No. 18-6996

==========

In The
United States Court of Appeals
For The Fourth Circuit

STEVEN DAVID AVERY,

Petitioner – Appellant,

v.

JUSTIN ANDREWS, Warden, FCC Butner,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

==========

BRIEF FOR AMICI CURIAE FAMM and WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF APPELLANT AND REVERSAL

PHILIP FORNACI
EMILY GUNSTON
JONATHAN M. SMITH
Washington Lawyers' Committee
for Civil Rights and Urban Affairs
11 Dupont Circle, NW
Washington, DC 20036
(202) 319-1000
(Additional counsel on reverse)

PETER GOLDBERGER
Chair, FAMM Amicus Cmte.
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
fax: (610) 649-8362
e: peter.goldberger@verizon.net

Attorney for Amici Curiae

Additional Counsel for Amica FAMM:

MARY PRICE
General Counsel, FAMM
1100 H Street, NW, Suite 1000
Washington, DC 20005
(202) 822-6700

MARGARET COLGATE LOVE
Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, DC 20002
(202) 547-0453

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-6996 Caption: Steven Avery v. Justin Andrews, Warden

Pursuant to FRAP 26.1 and Local Rule 26.1,

FAMM and Washington Lawyers' Committee for Civil Rights and Urban Affairs
(name of party/amicus)

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

Both amici are non-stock, non-membership, not-for-profit corporations (incorporated in the District of Columbia).

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____ Date: Sept. 21, 2018

Counsel for: FAMM and WLCCRUA

CERTIFICATE OF SERVICE

****

I certify that on Sept. 21,2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

_____ Sept. 21, 2018
(signature) (date)

Print Save Reset Form

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes and Rules

Other Authorities

IDENTITY AND INTEREST OF AMICI
(with required disclosures under Rule 29(a)(4)(E))

FAMM is a nonpartisan, national advocacy organization that promotes fair and effective criminal justice reforms to make our communities safe. Founded in 1991 as Families Against Mandatory Minimums, FAMM promotes change by raising the voices of families and individuals who are directly affected by counterproductive sentencing and prison policies. FAMM has developed a team of attorneys, advocates, and researchers with extensive expertise in crafting and promoting state and federal legislative and sentencing guideline reforms. FAMM also advances our members' interests before the executive branch by, for example, fostering improvements to the executive clemency process. FAMM routinely participates in precedent-setting cases in the U.S. courts of appeals and Supreme Court through the filing of amicus curiae briefs.

FAMM has long fought to improve the federal Bureau of Prisons' compassionate release program. We do so because we hear routinely from our members who are incarcerated in BOP facilities – and their loved ones – about significant delays in processing requests and inexplicable denials of requests, even those from dying prisoners. FAMM first urged the U.S. Sentencing Commission in 2001 to develop – and more recently, in 2016, to refine – USSG § 1B1.13, because as of 2001 the Commission had not acted to comply with 18 U.S.C. § 3582(c)(1)(A). That provision, enacted in 1984, requires a Policy

Statement on this subject to provide guidance to courts considering compassionate release motions from the Director of BOP. FAMM has worked to raise public awareness of the subject through public media and reporting, including an in-depth study co-authored with Human Rights Watch in 2012, "The Answer Is No: Too Little Compassionate Release in U.S. Federal Prisons."[1] FAMM is spearheading support for comprehensive legislative reform contained in the GRACE Act (S. 2471, 115th Cong.), which would provide prisoners a clear right to appeal a denied or neglected compassionate release request after exhausting administrative remedies. FAMM supports petitioner Steven Avery because we believe the Bureau of Prisons exceeded the statutory authority under 18 U.S.C. § 3582(c)(1)(A)(i) when it denied his request by relying on factors committed by statute to the sentencing court (in light of the cross-reference to 18 U.S.C. § 3553(a)), such as protecting public safety and reflecting the severity of the offense.

The Washington Lawyers' Committee for Civil Rights & Urban Affairs (WLC) was founded in 1968 to provide *pro bono* legal services to address issues of discrimination and entrenched poverty. Since then, it has successfully handled thousands of civil rights cases on behalf of individuals and groups, including prisoners.

Because of the District of Columbia's status as a federal district, all individuals convicted of felonies in the District since 1998 have been

[1] Available at https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf .

imprisoned in federal Bureau of Prisons (BOP) facilities. Over 4,500 convicted D.C. offenders currently reside in more than 90 different BOP facilities across the country. The WLC engages in extensive individual advocacy and class-action litigation on behalf of individuals in BOP custody, whether sentenced under D.C. or federal law. The WLC is one of the only legal organizations that advocates regarding systemic issues in BOP facilities nationwide.

* * *

Pursuant to Fed.R.App.P. 29(a)(4)(D), *amici* represent to this Court that counsel for the appellant have consented to the filing of this brief. However, the appellee, by counsel, stated that the government "opposed" this filing (while offering no reasons for that posture). Accordingly, pursuant to Fed.R.App.P. 29(a)(2)-(3), this brief accompanies a motion for leave to file.

Pursuant to Fed.R.App.P. 29(a)(4)(E), *amici* state that no party's counsel authored this brief, either in whole or in part, nor did any party or party's counsel contribute any money to either amicus, and in particular none that was intended or used to fund preparing or submitting the brief. Rather, only *amica* FAMM and its counsel (and no other person or entity) contributed any money that was used or intended to be used to fund preparing or submitting this brief.

ARGUMENT FOR AMICI CURIAE

The nature and duration of a federal criminal sentence are determined through a complex interaction of all three branches of government. Congress defines offenses and their attendant potential punishments, subject only to constitutional limitations. *United States v. Evans*, 333 U.S. 483 (1948); *United States v. Britton*, 108 U.S. 199, 206 (1883); *United States v. Hudson & Goodwin*, 7 Cranch (11 U.S.) 32 (1812). An Article III judge presides over a trial or guilty plea proceeding that determines guilt; the verdict or finding of guilt in turn delimits the available punishments for that defendant. *Alleyne v. United States*, 570 U.S. 99 (2013). A judge then exercises discretion, within defined statutory boundaries, to impose the sentence. *Booker v. United States*, 543 U.S. 220 (2005). When a sentence of imprisonment is part of the judgment, the Bureau of Prisons ("BOP"), an Executive Branch agency in the Department of Justice, executes that judgment, including by calculating the date when the sentence of imprisonment ends. 18 U.S.C. §§ 3585, 3624. The circumstances under which – and the extent to which – a sentence, once imposed, may be modified, are established either by statute or by the Federal Rules of Criminal, Appellate and 2255 Procedure. Any role BOP is to play in modifying a sentence must be set forth in a statute, and may not be exceeded.

This case involves a part of the 1984 Sentencing Reform Act, 18 U.S.C. § 3582(c)(1)(A)(i), which governs reductions of sentence for "extraordinary and

compelling reasons." As explained in detail in this brief for *amici curiae*, under that statute the judge can only act when a motion for such relief is filed by the Director of BOP. When acting upon the motion, the court is to determine whether release is "warranted" by the reasons identified by BOP in its motion, after considering, in the light of current circumstances, the many criteria for just sentencing articulated in 18 U.S.C. § 3553(a) and guidance provided by the Sentencing Commission in a Policy Statement. The BOP's interpretation and implementation of this statute is wrong as a matter of law, arrogates authority to itself that the statute assigns to the Commission and the judge, and thus abuses its limited position as gatekeeper.

In this case – and in many others like it of which the undersigned Amici are aware – the BOP exercised power that the governing statute assigns to the Judiciary. It thereby deprived the appellant of liberty without due process of law and violated his right to fair consideration under the governing statute. This Court should reverse the order of the court below and hold that the writ of habeas corpus under 28 U.S.C. § 2241 is available to remedy this grave and potentially tragic violation of law.

A. The Governing Statute, Properly Construed, Does Not Authorize BOP to Refuse to File a Sentence Reduction Motion for Reasons that Congress Expressly Assigned to a Court for Consideration.

Prior to the Sentencing Reform Act of 1984 going into effect in November 1987, a federal criminal sentence, once imposed, could be reconsid-

ered and reduced in the sentencing court's unlimited discretion, at any time within 120 days of the sentence being imposed, or (if the judgment was appealed) within 120 days after the conviction became final (potentially several years later). Fed.R.Crim.P. 35(b) (pre-1987 version). Most sentences were parolable, with parole eligibility arising, in the majority of cases, after service of one third of the full term. 18 U.S.C. § 4205(a) (1982 ed., repealed). The decision on parole was made by an independent executive agency, the United States Parole Commission.

Most important for present purposes, the Bureau of Prisons was authorized, in cases subject to pre-1987 law, to move the sentencing judge to reduce the "minimum term," thereby advancing the potential release date for a prisoner who was not yet eligible for parole. *Id.* § 4205(g) (1982 ed., repealed).[2] Actual release would then be up to the Parole Commission. Section 4205(g) contained no substantive criteria to guide BOP's decision of when to file, and for whom, leaving this in the sole discretion of BOP. Similarly, the statute afforded no substantive guidance to the judge receiving such a motion. BOP's regulations authorized motions to advance parole eligibility in "particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing ... for example, if there is an extraordinary

[2] This provision read: "At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required."

change in an inmate's personal or family situation or if an inmate becomes severely ill." 28 C.F.R. § 572.40(a).

The current sentencing system, as revamped in 1984, is very different. One of the principal features of the Sentencing Reform Act was "truth in sentencing." See *Mistretta v. United States*, 488 U.S. 361, 367 (1989). Congress abolished parole for prisoners sentenced after November 1, 1987. Henceforth, prison sentences would be determinate, subject to a lesser rate of reduction for good conduct than had formerly applied. The sentence could be modified only by the court and only in a scant handful of stated circumstances.

The sentence modification function previously served by § 4205(g) was replaced by 18 U.S.C. § 3582(c)(1)(A). That statute articulates a substantive standard on which an otherwise-final sentence may be reduced ("extraordinary and compelling reasons") and assigns particular responsibilities for assessing eligibility to three official actors: the Sentencing Commission, the BOP, and the sentencing court. Under that statutory scheme, the Commission is directed to establish policy defining when a prisoner's circumstances should be deemed to present an "extraordinary and compelling reason" potentially justifying reduction of the sentence; BOP is authorized to determine when someone meets one or more of the Commission-established criteria and to bring that case to the attention of the sentencing court by motion; and the sentencing court is then authorized to grant the motion after considering certain factors.

Section 3582(c) states that a federal sentencing court "may not modify a term of imprisonment once it has been imposed," except as provided in that subsection. One of the few authorized exceptions is found in the subsection at issue here. That clause provides:

> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction; ….
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; * * *

18 U.S.C. § 3582(c)(1)(A)(i).[3] The statute clearly states that it is the judge, not BOP, that is to determine, as a matter of fact ("it finds") whether (a) "extraordinary and compelling reasons" exist in a particular case that "warrant" a sentence reduction, and (b) that such reduction is consistent with guidance to be issued by the Sentencing Commission. In each individual case, in making this determination the court must first reconsider the § 3553(a) factors, previously

[3] The other allowable sentence reduction provisions apply to a defendant sentenced to life as a "three strikes" offender who has served 30 years, is at least 70 years old, and BOP determines is "not a danger" to others, *id.*(c)(1)(A)(ii); who has rendered valuable assistance to the government, whose sentence has been reversed and remanded on appeal, or has been vacated under § 2255, *id.*(c)(1)(B); or who is the beneficiary of a retroactive Guidelines reduction by the Sentencing Commission, *id.*(c)(2).

examined at the time of sentencing, as they may apply in the present circumstances.

The role assigned by § 3582(c)(1)(A) to the Sentencing Commission is clarified in another part of the Sentencing Reform Act, 28 U.S.C. § 994(a), which directs the Commission to "promulgate and distribute to all courts of the United States ... (2) general policy statements regarding ... any ... aspect of sentencing or sentence implementation ..., including the appropriate use of ... (C) the sentence modification provisions set forth in section[] ... 3582(c) of title 18 ...." The Act elaborates on this duty by providing more specifically that the Commission "shall" issue a "policy statement" describing:

> what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

Section 3582(c)(1)(A) does not expressly state the basis upon which the BOP Director is to decide whether to file a motion authorizing sentence reduction. Read as a whole, however, the statute is best understood as directing BOP to determine only whether "extraordinary and compelling reasons" may exist in a particular case, based on the criteria and categories defined by the Commission in its policy statement issued under § 994(t). The sentencing court is then to decide (guided by § 3553(a) and the Commission's policy statement)

whether the case at hand does present "extraordinary and compelling" reasons and, if so, whether the circumstances "warrant" a sentence reduction.

This reading comports with the legislative history, found in the 1983 Senate Judiciary Committee Report on the Sentencing Reform Act. The Senate Report refers to § 3582(c) as providing "safety valves" for the otherwise more determinate sentencing system created by the Act. It describes subsection (c)(1)(A) as applying in "the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner." S.Rep. 98-225, 98th Cong., 1st Sess., at 121 (Sept. 14, 1983).

Making clear that offense severity is not to be a disqualifying factor, the Report states that this provision applies "regardless of the length of sentence." *Id*. The "value of the forms of 'safety valves' contained in" the bill, the Committee explained, was that "they assure the availability" of relief in appropriate cases while "keep[ing] the sentencing power in the judiciary where it belongs" and "permit[ting] later review of sentences in particularly compelling situations." *Id*.

In 2007, twenty years after the Sentencing Reform Act went into effect, the Sentencing Commission finally issued a policy statement on compassionate release, as required by § 3582(c)(1)(A).[4] Thus, by the time appellant Avery's

[4] The Commission issued an initial version of USSG § 1B1.13 (p.s.) effective November 1, 2006. *See* USSG appx. C, amend. 683. That enactment did not define "extraordinary and compelling circumstances" or provide examples, as required by

case came up for consideration by BOP, the Commission, as directed by statute, had authoritatively defined "extraordinary and compelling reasons" in USSG § 1B1.13 (p.s.). As applicable to appellant Avery's case, the Commission's current policy statement provides that a reduction would be "consistent" with the Commission's views (as required by the statute) if any of several types of circumstance exist, *see* USSG § 1B1.13, Appl. Note 1(A)-(C) (2016 rev.).[5] Among the Commission-defined categories potentially warranting sentence modification is "terminal illness," *id.*(A)(i),[6] as in appellant Avery's case.

As the facts and history of the present case show, however, BOP, relying on its internal Program Statement 5050.49 (Aug. 12, 2013),[7] is improperly

---

the statute. Instead (expressly as a "first step" to be further developed), it deferred entirely to BOP. *Id.*, appl. note 1(A). That initial version was replaced a year later with a list of four criteria similar to those which exist today, but without elaboration or further guidance. USSG appx. C, amend. 698 (Nov. 1, 2007). For better or worse, during the first two decades of the statute's existence, the BOP was thus left to define "extraordinary and compelling circumstances" for itself, without the expert policy guidance that Congress intended the Commission to provide. The validity and reviewability of BOP action on requests for sentence reduction during the period from 1987 to 2007 are not at issue here. Because conformity with the Policy Statement is a critical part of the legality of any action under § 3582(c)(1)(A), however, case law arising from prisoner requests for compassionate release made prior to November 2007, when there was no such Policy Statement, is entirely inapt.

[5] The Commission also invites BOP to present cases to the courts for other reasons it may regard as extraordinary and compelling. *Id.*, Appl. Note 1(D).

[6] The "terminal illness" criterion, *inter alia*, was clarified and broadened in the most recent amendment to the Commission's policy statement. *See* USSG, appx. C, amend. 799 (Nov. 1, 2016).

[7] Available at https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf. In two years since the promulgation of the current § 1B1.13 policy statement, BOP has failed to amend its own 2013 Program Statement on the subject, to which it

attempting to exercise authority it does not possess, when it refuses to file a motion for reasons that the statute clearly assigns for decision to a federal judge. BOP determined that appellant Avery is terminally ill, a category of "extraordinary and compelling circumstances" recognized by the Sentencing Commission. Nevertheless, it declined to bring a motion to the sentencing court because of Mr. Avery's criminal history and conduct, concluding that "his release at this time would minimize the severity of his offense and pose a danger to the community." JA21. But consideration of factors relating to public safety is committed by statute not to BOP but rather to the sentencing court, which assesses whether a prisoner should receive a reduction in sentence by consulting the Commission's policy statement and reconsidering the factors set out in § 3553(a).[8]

The district court in this case engaged in no independent analysis of the applicable statutory language, but merely cited non-precedential opinions that do not grapple with the full structure, language, history and meaning of the

---

continues rigidly to adhere. This is so even though (as explained at length in appellant's brief, with which your Amici agree) that Program Statement – which is not even a formal regulation appearing as part of 28 C.F.R. § 571.60 *et seq*. – has no legal force and is inconsistent with the statute and congressionally-mandated Sentencing Commission guidance

[8] Notably, the other provision in § 3582(c)(1)(A) – governing modification of life sentences imposed under 18 U.S.C. § 3559(c) ("three strikes") – specifically confers authority on BOP to consider whether the defendant is "a danger to the safety of any other person or the community." *See* § 3582(c)(1)(A)(ii). Tellingly, the provision at issue in the present case lacks that particular directive.

governing provision. JA 53–57.[9] All of the cited opinions, moreover, arose prior to the promulgation of the current and pertinent version of the Sentencing Commission's policy statement, and all but one were litigated *pro se*. The failure of the court below to apprehend the issue correctly is most dramatically illustrated by its clearly erroneous explication of section 3582(c) as "provid[ing] *the BOP* discretion *to reduce a term of imprisonment* if 'extra-ordinary and compelling circumstances warrant such a reduction.'" JA 58 (emphasis added). The clear language of the statute shows unambiguously that the BOP has no legal power whatsoever to "reduce a term of imprisonment," and that this discretionary authority is conferred on the sentencing court.

Section 3582(c)(1)(A) does not state that the court should base its decision "on the recommendation" of BOP, but rather is authorized to act "upon [the BOP Director's] motion." Unlike a sentence reduction motion premised on cooperation (*see* 18 U.S.C. § 3553(e); Fed.R.Crim.P. 35(b)), the court's decision whether to grant the motion does not depend on finding facts that are within the peculiar purview or expertise of the government or of prison officials.[10] Interpreting the statute as conferring any more authority on BOP

[9] The non-precedential *per curiam* of a panel this Court that it cited (adopting as its opinion a non-published memorandum of the Eastern District of Virginia, dealt with a different sentence-modification provision entirely.

[10] For the same reasons, although the issue is not necessarily presented here, a U.S. Attorney's Office could not lawfully decline to file a motion under § 3582(c)-(1)(A) that was recommended to it by BOP, or advise BOP against recommending a filing, if in good faith government attorneys perceive that "extraordinary and compelling reasons" as defined by the Sentencing Commission in fact exist in the

than an exercise of ministerial judgment when it acts as gatekeeper under § 3582(c)(1)(A) (after finding clear facts, such as the prisoner's age, the percentage of the sentence that has been served, or whether an illness has been labeled "terminal" by a doctor) would be inconsistent with all other provisions of the Sentencing Reform Act that address BOP's role in the sentencing process. The Act as a whole (in keeping with the traditional office of penal authorities, as well as with our general understanding of the Article III "judicial power" as it applies to sentencing) does not invite prison managers to exercise discretionary and highly personal judgments about when the men and women committed to their custody should be released.

It follows that the Commission was correct, in explaining its 2016 amendment of the Policy Statement, "to encourage the [BOP] Director … to exercise his or her authority to file a motion" under this provision whenever its stated criteria are satisfied. The court, not the BOP, "is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted …." USSG appx. C, amend. 799 ("Reason for Amendment"), at 1389 (2016 rev.), *explaining* § 1B1.13, Appl. Note 4.

This Court should hold that this advisory interpretation of § 3582(c) by the Commission is legally correct, and indeed is compelled by the statutory language and structure. It follows that the BOP action challenged by appellant

---

case. The USAO could, however, properly express in the motion its view as to whether relief was "warranted," including addressing the question whether a danger to other persons or to the community exists. *See* USSG § 1B1.13(2) (p.s.).

Avery – refusing to file a motion that would authorize his sentencing judge to reduce his sentence on account of his terminal illness – was contrary to the governing statute. The district court erred in ruling otherwise, and in refusing to grant him prompt relief on that basis.

B. BOP Has Routinely Refused to Recommend the Filing of Sentence Reduction Motions for Plainly Qualified Candidates, With Results That Are Not Only Unlawful But Also Tragic.

Amici FAMM and Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC") hear routinely from federal prisoners and their loved ones about efforts to secure compassionate release. Their stories of lengthy delays and adverse decisions by BOP are often compelling. Most disturbing, however, are the accounts of adverse decisions that mirror the denial in appellant Avery's case: BOP candidly acknowledges that the prisoner meets one or more of the criteria outlined in BOP Program Statement 5050.49 (which correspond generally but not entirely to USSG § 1B1.13 (p.s.) and is not published as a formal regulation), but the petition to file a motion in court is nonetheless rejected for other, non-statutory reasons. In hundreds of cases over the years, family members have struggled to understand how a loved one who can barely move is considered a risk to public safety or how the release of an elderly prisoner who has served a significant amount of her sentence will minimize the seriousness of her crime, and why a prison official rather than a federal judge gets the final word on that question.

Amici present a few of their stories here to illustrate that appellant Avery's experience is not unique. Rather, it is illustrative of a pervasive problem. This amicus brief is being filed to urge this court to issue a reasoned and precedential opinion putting an end to BOP's longstanding and unlawful arrogation of judicial discretion, particularly where the impact of those decisions is so cruel and inhumane.

Gregory Schultz was convicted of multiple counts of securities and mail fraud and money laundering. He was sentenced on April 4, 2006, to 262 months in prison and ordered to pay restitution to his victims. Mr. Shultz was 69 years old when he was recommended more than a decade later for compassionate release by the warden at Butner Federal Medical Center. According to the Bureau of Prisons, he suffered from numerous medical conditions. They included multiple sclerosis, blindness in one eye, a neurocognitive disorder that had altered his personality, a neurogenic bowel and bladder, chronic kidney disease, and hypertension. Peripheral vascular disease had led to the amputation of his right leg above the knee, so that Mr. Schultz had to rely on a wheelchair. He could use a walker, but only with assistance. He could feed himself, but do little else. He could not bathe, dress, or attend to personal hygiene without help.

In February 2018, officials at BOP headquarters found that Mr. Schultz met the agency's criteria for compassionate release due to his debilitated medical condition. BOP's general counsel nonetheless denied a reduction in sentence, asserting that releasing Mr. Schultz early would "minimize the

seriousness of his offense."[11] In support of that assessment, the general counsel explained that Mr. Schultz had lied, accused federal prosecutors of wrongdoing, testified falsely, obstructed the criminal proceedings, and defrauded a number of victims of approximately $17 million.

Mr. Shultz, who had not been sentenced to life imprisonment, died in BOP custody on July 18, 2018, of prostate cancer. He was 69 years old and had served more than ten years for his nonviolent offenses. His family found the denial among his personal belongings provided to them following his death.

Robert Gutierrez was convicted in 2006 of possession with intent to distribute methamphetamine. His sentence was enhanced to 360 months because he was deemed a career offender due to prior felony drug convictions. President Barack Obama commuted Mr. Gutierrez's sentence on October 27, 2016, reducing it to 210 months. His current release date is March 3, 2020.[12]

Mr. Gutierrez is 78 years old. He has no history of violence, no infractions in prison, and a release plan that includes living with his sister in her home and supporting himself with social security and Medicare.

On January 28, 2018, Mr. Gutierrez applied for compassionate release based on his age and the fact that he had as of that day served 75 percent of his sentence. *See* USSG § 1B1.13, appl. note 1(B) ("Age of the Defendant"). More

[11] Memorandum from Ken Hyle to J.C. Holland at 1-2 (Feb. 28, 2018) (on file at FAMM). Additional documents relating to Mr. Schultz are on file at FAMM.

[12] Documents relating to Mr. Gutierrez's conviction, commutation, and compassionate release application are on file at FAMM.

than seven months later, the BOP's general counsel denied his application.[13] The denial acknowledged that Mr. Gutierrez did meet the criteria for compassionate release. The general counsel explained, however, that "[a]s the President has already reduced his sentence, an additional reduction for a non-medical reason is unwarranted. Accordingly, his RIS request is denied."

Nothing in the Sentencing Commission guidance, or even, for that matter, in the BOP's own dubious criteria, exempts individuals who receive commutation from eligibility for compassionate release.

Connie Farris is serving a sentence of 144 months imposed in April 2011 for multiple counts of mail fraud. The sentence was based on the amount of loss, number of victims, and her role in the offense. It was Ms. Farris's first offense.

In October 2016, the warden at FCI Dublin recommended Ms. Farris for compassionate release so that she could care for her husband, whose muscular dystrophy has rendered him incapacitated and who was left without any family to assist him.[14] The BOP considers a prisoner eligible for compassionate release in the event his or her spouse becomes completely disabled and the prisoner is the only available caregiver. Program Statement 5050.49, ¶¶ 5–6, at 5–9 (2013); *see also* USSG § 1B1.13, appl. note 1(C)(ii) ("Family Circumstances").

[13] Memorandum from Ken Hyle to C.R. Goetz (Aug. 20, 2018) (on file at FAMM).

[14] Memorandum from Charles C. Iwuagwu to Connie Farris (Oct. 28, 2016) (on file with FAMM).

The BOP general counsel sought opinions from the agency's medical and correctional programs directors. The medical director found that Mr. Farris, the inmate's spouse, met the BOP's definition of incapacitation.[15] The correctional programs director recommended Ms. Farris' release, explaining that Ms. Farris and her husband had been married for 49 years and had no children, that she had no criminal history prior to her offense, and had maintained a perfect record while incarcerated.[16]

Six months later, the general counsel rejected the recommendations. The denial affirmed that Ms. Farris and her husband met the established criteria, but denied release based on the nature and circumstances surrounding her offense. BOP found that Ms. Farris had "defrauded hundreds of investors of over $32 million over three years"[17] and concluded that "[r]elease at this time would minimize the severity of Mrs. Farris's offense."[18]

Some refusals to file a motion in court that purport to find the prisoner does not meet BOP medical criteria strain credulity in light of the documented medical conditions, extent of disability, and suffering endured by the prisoner. Such is the case with "**M.C**." Convicted of wire fraud, health care fraud, and

[15] Memorandum from Ken Hyle to Charleston C. Iwuagwu (July 14, 2017) (Ken Hyle memorandum) (on file with FAMM).

[16] Memorandum from Angela P. Dunbar to Kathleen M. Kenney (Jan. 17, 2017) (on file with FAMM).

[17] The general counsel misstates the sentencing court's loss finding, which was $1.9 million, according to official records in the possession of FAMM.

[18] Ken Hyle memorandum.

conspiracy to obstruct justice, this was M.C.'s first and only offense. She has served more than 90 months (7½ years) of 135-month (11-year, 3-month) sentence, with a release date of March 2020. M.C. suffers from sickle cell anemia, a terminal condition. She is unable to walk and spends more than 90 percent of her waking hours in her bed or in a wheelchair. The only activity she can perform independently is reading books in bed, and only for brief periods. She is often forced to skip meals because she cannot leave her bed and relies on others to bring her food.[19]

Notwithstanding her extraordinary limitations and terminal illness, BOP has repeatedly denied M.C.'s requests for approval of a motion for reduction in sentence. Despite M.C.'s submission of nine detailed affidavits from family and other prisoners describing her limitations, the Warden most recently denied her request in 2018, noting (contrary to evidence), "Although you have a history of sickle cell disease and anemia, your medical issues are stable. You are capable of self-care and you can independently perform your activities of daily living."

These four cases are emblematic of the many on file in the offices of *amici*. Only an authoritative court decision properly construing 18 U.S.C. § 3582(c)(1)(A)(i) and affirming the habeas corpus power of federal courts to require that BOP act in accordance with law can end this humanitarian crisis

[19] The facts of M.C.'s case, as presented here, are taken from official documents on file with WLC.

which has persisted for 30 years in defiance of a Congressional mandate for reform.[20]

C. District Courts Have Jurisdiction and Authority to Require BOP to Comply With the Statutory Scheme and File Sentence Reduction Motions for Qualified Candidates, So That Sentencing Judges Can Decide Whether, When and to What Extent a Sentence Should Be Reduced for "Extraordinary and Compelling Reasons."

The district court dismissed appellant Avery's petition for habeas corpus under 28 U.S.C. § 2241 on the basis that § 3582(c) confers unreviewable discretion on BOP to file a motion with the district court, or not. DDE 13, at 4–5. Yet nothing in the statute suggests a congressional intent to divest the district court of its broad, historic habeas corpus jurisdiction. *Cf. Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) (IIRIRA of 1996 analyzed and shown not to divest § 2241 jurisdiction); *Felker v. Turpin*, 518 U.S. 651, 665 (1996) (AEDPA provision stripping certiorari jurisdiction does not abrogate Supreme Court's power to issue writ under § 2241). The federal habeas corpus statute authorizes any federal court to hear the complaint of a federal prisoner who alleges he or she is "in custody in violation of the Constitution *or laws* or treaties of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). This Court has long recognized that a federal district court,

[20] *See* Human Rights Watch & Families Against Mandatory Minimums, "The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons," at 16-27, 34-39 (Nov. 2012), available at https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf ; Mary Price, *A Case for Compassion*, 21 Fed.Sent.Rptr. 170 (2009).

sitting in the location where the petitioner is confined, has jurisdiction under this clause to review actions of BOP affecting the question of when the prisoner will be released and the right to procedural due process. See, *e.g.*, *Timms v. Johns*, 627 F.3d 525, 530–531 (4th Cir. 2010); *Garcia v. Neagle, Warden*, 660 F.2d 983, 987–88 (4th Cir. 1982); *McNair v. McCune, Warden*, 527 F.2d 874 (4th Cir. 1975) (per curiam).

The district court's casual conclusion that a BOP decision at the threshold stage under § 3582(c) is not subject to judicial review under § 2241 when challenged, not on the merits, but as procedurally or substantively out of compliance with the governing statute, is contrary to law. It is therefore due to be reversed.

Moreover, although not pled, the district court had another basis to exercise jurisdiction in this matter: an action in the nature of mandamus under 28 U.S.C. § 1361 to compel a federal agency or official to perform a nondiscretionary duty, that is, to exercise statutory discretion under lawful criteria only. See *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (recognizing § 1361 jurisdiction over BOP to review conditions of federal pretrial confinement).

The district court did not lack jurisdiction or other authority to act in this case. Because BOP acted in violation of the governing statute, appellant Avery was entitled to judicial relief under 28 U.S.C. §§ 1361 and 2241(c)(3) releasing him from unlawful custody (or granting other appropriate relief under 28 U.S.C.

§ 2243(¶8)) unless BOP promptly agrees to file a compassionate release motion in his case.

CONCLUSION

For the foregoing reasons, complementing those advanced by the appellant, amici FAMM and Washington Lawyers' Committee for Civil Rights and Urban Affairs urge this Court to issue a precedential opinion instructing the Bureau of Prisons to comply with 18 U.S.C. § 3582(c)(1)(A) and file motions for sentence reduction whenever it finds that the statutory criteria, as elaborated by the Sentencing Commission in its Policy Statement, are facially satisfied, so that a just and humane decision can be made in each individual case by the sentencing court, as intended by Congress.

Respectfully submitted,

Dated: September 21, 2018

s/Peter Goldberger
PETER GOLDBERGER
Chair, FAMM Amicus Cmte.
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
fax: (610) 649-8362
e: peter.goldberger@verizon.net

Attorney for *Amici Curiae*

Of Counsel:
PHILIP FORNACI
EMILY GUNSTON
JONATHAN M. SMITH
WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, NW
Washington, DC 20036
(202) 319-1000

(Additional counsel for amica FAMM on following page)

MARY PRICE
General Counsel, FAMM
1100 H Street, NW, Suite 1000
Washington, DC 20005
(202) 822-6700

MARGARET COLGATE LOVE
Law Office of Margaret Love
15 Seventh Street, N.E.
Washington, DC 20002
(202) 547-0453

Co-Counsel for Amica FAMM

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

This brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed.R.App.P. 29(a)(4)(G) and 32(g), I certify, based on the word-counting function of my word processing system (Word 2003), that this brief complies with the type-volume limitations of Rule 29(a)(5), in that the brief contains 5790 words, including footnotes but excluding portions of the brief that are not to be counted, which is less than half the allowable length of a party's principal brief.

s/Peter Goldberger
PETER GOLDBERGER

CERTIFICATE OF SERVICE

I certify that on September 21, 2018, I caused a copy of the foregoing Brief of Amici Curiae to be served on (a) counsel for the government (appellee), Michael Lockridge, Esq., Senior Attorney, U.S. Bureau of Prisons (FCC Butner), and Special Assistant U.S. Attorney, Eastern District of North Carolina, and (b) counsel for the appellant, Assistant Federal Public Defenders Eric J. Brignac (E.D.N.C.), Elizabeth G. Daily (D.Ore.) and Steven R. Sady (D.Ore), all by automated CM/ECF delivery upon the electronic filing of the document.

s/Peter Goldberger
PETER GOLDBERGER