENJAMIN GRUENSTEIN

8 ON BEHALF OF THE PETITIONER

9 MR. GRUENSTEIN: Mr. Chief Justice,
10 and may it please the Court:

11 When Congress established the
12 extraordinary and compelling reasons standard
13 for sentence reductions under Section 3582, it
14 chose words that set a high bar for when courts
15 may grant such motions. It also chose words
16 that do not prescribe what types of reasons
17 will qualify. Instead, it delegated that task
18 to the Sentencing Commission and required that
19 district courts comply with the Commission's
20 guidance when exercising their discretion under
21 the statute.

22 This case presents the question
23 whether Congress has implicitly prohibited
24 district courts and the Sentencing Commission
25 from considering any reasons that may also be

1 alleged as grounds for habeas relief. It has
2 not.

3 Under the plain meaning of the
4 statute, if a court finds an error that
5 significantly increased the length of the
6 defendant's sentence, that fact can contribute
7 to a finding of extraordinary and compelling
8 reasons to reduce the sentence. And even when
9 a court finds no error, it may nonetheless
10 decide that the circumstances surrounding the
11 defendant's sentence were so unusual and unfair
12 as to be extraordinary and compelling. That's
13 what happened here.

14 The government's position is extreme.
15 It contends that no argument related to a
16 defendant's judgment may even be considered in
17 the extraordinary and compelling calculus. It
18 posits that only personal circumstances like
19 age and illness are relevant.

20 Our position is modest. We recognize
21 that personal circumstances are common reasons
22 that courts find to be extraordinary and
23 compelling. But we reject the government's
24 view that courts can never consider an error or
25 unfairness in a defendant's sentence in that

1 analysis. Allowing courts to grant a sentence
2 reduction in rare cases, based in part on
3 circumstances that could have been addressed on
4 habeas, will not frustrate the habeas statute's
5 procedural limitations. There is no basis to
6 adopt the government's non-literal reading of
7 3582.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Do you think the term
10 "compassionate release" suggests the
11 circumstances that you have in this case?

12 MR. GRUENSTEIN: Your Honor, the --
13 the term "compassionate release" is a term that
14 has been used colloquially and was used at one
15 point in a Department of Justice regulation.
16 We certainly concede that that term does seem
17 to relate to personal circumstances, but it
18 doesn't necessarily foreclose the possibility
19 that courts would consider other issues related
20 to the fairness of the defendant's sentence.

21 JUSTICE THOMAS: So, during the years
22 that the Bureau of Prisons actually initiated
23 this process, were there any circumstances in
24 which an -- a trial error would be the basis of
25 the motion?

1 MR. GRUENSTEIN: Certainly, there were
2 very few cases, period, when the -- the BOP was
3 involved.

4 JUSTICE THOMAS: But were -- even in
5 the few cases, were there any of this nature?

6 MR. GRUENSTEIN: There were not, Your
7 Honor.

8 JUSTICE THOMAS: What were -- what
9 were the -- what was the nature of those?

10 MR. GRUENSTEIN: It -- those were
11 generally where a -- a prisoner was terminally
12 ill or old, and the BOP --

13 JUSTICE THOMAS: In other words,
14 personal circumstance?

15 MR. GRUENSTEIN: They were certainly
16 personal circumstances. But we also saw, as --
17 our amicus, FARM, on page 15 of their brief,
18 they cite the Diaco case, which relates to the
19 predecessor, 4205(g), where, there, there were
20 cases relating -- there was one case relating
21 to sentencing disparities, and that was one of
22 the only two cases that are published about the
23 use of 4205.

24 JUSTICE SOTOMAYOR: So there were two
25 cases by BOP where they basically reference as

1 part of the circumstances a change in law,
2 correct? Banks, U.S. versus Banks, 428 F.
3 Supp. 1088, 1977, and in that case, the court
4 considered rehabilitation, which is now
5 prohibited by the new policy statement, as
6 being a sole ground, correct?

7 MR. GRUENSTEIN: That -- that's
8 correct in the case that Your Honor referred
9 to, is -- is --

10 JUSTICE SOTOMAYOR: But, nevertheless,
11 back then, BOP relied on rehabilitation,
12 correct?

13 MR. GRUENSTEIN: Rehabilitation,
14 absolutely. Yes.

15 JUSTICE SOTOMAYOR: And the Diaco
16 case -- I think you're minimizing it -- that
17 also was a New Jersey case where BOP made a
18 motion to the court for compassionate release,
19 and one of the factors was a -- a change of
20 sentencing, correct?

21 MR. GRUENSTEIN: Absolutely, Your
22 Honor.

23 JUSTICE SOTOMAYOR: So the two
24 published opinions were both BOP and weren't
25 limited to just personal circumstances?

1 MR. GRUENSTEIN: That -- that's
2 certainly correct, absolutely.

3 CHIEF JUSTICE ROBERTS: Counsel, you
4 say the situations in which these would arise
5 will be rare and unusual. Why in the world
6 would that be the case? You've got somebody
7 sitting in jail and they got 20 more -- 20 more
8 years to look at, and you go in and say, gosh,
9 I think there's, like, a 1 percent chance, you
10 know, you might be able to get out. The
11 prisoner is going to say, oh, okay, it's only
12 1 percent, let's forget about it.

13 You know, every lawyer would bring
14 these -- these -- these claims. And some
15 judges are going to grant them, and some are
16 not going to grant them. And I -- I'm -- I'm
17 not sure this factor is not something that
18 Congress took into account. And it does seem
19 that this is -- well, you'll have -- why
20 would -- why would this remain fair -- rare?

21 MR. GRUENSTEIN: Certainly, Your
22 Honor, and the reason it would be rare is
23 precisely because of the habeas statute, that
24 the defendant did have an opportunity
25 potentially to raise these issues on habeas.

1 Maybe he procedurally defaulted. He will then
2 have to show why the -- why he procedurally
3 defaulted, what were the circumstances
4 surrounding that, because merely procedurally
5 defaulting on a potentially meritorious claim
6 normally would not be found to be compelling.

7 JUSTICE ALITO: Did the meaning of
8 "extraordinary and compelling reasons" change
9 in 2018 when Congress enacted the First Step
10 Act?

11 MR. GRUENSTEIN: That's not our
12 position. Our position is that it has meant
13 the same thing, and that would be the
14 dictionary definitions of "extraordinary" and
15 "compelling," since 1984.

16 JUSTICE ALITO: Well, until 1980 --
17 until 2018, only the director of the Bureau of
18 Prisons could invoke this statute, right?

19 MR. GRUENSTEIN: That's correct, Your
20 Honor.

21 JUSTICE ALITO: And is it plausible
22 that Congress intended for the -- the director
23 of the Bureau of Prisons to make motions for
24 sentencing reduction based on an assessment of
25 the strength of the evidence or any factor that

1 has to do with the trial proceedings or the
2 sentence that was imposed?

3 MR. GRUENSTEIN: I do believe so, that
4 it was at least possible, Your Honor, as
5 referring back to the cases that Justice
6 Sotomayor discussed.

7 JUSTICE ALITO: Yeah, they're two
8 isolated cases, but doesn't that seem to be far
9 outside of the area of the director of the
10 Bureau of Prisons' expertise?

11 MR. GRUENSTEIN: It -- well, there
12 could be issues --

13 JUSTICE ALITO: And responsibility?

14 MR. GRUENSTEIN: That's certainly
15 true, Your Honor, but I would suggest that the
16 other agency that is involved in 3582 is the
17 Sentencing Commission, and there was a
18 delegation to the Sentencing Commission, whose
19 expertise, of course, goes far beyond the
20 Bureau of Prisons' to set up guidelines.
21 Congress did not delegate that task to the BOP.

22 JUSTICE JACKSON: And why would our
23 consideration be limited necessarily to what
24 was in the purview of the BOP? I understand
25 that there was an amendment that allowed the

1 statute or allowed these motions to be brought
2 by a defendant and essentially bypass the BOP,
3 so I'm wondering if that doesn't indicate
4 Congress's intent to allow for the
5 consideration of factors that the BOP either
6 wasn't able to or wasn't considering --

7 MR. GRUENSTEIN: Well, certainly --

8 JUSTICE JACKSON: -- previously.

9 MR. GRUENSTEIN: I'm sorry.

10 JUSTICE JACKSON: Yes.

11 MR. GRUENSTEIN: Certainly, Justice
12 Jackson, we do agree that when Congress amended
13 the statute, the reason it did so -- and it was
14 quite explicit about this -- was to allow more
15 circumstances to be raised. It's our position
16 it's not because the BOP was not able by law to
17 do so but that the BOP was not bringing enough
18 of these sorts of motions.

19 JUSTICE ALITO: Well, counsel, you
20 can't have it both ways. Either extraordinary
21 and compelling reasons remained the same after
22 the enactment of the First Step Act, which is
23 what I understood you to tell me, or it changed
24 in 2018, which is what you seem to have
25 suggested in response to Justice Jackson.

1 So which is it?

2 MR. GRUENSTEIN: No, I'm not saying
3 that the meaning of the words changed. I'm
4 saying that what Congress intended in the First
5 Step Act was to allow these sorts of motions to
6 be made more broadly. If --

7 JUSTICE JACKSON: And in any event, I
8 thought your argument was that Congress never
9 gave content to extraordinary and compelling
10 circumstances in the first instance.

11 MR. GRUENSTEIN: That's absolutely --

12 JUSTICE JACKSON: That it, in fact,
13 ceded that authority to the Sentencing
14 Commission.

15 MR. GRUENSTEIN: Absolutely. And --
16 and Congress used words that were intentionally
17 broad to allow the Sentencing Commission to
18 give guidance on circumstances that it might
19 not have anticipated when it passed the First
20 Step Act.

21 JUSTICE BARRETT: Counsel --

22 JUSTICE KAVANAUGH: But the Sentencing
23 Commission has not authorized this kind of
24 activity, has it?

25 MR. GRUENSTEIN: At this point,

1 certainly, for our case, the Sentencing
2 Commission hadn't spoken. The current policy
3 that was passed --

4 JUSTICE KAVANAUGH: Has spoken or --

5 MR. GRUENSTEIN: Has not for purposes
6 of our case.

7 JUSTICE KAVANAUGH: Right. And in
8 your opening, you, therefore, said the question
9 is whether they implicitly prohibited. Isn't
10 the question rather whether they authorized
11 this kind of motion?

12 MR. GRUENSTEIN: Yes. In our -- in --
13 in our view, by using words that are as
14 open-ended as "extraordinary and compelling"
15 and then by explicitly delegating to the
16 Sentencing Commission the authority to give
17 guidance, that is the authorization.

18 Congress did two things here. One, it
19 used very broad language, and, second, it gave
20 an explicit delegation to the Sentencing
21 Commission.

22 JUSTICE KAVANAUGH: Right, but the
23 Commission --

24 JUSTICE BARRETT: Counsel, the --

25 JUSTICE KAVANAUGH: I'm sorry.

1 JUSTICE BARRETT: No, no. Finish.

2 JUSTICE KAVANAUGH: But the Commission
3 hasn't in turn said that this kind of legal
4 error is a basis for this kind of motion,
5 correct?

6 MR. GRUENSTEIN: At -- at this point,
7 the Commission has not spoken to that. The
8 Commission --

9 JUSTICE KAVANAUGH: And -- and -- and
10 isn't -- shouldn't that be -- or how relevant
11 should that be in -- in how we think about
12 this?

13 MR. GRUENSTEIN: Well --

14 JUSTICE KAVANAUGH: In other words,
15 the Commission could, subject to legal
16 challenge, but it could identify this kind of
17 circumstance as the basis for such a motion,
18 but it has not done so, even though it has been
19 authorized, as you say, by Congress to
20 elaborate on what -- what the authorization
21 means.

22 MR. GRUENSTEIN: Yes, Your Honor.
23 In -- from 2018 until 2023, the Commission had
24 provided no guidance that applied to
25 defendant-initiated motions. So, at that

1 point, courts were simply acting under the
2 meaning of the statute.

3 So, yes, we certainly expect and we
4 would hope that the Commission could provide
5 further guidance on this issue, but it has not
6 yet taken that opportunity.

7 JUSTICE BARRETT: Counsel, can I ask
8 you a question about whether you have to go to
9 2255 first or whether you can go straight to
10 the compassionate release statute?

11 You answered, when the Chief was
12 asking you questions, in that interchange, you
13 suggested that the prisoner would have to go to
14 2255 first because, otherwise, it wouldn't be a
15 compelling circumstance for release.

16 So are you reading kind of an
17 exhaustion requirement into compelling so that
18 someone in your client's position would have to
19 try to get relief through 2020 -- 2255 first
20 before invoking this other procedure or no?

21 MR. GRUENSTEIN: No, Your Honor,
22 that's not our position.

23 Our position is that as part of the
24 extraordinary and compelling analysis, courts
25 would consider whether a defendant sat on his

1 rights or whether he's taken all opportunities
2 to enforce his rights.

3 Even if a defendant did not go through
4 2255, he would still have the option to argue
5 under 3582 that his -- his situation is
6 extraordinary and compelling. But his position
7 would be weakened by the fact that he did not
8 take the opportunity to enforce his rights.

9 JUSTICE BARRETT: Why -- why would you
10 ever bother with 2255? Seems like it would be
11 a lot easier to just go the other route as long
12 as you have some other circumstances to invoke.

13 MR. GRUENSTEIN: Well, the first
14 reason would be that 3582 sets a very high bar
15 for defendants. It has to be extraordinary and
16 compelling.

17 Also, the relief that a defendant can
18 obtain under 3582 is limited. He can only
19 correct -- he can only reduce the sentence,
20 whereas the relief under 2255 is much broader.
21 He can attack his conviction.

22 Also, there would be plenty of
23 sentence -- plenty of errors where a court will
24 not feel comfortable simply releasing somebody
25 but rather would want to correct the error by

1 remanding to the --

2 JUSTICE BARRETT: But a --

3 MR. GRUENSTEIN: -- by having a new
4 trial.

5 JUSTICE BARRETT: But a First Step Act
6 error, I mean, you've made the position, and
7 it's true, Congress changed it because those
8 sentences were extreme, right? They were
9 extremely long.

10 And it -- it seems to me that if,
11 indeed, that's extraordinary and compelling,
12 the disparity between similarly situated
13 defendants who get the benefit of the act and
14 who don't, I mean, why wouldn't that be
15 extraordinary and compelling on its own terms?

16 And plus, you know, there are
17 downsides too to attacking the validity of your
18 conviction, because then you could be subject
19 to retrial.

20 MR. GRUENSTEIN: That's right, Your
21 Honor. And it certainly can be extraordinary
22 and compelling. But, to date, courts have
23 interpreted the phrase narrowly.

24 There have only been, by our count,
25 12 cases since 2018 when the First Step was

1 enacted where a court, based on an argument
2 that could have been raised on 2255, in part
3 granted a sentence reduction.

4 So courts have been using this very
5 infrequently to -- to grant relief.

6 JUSTICE KAGAN: But 2255 has some
7 harsh limitations. You know, there's a short
8 statute of limitations. There is preclusion of
9 second and successive petitions for the most
10 part.

11 You know, can't you imagine that
12 defendants who face those limitations and, you
13 know, they -- they file their 2255 motion three
14 days late or something like that, that this
15 would then be used essentially as an end-run
16 around those prohibitions?

17 MR. GRUENSTEIN: Your Honor, I don't
18 think it would be an end-run precisely because
19 a 3582, even if you do claim an error, will not
20 necessarily be granted. It will be difficult
21 for that.

22 And -- and I agree with Your Honor
23 that there are harsh limitations associated
24 with 2255, and Congress has stated those --
25 that those limitations are appropriate, but it

1 doesn't mean that in every case, as applied to
2 every defendant, that those limitations are
3 fair.

4 And, under certain circumstances, if a
5 defendant misses a limitation by three days, he
6 may not be able to challenge his conviction,
7 but he should at least be able to argue this
8 unfairness.

9 The error and the unfairness of him
10 not having been able to bring it under 2255 is
11 part of all --

12 JUSTICE KAGAN: I suppose what I'm
13 suggesting is that, you know, Congress, for
14 better or for worse, made a determination that
15 those are the limitations that it wanted and
16 even to the extent that a judge thinks that
17 they are unfair, in all cases, in most cases,
18 that I -- I doubt that Congress meant for
19 individual judges to override its own judgment.

20 MR. GRUENSTEIN: Absolutely, Your
21 Honor. And that's certainly a limitation that
22 should be placed on 3582 that a judge cannot
23 simply second-guess a decision made by
24 Congress.

25 But, even where Congress creates a

1 generally applicable law such as a mandatory
2 minimum, it doesn't mean that Congress even
3 believed that in every case that would be fair
4 to the defendant. And all we're asking for is
5 that a judge can consider that the way the law
6 has been applied to this defendant has been
7 unfair or even potentially erroneous.

8 JUSTICE JACKSON: And I thought in
9 response as well to Justice Kagan's point is
10 the thought that the limitations that exist in
11 the habeas context are relative to the actual
12 aim of habeas and goal of habeas, which is
13 vacatur of the sentence.

14 It's also not discretionary. Where
15 the -- the -- the defendant has satisfied the
16 criteria of demonstrating that his sentence is
17 unlawful, the court has to, according to the
18 statute, give him habeas. And so, yes, there
19 are strict limitations, but there's also this
20 particular goal.

21 It seems to me that compassionate
22 release is a totally different thing, and so,
23 to the extent that compassionate release is
24 about the court's consideration of a sentence
25 reduction, one might think that the same

1 limitations aren't intended to apply, that it's
2 not actually an end-run in any meaningful
3 sentence. These are just two different
4 regimes, and it doesn't seem to necessarily
5 follow that the considerations in one are
6 mutually exclusive such that they can't arise
7 in the other.

8 MR. GRUENSTEIN: That -- that's
9 absolutely correct, Justice Jackson, and
10 it's -- it's worth remembering that Section
11 3582 is as much an act of Congress as Section
12 2255 and should be given respect.

13 JUSTICE JACKSON: Is there anything
14 in the statute or the legislative history to
15 suggest that Congress wanted the 3582 sentence
16 reduction dynamic to be limited in some way by
17 what could have been raised in habeas or what
18 is happening in the habeas scheme?

19 Is there anything that links those two
20 in the text or even in the legislative history?

21 MR. GRUENSTEIN: Absolutely not,
22 Your Honor. And, in fact, the Court has given
23 guidance about how, when there's a potential
24 tension between two statutes, how that tension
25 should be resolved, and that's the Preiser line

1 of cases. And it's not simply that one statute
2 can be seen in some circumstances to evade the
3 other.

4 What happened in Preiser and that line
5 of cases was that 90 -- 1983 was seen as a
6 potential end-run around every single
7 constitutional 2255 motion. And that's why the
8 Court found that a literal reading of 1983
9 would swamp the habeas statute. It would
10 wholly frustrate Congress's goals.

11 Here, allowing defendants to bring
12 motions under 3582(c)(1)(A) in the rare
13 circumstances that -- that they could get
14 relief, having a sentence reduction under those
15 circumstances would certainly not frustrate the
16 habeas -- the procedural limitations under
17 habeas. And for reasons I said earlier, courts
18 should actually take into account those
19 procedural limitations.

20 JUSTICE JACKSON: And, in fact, it
21 would enable the kind of "safety valve" that
22 Congress expressly in its reports, et cetera,
23 in describing compassionate release -- that's,
24 I think, the design of it.

25 MR. GRUENSTEIN: That -- that's

1 absolutely correct, Your Honor, and that's
2 precisely how the two statutes sit one next to
3 the other and not in conflict. Habeas applies
4 generally to claims of error relating to a
5 conviction or a sentence. 3582 is the safety
6 valve that can be applied to reduce a sentence
7 should all of the other avenues of relief fail.

8 JUSTICE KAGAN: But the -- but the
9 question is safety valve for what? I mean, not
10 every safety valve is a safety valve for
11 everything. And I would not have thought that
12 it's a safety valve in order to relitigate
13 trial errors in the way that a 22-5 motion is.
14 That's the entire point of a 2255 motion.

15 So, you know, I -- I guess I don't see
16 any -- any evidence that Congress meant for
17 this to be a kind of do-over statute.

18 MR. GRUENSTEIN: Well, Your Honor,
19 the -- perhaps the best evidence of it is the
20 words that Congress used. They said
21 "extraordinary and compelling." Those are
22 words that don't have a specific meaning, and
23 it's given to the Court to decide what is an
24 extraordinary and compelling circumstance.

25 So there are cases we cited, the

1 Trenkler case, where someone had been sitting
2 in jail for years. He was sentenced to a life
3 sentence even though the statute under which he
4 was convicted, which had been amended just
5 slightly after his verdict, and that's why no
6 one picked up on it, said that he could not be
7 convicted -- not be sentenced to life.

8 So, in that situation, yes, could --
9 if he could have raised it under 2255, he
10 should have. And maybe that detracts slightly
11 from a finding of extraordinary and compelling,
12 but, when he's sitting in jail serving a life
13 sentence that is unlawful -- that's all we're
14 saying, is that that's something that courts
15 should be able to consider as one of the
16 factors, just as much as age and illness.

17 JUSTICE ALITO: Suppose that a
18 defendant, a prisoner claims that there was a
19 fatal error at trial but doesn't bring a 22 --
20 after -- you know, after the direct appeal,
21 does not bring a 2255 for three years;
22 therefore, misses the statute of limitations.

23 What would be extraordinary about that
24 situation and would allow the -- the prisoner
25 then to try to get the -- to get a lot of the

1 relief that could have been obtained, maybe all
2 of the relief that could have been obtained,
3 under 2255 by filing a 3582 motion?

4 MR. GRUENSTEIN: Well, Your Honor,
5 certainly, there can be some things that are
6 extraordinary and compelling about those
7 circumstances. One, we would have to
8 understand what is the prejudice that that
9 fatal error had on the verdict. Did it change
10 it from an -- from an acquittal to a -- a
11 guilty verdict?

12 Then why did the defendant -- if this
13 was such a glaring error, why did the defendant
14 not bring a -- a 2255? Maybe he had a mental
15 breakdown and -- and couldn't speak to his
16 lawyers during that time. We don't know the
17 circumstances.

18 All we're saying is that all of the
19 circumstances should be considered as part of
20 the extraordinary and compelling analysis, the
21 same way that personal circumstances are.

22 JUSTICE ALITO: I understand that. To
23 go back to your answer to the Chief Justice's
24 question, suppose you're advising a whole
25 string of prisoners who have been convicted,

1 they've lost on direct appeal, and for one
2 reason or -- they all have claims of trial
3 error or some other flaw in their conviction,
4 but they've all -- they're all barred from
5 proceeding under 2255 because of the statute of
6 limitations or some other factor, and you look
7 at their claims and you think this is not a
8 ridiculous claim.

9 Would there be any circumstances in
10 which you would not file a motion for sentence
11 reduction?

12 MR. GRUENSTEIN: Well, Your Honor, I
13 think the same could be asked of -- of anyone
14 who has any medical illness or is approaching
15 older age: Is there any reason they wouldn't?
16 And this is precisely what the Sentencing
17 Commission is authorized to do, is to put in
18 guardrails.

19 But, to Your Honor's question, I think
20 the close calls, when there's, you know,
21 potential error, I'm not sure that that's the
22 sort of unfairness that courts would typically
23 find extraordinary and compelling.

24 JUSTICE ALITO: Well, I'm not even
25 talking exclusively about close calls. I'm

1 talking about arguments that are not so
2 frivolous as to damage your professional
3 reputation if you brought them.

4 MR. GRUENSTEIN: Well, I -- I --

5 JUSTICE ALITO: Wouldn't you always do
6 that?

7 MR. GRUENSTEIN: Absolutely, Your
8 Honor. And, similarly --

9 JUSTICE ALITO: So this isn't going to
10 be unusual.

11 MR. GRUENSTEIN: I think what would --

12 JUSTICE ALITO: This is going to be
13 standard.

14 MR. GRUENSTEIN: I think what would be
15 unusual is that courts would find the
16 compelling circumstances that we're talking
17 about. The First Circuit I cited in our reply
18 brief -- after Trenkler in 2022, there has not
19 been a single case that we found where a court
20 has granted a compassionate release motion in a
21 situation where a -- an argument that could
22 have been raised on habeas was the basis for
23 that -- for that motion.

24 So we haven't seen that level of -- of
25 motions being filed, but we certainly

1 anticipate and Congress anticipated that the
2 Sentencing Commission can put the guardrails,
3 the same way that Congress --

4 JUSTICE KAVANAUGH: Well, you --

5 MR. GRUENSTEIN: -- that the Sentencing
6 Commission -- I'm sorry.

7 JUSTICE KAVANAUGH: Keep going.
8 Sorry.

9 MR. GRUENSTEIN: I was just going to
10 say the same way the Sentencing Commission
11 dealt with the flood of these compassionate
12 release motions during COVID.

13 JUSTICE KAVANAUGH: But the Sentencing
14 Commission, like Congress, has not authorized
15 or envisioned or articulated anything close to
16 this kind of legal error being the basis for
17 this kind of relief, and that concerns me
18 because, as Justice Kagan said, you don't see
19 anything suggesting that Congress wanted a
20 do-over kind of statute, but you don't see
21 anything from the Commission either. Your case
22 would be obviously quite a bit stronger if you
23 had the Commission having identified this as
24 they have with some other things.

25 MR. GRUENSTEIN: Certainly, Your

1 Honor. But I think the -- what we should read
2 into the Commission's silence on this is that
3 these will be cases that will be few and far
4 between where a court would actually find the
5 circumstances to be extraordinary.

6 JUSTICE KAVANAUGH: Well, how do we
7 know that? I mean, first of all, as Justice
8 Alito says, I think they'll be far more common
9 that they are -- they're brought, so that'll be
10 a whole new docket, one imagines, of -- of
11 these kinds of motions. But -- but how do we
12 know that individual district judges are going
13 to, as your word, be modest or routinely deny
14 these?

15 MR. GRUENSTEIN: Well, Your Honor,
16 certainly, we haven't seen -- in the circuits
17 that have allowed it, we haven't seen --

18 JUSTICE KAVANAUGH: But, if you win
19 this case, one imagines that could, you know,
20 super-charge the -- the efforts --

21 MR. GRUENSTEIN: That -- that --

22 JUSTICE KAVANAUGH: -- to use this.

23 MR. GRUENSTEIN: -- that -- that's
24 correct.

25 JUSTICE KAVANAUGH: In fact, you would

1 want that, wouldn't you? Wouldn't you want
2 this to be used more often?

3 MR. GRUENSTEIN: Well, I'm just
4 representing my -- my current client.

5 JUSTICE KAVANAUGH: Yeah.

6 MR. GRUENSTEIN: But --

7 JUSTICE KAVANAUGH: Your legal
8 position would say that?

9 MR. GRUENSTEIN: Our legal position is
10 that it should be -- this should be something
11 that should be in the mix. And, certainly,
12 courts will take into account several things
13 that I think would limit their exercise of
14 discretion.

15 First, they would take into the fact
16 that there's the law of the case. If an issue
17 had been raised, courts should not be
18 revisiting it.

19 Second, I think it's likely that these
20 sorts of arguments will be made mostly in cases
21 of mandatory minimum sentences, where the
22 element of unfairness that arises from the
23 error could not have been considered before.
24 So we're seeing how the -- the universe of
25 cases where this sort of argument would be made

1 is getting smaller and smaller.

2 And rehabilitation is certainly an
3 area where you would expect many motions to be
4 brought, and there have been, but still, the
5 number of total compassionate release motions
6 is modest and, if the Commission speaks more,
7 will be even more modest.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 Justice Alito?

12 JUSTICE ALITO: Well, you just
13 mentioned mandatory minimum sentences. There
14 are a lot of district judges and other federal
15 judges who don't like mandatory minimums. So,
16 if a -- if a prisoner has been sentenced to a
17 mandatory minimum sentence, could a district
18 judge say, if a motion under 3582 is made, you
19 know what, that mandatory minimum is -- is too
20 much under the circumstances of this case, so
21 I'm going to grant a sentence reduction?

22 MR. GRUENSTEIN: Well, Your Honor,
23 Section 3582 does allow sentencing under
24 3582 -- I'm sorry, under the mandatory minimum
25 for any extraordinary and compelling reason.

1 But we -- certainly, it's our position that a
2 court could not just say I don't like mandatory
3 minimums and, therefore, I won't apply them.
4 It has to be something about the unfairness of
5 that mandatory minimum in a particular case.

6 JUSTICE ALITO: Would you agree that
7 one of the principal goals or a -- a major goal
8 of the Sentencing Reform Act was finality?

9 The Sentencing Reform Act got rid of
10 parole, it didn't like the situation where
11 someone would be sentenced to 30 years in
12 prison, this was standard at the time,
13 maximum -- a -- a life sentence was considered
14 to be 30 years, but then, after -- after 10
15 years, the person would be -- would be paroled,
16 it got rid of all that?

17 Would you agree that that was a major
18 goal of the -- a major objective of the
19 Sentencing Reform Act?

20 MR. GRUENSTEIN: Absolutely, Your
21 Honor. But it was also a goal in 3582 to have
22 a safety valve where judges could still
23 exercise discretion at a later point in the
24 process.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, I -- I'm
4 assuming here that a basic part of your
5 argument is that actual innocence claims are
6 not cognizable under 2020 -- 2255 at all?

7 MR. GRUENSTEIN: That -- that's based
8 on our understanding of what the Court has said
9 to date.

10 JUSTICE SOTOMAYOR: We've never said
11 they are?

12 MR. GRUENSTEIN: That's correct, Your
13 Honor.

14 JUSTICE SOTOMAYOR: And so whether
15 2255 would be implicated in some other claim is
16 irrelevant to your claim? This is an issue
17 that couldn't even be raised there, not because
18 of a procedural bar or anything else, but it's
19 just not cognizable?

20 MR. GRUENSTEIN: That's correct, Your
21 Honor. And that's one of the difficulties in
22 this case, is that the courts --

23 JUSTICE SOTOMAYOR: All right. Now --

24 MR. GRUENSTEIN: Yeah.

25 JUSTICE SOTOMAYOR: -- may I go back

1 to a -- a problem I have with your case, which
2 is all of the facts that Judge Hellerstein
3 relied upon were known to him at trial. He
4 knew what your client's claim of innocence was.
5 He knew all the evidentiary weaknesses that he
6 wrote about in his current opinion. He knew
7 that only one shot came from your client's gun,
8 et cetera, et cetera.

9 The only thing he did not know was the
10 exact reduced sentence that the co-conspirators
11 would receive because they were sentenced after
12 your client, but he knew they were going to get
13 a substantial reduction because they were
14 cooperators.

15 How do we call that new and compelling
16 evidence, compelling or extraordinary evidence?
17 It's all -- there's nothing new. I -- I would
18 have an easier time if I thought that actual
19 innocence had been proven after the fact.

20 MR. GRUENSTEIN: Yes, Your Honor.
21 There was another fact that Judge Hellerstein
22 did take into account that he had not focused
23 on previously, which is that the getaway driver
24 was sentenced to two years in prison, and that
25 suggested to him that the government itself had

1 concerns about the credibility and the
2 reliability of the cooperator's testimony.

3 JUSTICE SOTOMAYOR: All right. Now
4 you said earlier -- and I agree with you --
5 both age and medical condition -- or any other
6 reason doesn't ever stand alone because there
7 are old people who are not released from
8 prison, there are sick people who are not
9 released from prison. It's one among many
10 circumstances.

11 Your claim of -- and I put it in
12 quotes -- "actual innocence" doesn't stand
13 alone. But what does it stand with in this
14 case? There certainly was no medical need.
15 There's no age need. There's no extraordinary
16 circumstance to this individual. So why isn't
17 it only one factor?

18 MR. GRUENSTEIN: What it stands with,
19 Your Honor, is the fact that despite the --
20 despite the judge's concern about innocence,
21 that this defendant was sentenced to a life in
22 prison.

23 JUSTICE SOTOMAYOR: That -- that is --
24 that is what bothers me.

25 MR. GRUENSTEIN: But, Your Honor --

1 JUSTICE SOTOMAYOR: That -- that it's
2 a judge's disquiet as opposed to an individual
3 circumstance, because no matter how you look at
4 extraordinary and compelling, it focuses on the
5 individual, not on the judge's disquiet.

6 By the way, I was a district court
7 judge, and I had a great deal of respect for
8 the disquiet that sometimes judges feel. It
9 happens to every district court judge. There's
10 a case where you really struggle.

11 But can we in the facts of this case
12 denote that that is an extraordinary
13 circumstance?

14 MR. GRUENSTEIN: Well, what I would
15 say, Your Honor, is that this is the sort of
16 discretion that judges generally have in
17 sentencing, and it's reviewed on appeal for
18 abuse of discretion.

19 JUSTICE SOTOMAYOR: But --

20 MR. GRUENSTEIN: The court of appeals
21 didn't review it for abuse of discretion.

22 JUSTICE SOTOMAYOR: Well, I agree with
23 you. And maybe that's what they should have
24 done. But I -- but I am troubled by this.
25 Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: I mean, just to
3 continue in that vein, do you think that the
4 district court here on the initial trial could
5 have received the jury's verdict of guilt and
6 said, you know, I'm not going to overturn that
7 verdict of guilt, I have no basis for doing
8 that, but, in the sentencing, I'm going to
9 reduce the sentence because I feel disquiet
10 with respect to that verdict?

11 Could the district court have done
12 that?

13 MR. GRUENSTEIN: Well, certainly not
14 in this case, Your Honor, because it was a
15 mandatory life sentence. But, as a general
16 matter, while the court does have to take the
17 verdict as given when conducting the -- the
18 guidelines analysis and the 3553 analysis, how
19 the court weighs the different factors, such as
20 personal circumstances, the nature and -- and
21 the characteristics and history of the
22 defendant, it can certainly weigh those factors
23 differently.

24 JUSTICE KAGAN: Well, personal
25 circumstances, you broadened it out. I really

1 was limiting it to would it be appropriate for
2 a district court to say, I'm not overturning
3 the jury verdict, but I'm not sure I agree with
4 it; therefore, I'm going to reduce the sentence
5 beyond -- below what I would ordinarily give.

6 MR. GRUENSTEIN: I think, in weighing
7 the 3353 factors, as long as the court
8 recognizes that the verdict was guilty and
9 takes that into consideration, how it weighs
10 the verdict and the offense with the personal
11 circumstances could be taken into account and
12 can result in a lower sentence.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: I'm not sure I
17 understood that last answer. I -- I -- I don't
18 doubt 3553(a) factors are very broad and give
19 the district judge rightly lots of discretion
20 in sentencing where there's not a mandatory
21 minimum.

22 But I -- I wouldn't have thought that
23 one of the circumstances, personal
24 circumstances that a judge could take into
25 account has, as Justice Sotomayor says, really

1 nothing to do with the defendant. It has to do
2 with the judge's own disquiet, perhaps
3 reasonably so, about the jury's verdict.

4 And I thought, in our legal system,
5 the jury's verdict on the facts is not
6 something a court can impeach unless it's
7 clearly erroneous.

8 MR. GRUENSTEIN: That's correct, Your
9 Honor. And what I was referring to in -- in
10 answering Justice Kagan is that the judge here,
11 for example, referenced the -- the fact that
12 the defendant had no history of violence.

13 JUSTICE GORSUCH: Sure.

14 MR. GRUENSTEIN: That he was a working
15 man, that he --

16 JUSTICE GORSUCH: All of that's fair
17 game. I agree with you. I'm not -- again,
18 I -- I -- I don't question any of that.

19 But the appropriate remedy for
20 disquiet about a jury verdict is to set it
21 aside as -- as, you know, beyond the pale. It
22 isn't to say, I disagree with the jury about
23 the facts and, therefore, I'm reducing the
24 sentence, is it?

25 MR. GRUENSTEIN: Well, normally, it

1 isn't, but, under 3582 --

2 JUSTICE GORSUCH: No, I understand
3 30 -- your 3582 argument, but, under 3353,
4 that's not an appropriate consideration, is it?

5 MR. GRUENSTEIN: It's -- it -- it
6 could be a consideration when weighing all the
7 factors deciding how much weight to give to
8 questions like protecting the public from the
9 defendant or the --

10 JUSTICE GORSUCH: I think, in that,
11 protecting the defendant from the public, you
12 have to take as given, again, the jury verdict.
13 I don't think you get to impeach it by saying,
14 I just disagree with it, can you?

15 MR. GRUENSTEIN: Right. But -- no, I
16 agree with that, Your Honor.

17 JUSTICE GORSUCH: Okay.

18 MR. GRUENSTEIN: But the question is
19 how to weigh it.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: Just one more on
24 the role of the Commission. Do you think the
25 Commission could under 994(t) say that claims

1 of error in the -- in the conviction or
2 sentence are not cognizable, are not
3 extraordinary and compelling circumstances for
4 purposes of these motions?

5 MR. GRUENSTEIN: Yes, Your Honor. The
6 Commission has the discretion to decide what is
7 within the -- the meaning of the words and --
8 and to take the position that certain things
9 are off the table, yes.

10 JUSTICE KAVANAUGH: And you think, if
11 they said that as to this issue, that would
12 be -- that you wouldn't be able to challenge
13 that?

14 MR. GRUENSTEIN: That's correct, Your
15 Honor. District courts would have to comply
16 with that guidance.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 Justice Jackson?

21 JUSTICE JACKSON: So, as I see the
22 question presented as we've crafted it, we are
23 not actually being asked in the context of this
24 case to make a determination about whether a
25 district court's disquiet or concerns about

1 actual innocence can qualify as extraordinary
2 or compelling circumstances. I mean, this was
3 the exchange you just had with Justice
4 Kavanaugh. If the Commission said those things
5 are off the table, then they'd be off the
6 table.

7 Instead, I read our revised question
8 presented to be saying that anything that could
9 possibly be raised in the context of a habeas
10 petition is off the table, and I guess I'm a
11 little worried about the workability of that.
12 When we think about what could be raised in the
13 context of a habeas petition, ordinarily, the
14 habeas petition raises the claim that the
15 defendant has the right to be released on the
16 grounds that the sentence or the conviction is
17 unlawful.

18 Here, the judge said the conviction is
19 not unlawful. He -- he made an express
20 statement that he wasn't relying on any claims
21 about the lawfulness of the conviction. He
22 just had these other concerns.

23 So I guess I'm -- this is a
24 long-winded question, but it's -- it worries me
25 that we would have a rule that says anything

1 that arises in the context of habeas can't be
2 considered in this proceeding because I don't
3 know how you would do that from a workability
4 perspective.

5 MR. GRUENSTEIN: Your Honor, I agree
6 there is a workability problem. And then
7 there's also the perverseness of having claims
8 that could not be brought in habeas would not
9 fall within that rule, which I think is why the
10 government went to a rule that it's only
11 personal circumstances are allowed to be
12 considered, and --

13 JUSTICE JACKSON: That was their way
14 of -- of solving my work -- my workability
15 concerns?

16 MR. GRUENSTEIN: I -- I -- I think
17 that is, Your Honor. And there's no way to
18 read that out of the statute.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Feigin.

23 ORAL ARGUMENT OF ERIC J. FEIGIN

24 ON BEHALF OF THE RESPONDENT

25 MR. FEIGIN: Thank you, Mr. Chief

1 Justice, and may it please the Court:

2 Section 3582(c)(1)(A)(i) is a narrow
3 exception to sentencing finality that allows a
4 court to reduce a valid sentence in limited
5 exceptional circumstances that aren't otherwise
6 addressed by the criminal justice system. I
7 think what you've just heard and what's in
8 their briefs is a proposal to make it instead
9 an open-ended loophole to challenge the
10 validity of sentences continuously through a
11 potentially endless series of collateral
12 attacks on the criminal judgment.

13 The question whether a collateral
14 attack on the criminal judgment compels relief
15 is a question that's addressed by Section 2255,
16 which draws a careful and deliberate line
17 between finality and error correction. And,
18 yes, Justice Kagan, it's a strict line, and,
19 ordinarily, a prisoner's claim isn't going to
20 be compelling enough to meet it. But that
21 doesn't mean that the claim can be wrenched out
22 of context and, although procedurally and
23 substantively deficient, can be used to create
24 extraordinary and compelling circumstances that
25 warrant reducing a valid sentence, whether or

1 not it's window-dressed with other factors that
2 aren't themselves extraordinary and compelling
3 reasons that warrant a sentence reduction and
4 would be irrelevant under Section 2255.

5 If you could do that, then it would
6 really eradicate all the substantive,
7 procedural, and temporal limits on Section 2255
8 claims and on collateral attacks on criminal
9 judgments in general. And they say they can't
10 find a single case in which that's happened. I
11 think the Court has one in front of it right
12 now.

13 It may be true that disquiet would get
14 you -- a claim of disquiet would get you
15 nowhere under Section 2255, Justice Sotomayor,
16 but I don't think that's to its benefit as a
17 recycled claim under Section 3582(c)(1)(A)(i).

18 I'm sorry, Justice Thomas.

19 JUSTICE THOMAS: Mr. Feigin, the --
20 there was some discussion earlier about several
21 district court cases where the sentence had
22 been reduced. Was the provision there -- I
23 think it was 4205(g) -- is that the equivalent
24 of the provision here, the compassionate
25 release provision here?

1 MR. FEIGIN: It's not an equivalent.
2 It's more like an ancestor to this particular
3 provision. And let me -- so one big difference
4 is that the exact language I was just
5 referencing that requires extraordinary and
6 compelling reasons that warrant a sentence
7 reduction is language you'll see in the current
8 statute and the one -- and it's language from
9 the original Sentencing Reform Act that wasn't
10 in 4205(g).

11 But let me address the two cases that
12 were brought up this morning. Banks is a case
13 of rehabilitation, and -- and that was the
14 reason for release. And that's one thing we
15 absolutely know for sure -- and this Court has
16 several cases on this topic -- that Congress
17 was trying to cut off as a reason for release,
18 and 994(t) will tell you that as well, when it
19 enacted the Sentencing Reform Act.

20 The other case is Diaco, which was
21 decided several years before the Sentencing
22 Reform Act was enacted. With all due respect
23 to the District of New Jersey, we're not a
24 hundred percent certain that Congress would
25 have been aware of it. And, frankly, we think

1 it's wrong. And even then, it's a very
2 exceptional circumstance where, essentially,
3 what happened was another district judge went
4 beyond that district judge's authority to grant
5 relief to all the co-defendants of this one
6 defendant and without any other mechanism to
7 kind of effectuate the original sentencing
8 intent, which had gotten frustrated by ultra
9 vires action by another district court.

10 The district judge urged the BOP to
11 file a motion to allow for early release on
12 parole if the Parole Commission were to grant
13 it. And the district judge in the case decided
14 to grant it because it was -- I think he viewed
15 it as the least bad thing he could do to solve
16 the rather unusual circumstance that came up
17 there.

18 But I don't think it's the camel's
19 nose under the tent to allow legal claims. And
20 just to answer one question you asked me -- my
21 friend on the other side, Justice Thomas, the
22 word "compassionate release" actually is the
23 title of the provision in the First Step Act
24 that enacted the amendments to Section 3582(c)
25 that we're talking about, you know, some of

1 which are -- are at issue today.

2 And I think the 2018 enactment of the
3 First Step Act actually reinforces the original
4 intent of Congress that this be for exceptional
5 circumstances, not that it just be a loophole
6 for Section 2255.

7 JUSTICE JACKSON: It does say
8 exceptional circumstances, but it doesn't say
9 solely personal circumstances. So I don't
10 really know -- I mean, I appreciate the
11 government intuiting that, but we do have some
12 indication that Congress was thinking beyond
13 just personal circumstances from the
14 legislative history.

15 We have a case -- and I'll find the
16 case name in a moment -- but in which Justice
17 Scalia indicated that compassionate release
18 might be available -- you might know the case
19 I'm talking about -- for --

20 MR. FEIGIN: Setser?

21 JUSTICE JACKSON: Yeah. For, you
22 know, an unusually long sentence. So where's
23 the personal circumstances limit that the
24 government is relying on here?

25 MR. FEIGIN: So I think there are --

1 there's a lot -- a lot of reasons to think
2 that, Your Honor. And there's a lot packed
3 into that question or a few parts packed into
4 that question.

5 But, first of all, I think the very
6 language, "extraordinary and compelling
7 circumstances that warrant a sentence
8 reduction," requires a court to look at the
9 backdrop of sentencing law. It's not
10 extraordinary and compelling in a vacuum. It's
11 extraordinary and compelling reasons that
12 warrant a sentence reduction.

13 Second, I think there's a category
14 mismatch when we're talking about these kinds
15 of legal claims here because, as has been noted
16 this morning, when you raise a Section 2255
17 claim, you're challenging the validity of the
18 criminal judgment. And Section
19 3582(c)(1)(A)(i) -- we talk about this in our
20 brief -- presumes that the judgment is valid
21 and it's about reducing a valid sentence. And
22 there's kind of a category mismatch with taking
23 a reason why the sentence is invalid --

24 JUSTICE JACKSON: But isn't that --
25 why doesn't -- but why doesn't that cut against

1 you? That was the point I was trying to make
2 to your colleague on the other side, which is
3 that to the extent these are two different
4 things and that compassionate release assumes a
5 valid sentence and that you need to have it or
6 you're asking for a sentence reduction
7 notwithstanding that, why then are we
8 evaluating your ability to get one of those
9 vis-à-vis what you could do in the other world,
10 where you'd be claiming that your sentence or
11 conviction is invalid?

12 MR. FEIGIN: I think it cuts entirely
13 in our favor, Your Honor, because it shows that
14 these are meant for personal circumstances
15 because it's a -- it doesn't really make any
16 logical sense to reduce a valid sentence
17 because of a procedurally or substantively
18 deficient claim, the -- the point of -- the
19 point of the claim being that the sentence was
20 actually invalid.

21 That is, you're taking -- to use a
22 slightly pejorative term, a kind of half-baked
23 claim of legal error in a conviction or
24 sentence and saying, okay, yeah, it's not quite
25 there, but that's a reason for taking the

1 sentence as given and reducing it. That -- I
2 don't think that makes sense. And that points,
3 again, toward personal circumstances.

4 JUSTICE KAGAN: Well, one of the
5 things --

6 MR. FEIGIN: But other --

7 JUSTICE KAGAN: -- that I find
8 perplexing about this statute is that I would
9 have thought that this statute would have
10 required changed circumstances, you know, more
11 even than personal circumstances, that it would
12 have required changed circumstances, that
13 that's the reason for reducing a sentence.

14 Why doesn't the statute say that? And
15 is that what you're suggesting the statute
16 really is all about?

17 MR. FEIGIN: I do think it is for
18 changed circumstances, Your Honor. I think, if
19 you look at the legislative history, that's
20 what Congress was anticipating. I think that's
21 why the BOP filed these motions to begin with
22 and continues to have a gatekeeper role today.

23 I think we see that in 3582(d), which
24 are the notification requirements for the BOP
25 which require notifications in cases of

1 terminal illness, which is actually kind of the
2 canonical example that Congress was thinking
3 of. You can look at the original Senate report
4 for the Sentencing Reform Act at pages 55, 121,
5 and 173 if you want some evidence of that.

6 And I -- and I --

7 JUSTICE KAGAN: The -- the --

8 MR. FEIGIN: -- think we find -- we
9 find -- and the other notification circumstance
10 would be when someone is too medically or
11 mentally infirm to file one.

12 JUSTICE KAGAN: I mean, there might be
13 changed circumstances that are not personal in
14 nature, that are, in fact, legal in nature and
15 so that there would be a divide between your
16 personal circumstances line and the changed
17 circumstances line.

18 And the -- the -- the example I'll
19 give you is, you know, suppose the statutory
20 construction the way the courts interpret a
21 given statute have changed since the initial
22 sentencing such that somebody was sentenced to,
23 let's say, a long sentence, and then the courts
24 say, no, if he were coming up today, actually,
25 he wouldn't be found guilty at all.

1 What do you do with that? Is that the
2 kind of thing that can be taken into account
3 under this statute?

4 MR. FEIGIN: No, Your Honor, it's not
5 the kind of thing that can be taken into
6 account because that's something that's
7 otherwise addressed in the legal system. And
8 the Court had a case about this a few years
9 ago, it was Jones against Hendrix.

10 And in Jones against Hendrix, the
11 question was whether someone who had -- or we
12 didn't think he actually had a valid claim, but
13 who had a claim that there was a statutory
14 error in his conviction, but he'd already
15 raised it once on 2255, could get relief under
16 2255.

17 And what the Court said in Jones was
18 no, because Congress specifically thought about
19 when someone in that situation should be able
20 to get relief, and it allowed relief on a
21 second or successive only for constitutional
22 claims, not for statutory claims.

23 Now, on their view --

24 JUSTICE KAGAN: Yeah. So that's
25 right, the 22 -- you couldn't do this by way of

1 a 2255 motion. But, gosh, it does seem as
2 though, there, a safety valve would be
3 appropriate given that somebody is serving a
4 lengthy sentence for something that is not a
5 crime at all.

6 And if we're sort of thinking of this
7 statute as a changed circumstances statute, not
8 as a kind of general do-over for all your
9 claims that you could have brought way back
10 when but as a changed circumstances statute,
11 that would seem to me to be potentially
12 appropriate.

13 MR. FEIGIN: Well, Your Honor, if
14 Congress wants to allow a remedial mechanism
15 for that, it would be free to do so. It could
16 add at points the Department has either
17 proposed or at least considered proposing a new
18 2255(h)(3) that would allow that.

19 It is the kind of claim you might be
20 able to bring on a first 2255, and it would be,
21 you know, provided it were brought in time.
22 And Congress can change the limitations on 2255
23 that it has.

24 But it's drawn a line between finality
25 and error correction. And I don't think it

1 meant for Section 3582(c)(1)(A)(i) to be kind
2 of a loophole for whatever --

3 JUSTICE KAVANAUGH: Well, could
4 they -- I'm sorry.

5 MR. FEIGIN: I'm sorry. For
6 whatever --

7 JUSTICE KAVANAUGH: Could --

8 MR. FEIGIN: -- it -- it had --
9 limitations it had imposed.

10 Sorry, Justice --

11 JUSTICE KAVANAUGH: Do you have more?

12 MR. FEIGIN: -- Kavanaugh. That was
13 not important --

14 JUSTICE KAVANAUGH: Could --

15 MR. FEIGIN: -- enough to interrupt
16 you.

17 JUSTICE KAVANAUGH: No, it -- it was.
18 Could the Commission do that?

19 MR. FEIGIN: Could the Commission?

20 JUSTICE KAVANAUGH: Could -- could the
21 Commission, under its authority under 994(t)
22 do --

23 MR. FEIGIN: No. I mean, I think this
24 gets a little bit --

25 JUSTICE KAVANAUGH: Let me finish.

1 MR. FEIGIN: Oh, sorry.

2 JUSTICE KAVANAUGH: -- do what Justice
3 Kagan was talking about?

4 In other words, your -- your answer to
5 Justice Kagan: Well, Congress could do that.

6 My question is: Could the Commission,
7 under its broad authority under 994(t), do the
8 same thing or not and, if not, why not?

9 MR. FEIGIN: No, we don't think that
10 the Commission, in a post-Loper Bright world,
11 has the authority to make something that's not
12 an extraordinary and compelling reason that
13 warrants a sentence reduction into something
14 that is an extraordinary and compelling reason
15 that warrants a sentence reduction.

16 JUSTICE KAVANAUGH: I don't know how
17 Loper Bright affects that, but extraordinary
18 and compelling are both capacious terms and
19 leave a lot of discretion, aren't they?

20 MR. FEIGIN: Well, let -- then let me
21 give you a longer answer to this, Your Honor,
22 which goes probably a little bit more to the
23 next case.

24 But, first of all, it's just a pure
25 question of statutory interpretation. If these

1 words don't cover it, then the Commission can't
2 add them.

3 Second, the Commission's required to
4 comply with all provisions of law under 994(a).
5 And they acknowledge that. They actually
6 accept something from their new Rule (b)(6)
7 because it's covered by 3582(c)(2), and they
8 don't think they can expand on that.

9 But, even beyond that, Your Honor, the
10 Commission doesn't -- the Commission doesn't
11 have just general authority to override general
12 provisions of sentencing law because the
13 Commission's role -- the Commission isn't the
14 exclusive interpreter of extraordinary and
15 compelling circumstances.

16 JUSTICE JACKSON: But doesn't --

17 MR. FEIGIN: If you look at --

18 JUSTICE JACKSON: -- the statute make
19 them that --

20 MR. FEIGIN: It does --

21 JUSTICE JACKSON: -- in some way? I
22 mean, this goes to a question about the
23 ordering and the steps and -- and what the
24 government's view is about --

25 MR. FEIGIN: Exactly --

1 JUSTICE JACKSON: -- how much -- how
2 much judges have to defer to the Commission's
3 view -- views on this.

4 MR. FEIGIN: That's exactly where I
5 was going, Your Honor.

6 So, if you look at Section
7 3582(c)(1)(A)(i), you'll see that there's
8 actually two threshold findings that a court
9 needs to make before the court is going to be
10 empowered to look at the 3553(a) factors and
11 reduce the sentence.

12 One of them is that the court has to
13 find extraordinary and compelling
14 circumstances, and the other one is that the
15 court has to find that a reduction would be
16 consistent with the policy statements of the
17 Sentencing Commission.

18 This Court's decision in Koons against
19 United States -- I know there are two cases
20 with similar names, I'm talking about the one
21 with an "s" -- addresses exactly identical
22 language that appears in 3582(c)(2) and calls
23 it language of limitation. And I think it's
24 even more so here because the court, district
25 court, has to make an independent evaluation

1 even if there is a policy statement addressing
2 it of extraordinary and compelling
3 circumstances.

4 And, of course, I'm sure Petitioner
5 would agree that the court has to make an
6 independent determination of it because,
7 otherwise, if there were no applicable policy
8 statement, which is what the Second Circuit
9 found in the context of Petitioner's case,
10 there would be no way to grant any sentence
11 reductions at all because no sentence
12 reduction --

13 JUSTICE JACKSON: No. You -- you --
14 you'd -- you'd certainly have to make an
15 independent judgment where there were no
16 circumstance -- or no policy statement, but I
17 understood Petitioner to agree with Justice
18 Kavanaugh that if there were such a policy
19 statement, the court would have to defer to it.

20 MR. FEIGIN: Well, that if there were
21 such a policy statement, Your Honor, it
22 wouldn't change the structure of the statute,
23 and the structure of the statute very clearly
24 and explicitly lays these out as two separate
25 steps.

1 So the court has to itself find
2 extraordinary and compelling reasons, and
3 then it has to see whether its finding or the
4 other base -- any of its other bases --
5 anything else it -- it might do with regard to
6 the sentence reduction -- there are some
7 additional constraints the Sentencing
8 Commission has replaced on reductions -- are
9 consistent with what the Sentencing Commission
10 does.

11 My -- my point is that we know they're
12 independent steps. And the reason that someone
13 like Petitioner was able, we think incorrectly,
14 to get a sentence reduction even in the absence
15 of any policy statement, that is, the absence
16 of any Commission definition at all of what its
17 view of extraordinary and compelling
18 circumstances are, is that these are, in fact,
19 two separate steps.

20 So it's a particularly inappropriate
21 circumstance to completely defer to the
22 Commission because, of course, the Commission
23 is only telling us what it thinks are
24 extraordinary and compelling circumstances for
25 purposes -- reasons, I'm sorry -- for purposes

1 of limiting the statute under its own policy
2 statements when the court gets to that second
3 step.

4 JUSTICE KAVANAUGH: On that second
5 step, if the Commission has not said that
6 something is extraordinary and compelling, so,
7 in other words, it's been silent on it, it said
8 other things are extraordinary and compelling
9 but has not said this is, would it be
10 permissible for a district judge then to say
11 that such a reduction is consistent with the
12 applicable policy statements?

13 In other words, how do you read
14 Commission silence on the particular issue?

15 MR. FEIGIN: We read it as preclusive,
16 Your Honor. We don't think that this could be
17 brought today under the Commission's current
18 policy statement.

19 I mean, maybe there would be some
20 debate about that, but I don't think -- I don't
21 think there would be much. I think it's always
22 been understood that the Commission's -- the
23 Commission's limited.

24 JUSTICE KAVANAUGH: And that's kind of
25 the end of it then for this case, isn't it,

1 under your view?

2 I mean, that's one way that's the end
3 of it, which is the Commission has not issued a
4 policy statement that authorizes or that
5 suggests something like this is extraordinary
6 and compelling and that's an independent
7 requirement of the statute and that's the end
8 of it? Is that one of your arguments?

9 MR. FEIGIN: Well, that's not going to
10 be the end of this case because it arose when
11 the policy statement wasn't in effect. So we
12 wouldn't apply the policy statement to --

13 JUSTICE KAVANAUGH: But there's never
14 been a --

15 MR. FEIGIN: -- to him unless
16 they're --

17 JUSTICE KAVANAUGH: -- there's never
18 been a policy statement that authorizes this --
19 this --

20 MR. FEIGIN: That's correct, Your
21 Honor. But I don't think the Court can rest on
22 that as a potential limitation to the loophole
23 because, as we'll get into more in the next
24 case, there's always the possibility that the
25 Sentencing Commission could do that.

1 We could have another period where,
2 for some reason, there isn't a policy statement
3 and then it becomes a free-for-all.

4 There also is -- and we think it's a
5 quite limited one, there is a subsection (b)(5)
6 to the current policy statement, 1B1.13, which
7 is an other reasons statement. And we could
8 imagine prisoners, correctly or not, trying
9 to -- we think incorrectly, but I'm sure they
10 would assert correctly -- trying to jam in what
11 are their recycled 2255 claims under that.

12 And the real problem with that -- and
13 this gets to something you were discussing with
14 Petitioner's counsel, Justice Kagan -- is what
15 we're doing is we're taking the limitations
16 that 2255 imposes and we're replacing them with
17 Section 3582(c)(1)(A)(i) considerations to make
18 some kind of Frankenstein monster that I don't
19 think is what Congress intended.

20 For instance, take your example of
21 someone who misses the filing deadline by three
22 days or three weeks or even three years. And
23 the person says, well, okay, there is a
24 doctrine that would handle that under 2255.
25 It's equitable tolling. And I can't show you

1 any circumstances that are sufficient for
2 equitable tolling, but what I can show you is
3 that I've really rehabilitated in prison, so
4 that's the reason to let me out.

5 That is nothing but a complete
6 end-around to a Section 2255 claim. You are
7 using the 2255 claim there as essentially the
8 sole reason for reducing the sentence, except
9 for rehabilitation, which is the one thing we
10 know Congress did not want to be the reason
11 that people are granted early release.

12 JUSTICE JACKSON: But I guess I
13 can't -- I'm trying to understand how your --
14 how your rule is workable in any real way even
15 with that example.

16 So suppose you have an 80-year-old
17 prisoner who has cancer, and I -- I take it
18 that your rule is that that's the kind of
19 classic personal circumstance that can be
20 considered in the context of compassionate
21 release. But that could also be considered in
22 the context of a habeas motion with respect to
23 something like the tolling issue that you
24 raised.

25 So I guess I don't understand why

1 you're saying or how you could be saying that
2 anything that comes up in the context of habeas
3 can't be ever considered in this context, and
4 maybe I have your rule -- I'm not
5 understanding.

6 MR. FEIGIN: We're not saying anything
7 that could ever be relevant to habeas --

8 JUSTICE JACKSON: Okay. So what are
9 you saying?

10 MR. FEIGIN: So I'm not saying, like,
11 for example, equitable tolling like I was in a
12 coma, you know, that could -- I -- I suppose
13 that might affect someone's claim of illness
14 under a Section 3582 motion. Our -- our
15 argument is that something that would be
16 grounds for attacking the validity of the
17 original criminal judgment, that is, the kind
18 of thing that would be raised as a Section 2255
19 claim, this would be the -- the claim, not just
20 some attendant circumstance to the claim that
21 might be used for something like equitable
22 tolling, can't be advanced as a -- as an
23 extraordinary and compelling reason.

24 JUSTICE JACKSON: Even if you're not
25 trying to advance it to attack your sentence in

1 this context, even if you accept that your
2 sentence is valid and that you would like it to
3 be --

4 MR. FEIGIN: That's right, Your Honor,
5 because, by hypothesis, anything else the
6 prisoner is alleging, for this question ever to
7 make a difference, nothing else the prisoner
8 alleges is itself going to be extraordinary and
9 compelling enough. So what gets them over the
10 line in these kinds of cases, in order for the
11 question presented in this case to matter, the
12 thing that gets them over the line has to be
13 the Section 2255 claim.

14 I don't think what Congress wanted was
15 for someone to come in and take -- and have
16 reasons that aren't enough to get them over the
17 line, so the canonical example being
18 rehabilitation, the court says no, and the
19 prisoner says: Well, here's my ace in the
20 hole. It's a Section 2255 claim. Now it would
21 never get anywhere because it's substantively
22 deficient, and it would be wildly out of time,
23 and I've already filed a Section 2255 motion,
24 but, hey, here's what I got, and if you add
25 this to my rehabilitation, which is

1 insufficient to --

2 JUSTICE SOTOMAYOR: Except,

3 Mr. Feigin --

4 MR. FEIGIN: Yeah.

5 JUSTICE SOTOMAYOR: -- what you're

6 assuming is bad faith, really, because --

7 and -- and that's not the way we function.

8 What you want is a rule that says not only if

9 it can be brought in -- or should have been

10 brought under 25 -- 2255, but even if it

11 couldn't have but might have been -- and I

12 don't know how far your conflict articulation

13 is going to go -- then it could never be an

14 exceptional circumstance standing alone.

15 Well, nothing standing alone is ever

16 an exceptional circumstance. Neither age nor

17 medical condition standing alone qualifies you

18 for a reduction. It does have to be

19 extraordinary and compelling, and for that, you

20 need something more.

21 So I understand in this case the

22 argument that the judge's disquiet standing

23 alone should not permit him to modify a

24 sentence, that it had to have been with

25 something else, and I can accept the argument

1 that the something else wasn't much here.

2 But you want a more absolute rule, and
3 I fear that an absolute rule will be twisted
4 and create its own nightmare because there is
5 nothing that standing alone is extraordinary
6 and compelling.

7 MR. FEIGIN: Your Honor, that's not --
8 the rule that we're asking for is the rule I
9 was articulating to Justice Jackson or at least
10 attempting to articulate to Justice Jackson,
11 which is that attacks on the validity of the
12 conviction or sentence --

13 JUSTICE SOTOMAYOR: Well, you're
14 saying --

15 MR. FEIGIN: -- are excluded.

16 JUSTICE SOTOMAYOR: No --

17 MR. FEIGIN: No, I --

18 JUSTICE SOTOMAYOR: -- what you're
19 trying to say is you can't even consider it.
20 And that's what I'm asking you.

21 MR. FEIGIN: And --

22 JUSTICE SOTOMAYOR: Is your rule
23 absolute that way? There -- there are
24 circumstances where it could be one among many
25 factors that lead a court to a sentencing

1 reduction, as it can be one among other factors
2 where the court says no, I'm not going to do it
3 anyway.

4 MR. FEIGIN: Well, Your Honor, I think
5 there -- first of all, I don't think there
6 would be any kind of nightmare because this is
7 the way it has worked for the entire history of
8 Section 3582(c)(1)(A)(i) until the First
9 Circuit decision in I think it was 2022. So I
10 don't think there would be anything new. If
11 anything, I think their rule would be very
12 complicated and unworkable because all of a
13 sudden we would see any of the 5,000 prisoners
14 who --

15 JUSTICE SOTOMAYOR: But you haven't
16 seen -- you haven't seen any of that there.

17 MR. FEIGIN: Your Honor, on their
18 rule --

19 JUSTICE SOTOMAYOR: I -- I -- I love
20 the scare -- the scare tactic, but I look for
21 reality, and it just hasn't happened. And what
22 I look at is the amicus who provides us with
23 case after case where courts are taking their
24 responsibility very seriously. They're writing
25 50-page, 60-, 70-page opinions analyzing

1 care -- cases with extreme care.

2 MR. FEIGIN: And, Your Honor, I think
3 that's exactly the problem, because any of the
4 5,000 prisoners who file 2255 motions in a year
5 could just keep bringing these same claims or
6 new ones under 3582(c)(1)(A)(i) and forcing
7 district courts to respond to --

8 JUSTICE SOTOMAYOR: We have -- we
9 have --

10 MR. FEIGIN: -- what are essentially
11 new habeas --

12 JUSTICE SOTOMAYOR: We have -- we have
13 plenty of ways to handle frivolous filings,
14 counsel. We do it all the time --

15 MR. FEIGIN: The question is
16 whether --

17 JUSTICE SOTOMAYOR: -- and quickly.

18 MR. FEIGIN: I'm sorry, Your Honor. I
19 think the question is whether Congress was
20 trying to encourage the recycling or the
21 renewal or the creation of new --

22 JUSTICE SOTOMAYOR: What we do know is
23 that Congress was permitting sentences to be
24 reopened, and in none of the words it's used
25 does it put in any of the limitations that

1 you're proposing.

2 It does not limit this to personal
3 circumstances, and, in fact, the examples
4 don't. It hasn't limited it to only questions
5 of fact and not law, which is what you're
6 suggesting. It has -- and it has always
7 included that there might be other reasons, and
8 it's permitted the Sentencing Commission to
9 define those other reasons.

10 MR. FEIGIN: Well, Your Honor, I think
11 there is a very strong principle -- I think
12 Preiser and other cases are an example of it,
13 and we have some of the others in our brief --
14 that statute -- statutory schemes should be
15 interpreted in a harmonious whole. And I think
16 reasons warranting a sentence reduction points
17 to that harmonious whole. And the idea that --

18 JUSTICE SOTOMAYOR: Except -- except
19 our Heck line of cases make very clear that
20 we -- 1983 and 2255 are not invalid if there's
21 a way to read both where the validity of the
22 sentence and conviction are not challenged.

23 And, here, this is not challenging the
24 validity of the conviction or sentence. It's
25 asking for a modification under a separate

1 statutory authorization, but it's not
2 challenging the validity.

3 MR. FEIGIN: But the reason for the
4 reduction is a challenge to the validity. Even
5 something like disquiet is, of course,
6 questioning the validity of the original
7 criminal judgment.

8 And, yes, that claim would not be
9 cognizable under Section 2255 because it would
10 be substantively deficient because it's not
11 even clear you can do an actual innocence
12 claim, and if you could, it would require that
13 no reasonable juror would find that the
14 defendant is --

15 JUSTICE SOTOMAYOR: And the judge
16 never --

17 MR. FEIGIN: -- not guilty.

18 JUSTICE SOTOMAYOR: -- did that and
19 under motion after motion, he denied relief,
20 legal relief invalidating the conviction and
21 the sentence, but he didn't grant that. He did
22 something totally different.

23 MR. FEIGIN: And then --

24 JUSTICE SOTOMAYOR: Thank you,
25 Mr. Feigin.

1 MR. FEIGIN: Yeah. Sorry. Your
2 Honor, and then what he does do, and this is
3 what we see in this case, is he eventually
4 grants a different statutory mechanism for
5 relief under -- his -- the basis being disquiet
6 with the verdict and sentencing disparities
7 that are related to his disquiet with the
8 verdict.

9 And, again, that is simply just a
10 recycled and frankly non-cognizable Section
11 2255 claim. An actual innocence assertion was
12 made on 2255 before. And there's another --
13 there's another Section 2255 claim pending in
14 the district court right now that makes the
15 same assertion.

16 I think another way to think about it,
17 in addition to the kind of ace in the hole
18 being a procedurally or substantively deficient
19 attack will need to wait for another day
20 because I'm out of time, Mr. Chief Justice.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas?

23 Justice Alito?

24 Justice Sotomayor?

25 Justice Kagan?

1 JUSTICE KAGAN: So what you just said,
2 Mr. Feigin, is one of the confusing parts of
3 this case to me, is that when I read your
4 brief, the formulation of the test that you
5 offer is could the claim of error have been
6 raised under 2255?

7 And I have some sympathy for why that
8 would be an extremely relevant question, but it
9 just does not seem to be a question that
10 applies in this case because here, as you say,
11 we've never said that an actual innocence claim
12 could be raised under Section 2255, so sort of
13 the premise of your argument, which is it could
14 have been raised in 2255, sorry, you lost your
15 chance.

16 But the premise of the argument is it
17 could have. And here we don't really know that
18 it could have. The court has never said
19 whether it could have.

20 So the rule doesn't really seem to fit
21 the case, if you understand what I mean.

22 MR. FEIGIN: Well, two points, Your
23 Honor. I -- I -- you might I think more
24 usefully use the formulation that it would be a
25 claim that attacked or an asserted reason that

1 attacks the validity of the conviction or
2 sentence. And I think this one would fall into
3 that.

4 And when we talk about Section 2255 --

5 JUSTICE KAGAN: So there -- there is a
6 real difference between that formulation and
7 the one you most often give in your briefs. So
8 you're now switching from the one you give in
9 your brief to saying does this attack the
10 validity of the conviction?

11 MR. FEIGIN: Well, we -- we said both
12 in our brief, Your Honor. And to the extent
13 we're focusing on Section 2255 claims, I mean,
14 frankly, that's largely as a result of the
15 Court written question presented that we were
16 trying to work within, which I assume kind of
17 was written in a way that the Court intended to
18 apply to this case, but the second thing I'd
19 say is to the extent you would include things
20 that would attack the validity of the
21 conviction or sentence like a claim of
22 disquiet, that just aren't even substantively
23 meaningful enough to get past the -- you know,
24 the first marker on Section 2255 claim, that's
25 all the worse for prisoners in this position.

1 So I think you would write it a bit
2 more broadly. But I -- I would take something
3 -- I would -- I would take this as something
4 that could be alleged under Section 2255 and it
5 would simply lose.

6 I think it would make absolutely no
7 sense to have a rule that if you could win or
8 you -- you could have made your claim under
9 Section 2255 and it would be substantively
10 valid, then you're precluded, but if you would
11 have had a substantively invalid claim, you
12 wouldn't be.

13 JUSTICE KAGAN: Okay, thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Just so I have the
18 government's position clear, where does a
19 prisoner go who has a claim of actual innocence
20 based on newly-discovered evidence?

21 MR. FEIGIN: So as this Court has
22 explained in one other case is Herrera against
23 Collins, if you have a claim of actual
24 innocence, it's got to be paired with another
25 constitutional claim. Now, Congress has made

1 an exception in Section 2255 --

2 JUSTICE KAVANAUGH: So I think your
3 answer there is nowhere other than a pardon.

4 MR. FEIGIN: Well you could, if it's
5 paired with a claim of constitutional error --

6 JUSTICE KAVANAUGH: If it's not -- if
7 it's not paired. It's just a freestanding --

8 MR. FEIGIN: If it's not paired with a
9 claim of constitutional error, I think it's
10 going to have to be addressed through the
11 clemency procedure.

12 JUSTICE KAVANAUGH: Thank you.

13 JUSTICE BARRETT: So just to follow up
14 on that point, Mr. Feigin, would the idea be
15 that if an actual innocence claim, a
16 freestanding claim, is not available under
17 2255, it's because Congress has implicitly
18 precluded it by not giving a route to raise
19 such a challenge under 2255?

20 MR. FEIGIN: Well, I think there --
21 there are a couple of -- there are a couple of
22 reasons. First, the -- the -- I don't think
23 Congress has disturbed this Court's -- this
24 Court has never squarely addressed whether
25 there's a freestanding claim of actual

1 innocence.

2 And I think, if the Court were to,
3 contrary to the skepticism I think the Court --
4 I -- I -- I read in the Court's opinion in
5 Herrera against Collins, the Court were to
6 decide that such a claim exists, I don't think
7 Congress has precluded it under Section 2255.

8 But, if it's not a -- a -- an existing
9 root to post-conviction relief, then I don't
10 think it can be read into Section 2255. That
11 is, Congress wasn't trying to create some new
12 ground for relief.

13 Congress did enact Section 2255(h)(1),
14 which kind of mirrors the actual innocence
15 exception as a reason why someone -- as -- as a
16 showing that a particular prisoner could make
17 to bring a second or successive claim that
18 would otherwise be precluded, but I don't read
19 Section 2255(h)(1) to authorize that kind of
20 claim as a freestanding claim divorced from
21 constitutional error.

22 I think what it does is, if you can
23 meet the actual innocence bar, it is allowing a
24 second or successive claim that relies on some
25 constitutional ground.

1 JUSTICE BARRETT: I guess I'm just
2 trying to figure out how to articulate the
3 rule. I mean, you offer one way. If we say
4 that if you're going to challenge the validity
5 of a conviction or a sentence, 2255 is your
6 option. You know, that -- that rule I can see
7 making sense.

8 Otherwise, it feels like we would have
9 to decide if we peg it to 2255 very
10 specifically, like, if you could bring this
11 as -- if this is a cognizable claim under 2255
12 and you can't raise it under the compassionate
13 release statute, it seems to me that we have to
14 decide whether an actual innocence claim in a
15 freestanding way is available under 2255, which
16 I take Justice Kagan to be pressing you on.

17 MR. FEIGIN: That's why I'd go with
18 the other formulation, Justice Barrett. In
19 answer to both you and Justice Kagan, if this
20 helps, we don't really conceive of those things
21 as being different.

22 Section 2255 is the vehicle for
23 raising claims or challenges to the validity of
24 a conviction or sentence. So I think the
25 phrase Section 2255 claim one might think of as

1 something that has some chance of succeeding if
2 it's brought at the proper time.

3 I think the right way to think about
4 it in this context is just the type of thing
5 that would be -- is the proper office of
6 Section 2255.

7 And the space that 2255 fills, the
8 role that it fills within the sentencing scheme
9 is it's the place you go when you have a
10 challenge to the validity of your conviction or
11 sentence. That place is not 3582(c)(1)(A)(i).

12 There's no way that Congress wanted
13 the BOP originally or as the gatekeeper now or
14 district courts to be relitigating claims of
15 actual innocence under Section
16 3582(c)(1)(A)(i), let alone just a mere
17 argument about disquiet.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: I guess it seems to
21 me that that argument really only works if that
22 is the only concern in the 3582 world. I mean,
23 what if we have the 80-year-old defendant who
24 has cancer and other ailments and there's this
25 concern about whether or not his conviction is

1 valid? Why -- why would the government say
2 that that couldn't be part of the overall
3 analysis if there's more than one factor?

4 MR. FEIGIN: Well I think there's two
5 reasons for that, Your Honor. One is one I was
6 suggesting earlier, which is that if you have
7 other claims -- and I just take -- taking your
8 hypo, I -- I will assume for the sake of
9 argument that those other reasons would not
10 themselves be extraordinary and compelling.

11 JUSTICE JACKSON: Well, I mean,
12 Congress has said in 9 -- 994(t), like, even
13 when it looked at rehabilitation, it just said
14 it can't be used alone. It took it off the
15 table in its sole form.

16 And I guess I just don't understand
17 why the government isn't doing that sort of
18 thing as opposed to saying you can never look
19 at it.

20 MR. FEIGIN: So -- so I -- I have two
21 answers to your -- to your question, Justice
22 Jackson. I mean, the -- the first way to look
23 at it is assuming those other reasons are not
24 sufficient on their own, like, you gave the
25 80-year-old and -- and she has cancer. If that

1 weren't enough on its own, then I don't think
2 the ace in the hole can be a procedurally or
3 substantively deficient challenge to the
4 validity of the conviction or sentence.

5 And the reason for that is that
6 wouldn't warrant a sentence reduction. It's
7 not an exceptional and compelling --

8 JUSTICE JACKSON: I understand.

9 MR. FEIGIN: It's that there's nothing
10 exceptional and compelling to the mix.

11 The second answer that I -- I was -- I
12 would give, which is actually what I was about
13 to say when my red light came on, is the other
14 way of thinking about this is this is a
15 repackaged Section 2255 claim. The statute
16 that tells us when there can be relief on a
17 challenge to the validity of a conviction or a
18 sentence is Section 2255, and it tells us the
19 circumstances that are relevant.

20 JUSTICE JACKSON: I understand. Thank
21 you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Rebuttal, Mr. Gruenstein?

25

1 REBUTTAL ARGUMENT OF BENJAMIN GRUENSTEIN
2 ON BEHALF OF THE PETITIONER

3 MR. GRUENSTEIN: I'd like to start by
4 talking about a question that Justice Kagan
5 asked, whether the government's position would
6 be workable. And what the government's
7 position to exclude habeas-like claims would
8 require would be an analysis in each case of
9 whether a claim could be brought under habeas.
10 And what the colloquy about actual innocence
11 shows is that that's not always an obvious
12 question. And to the extent a Petitioner under
13 3582 could not raise actual innocence, which
14 seems to me like it would be the ultimate
15 extraordinary and compelling circumstance,
16 shows how the -- the government gets things
17 backwards.

18 The government ultimately tries to
19 deal with the unworkability problem by saying
20 that the rule really is personal circumstances.
21 Not only is that nowhere in the language of the
22 statute, but clearly cases will fall through
23 the cracks. The Setser case is one of them
24 where the -- the Court considered using 3582 to
25 deal with a -- a state sentence that was not --

1 that was going to run consecutive.

2 Also, of course, the cancer patient
3 that Justice Jackson referred to, if someone
4 had cancer and was serving a 30-year sentence
5 and had 5 years left to live, it certainly
6 should be relevant that the -- the conviction
7 that he had was no longer valid or would not be
8 valid today.

9 The only reason to read the statute in
10 a way that is not according to its literal
11 terms is if there's another statute that
12 conflicts. The government talks about how
13 these issues are otherwise addressed in the
14 legal system.

15 That is not the test. The test is
16 whether there is any reconcilable conflict and
17 whether this reading of 3582 would wholly
18 frustrate the habeas statute. That's what
19 Jones v. Hendrix was, where allowing a 2241
20 would entirely undermine the -- the 225 -- 2255
21 restrictions.

22 As to Justice Sotomayor's point about
23 the work that justices -- that judges are doing
24 in these sorts of cases, judges are doing very
25 comprehensive work, and it's not surprising

1 because this is very similar to the work judges
2 do every day in sentencing when they are --
3 previously looked at heartland departures.
4 They look at what it -- what makes this case
5 extraordinary. And judges are well suited to
6 do that, subject to the -- to review by courts
7 of appeals.

8 And, finally, I would -- as to Justice
9 Kavanaugh's point about the Commission not
10 speaking yet on this issue, I think it's
11 relevant to go back to the language of the
12 statute first, which is the words are
13 "extraordinary and compelling." They are, in
14 Your Honor's words, capacious. They leave a
15 lot of discretion to the district courts.

16 But there's another very important
17 feature to the statute, which is that there's a
18 delegation to the Sentencing Commission to --
19 if there are things to be taken off the table,
20 if changed circumstances should be the -- the
21 touchstone, that is for the Sentencing
22 Commission.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. GRUENSTEIN: Thank you, Your

1 Honor.

2 CHIEF JUSTICE ROBERTS: The case is
3 submitted.

4 (Whereupon, at 11:25 a.m., the case
5 was submitted.)

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