No. _____

IN THE
SUPREME COURT FOR THE UNITED STATES

JOHN G. TOMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION OF DEFENDANT PETITIONER JOHN G. TOMES

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner John G. Tomes, respectfully asks leave to file his petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Mr. Tomes encloses his affidavit of indigence in support of this motion.

Respectfully submitted,

/s/ Matthew M. Robinson
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I. QUESTION PRESENTED FOR REVIEW

A. Whether "Extraordinary and Compelling Reasons" to Reduce a Defendant's Sentence under 18 U.S.C. § 3582(c)(1)(A)(i) may be based on any Factor a Court Finds Relevant, Including Unjust Sentencing Disparities in Punishment and an Exceedingly Long Sentences that No Longer Fulfills Legitimate Sentencing Purpose under 18 U.S.C. § 3553(a)(2).

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The United States District Court for the Western District of Kentucky entered final judgment of conviction on June 7, 2018 and a sentence of 240 months' imprisonment. See, Judgment, United States v. Tomes, 3:16-cr-00113-2 (WD KY 6/11/18), attached. Tomes filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), which the district court denied on August 31, 2020. See Order, United States v. Tomes, 3:16-cr-00113-2 (WD KY 8/31/20), attached. The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision in a published opinion dated March 9, 2021. See Opinion and Order United States v. Tomes, No. 20-6056 (6th Cir. 3/9/21), reported at 990 F.3d 500 (6th Cir. 2021), attached. The Sixth Circuit subsequently denied petition for rehearing en banc in an unreported order dated April 8, 2021. See, Order, United States v. Tomes, No. 20-6056 (6th Cir. 2021), attached.

V. STATEMENT FOR THE BASIS OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and 18 U.S.C. § 3582(c)(2), as Petitioner was charged with offenses against the United States, including: conspiracy to distribute controlled substances, in violation of 21 U.S.C. §§ 841(a)(l) and 846; possession with intent to distribute in violation of 21 U.S.C. §§ 841(a)(l), (b)(l)(A)(viii); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A); felon in possession of a firearm, in violation of 18 U.S.C. § 922(g); conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956; and money laundering, in violation of 18 U.S.C. § 1957. District Court Document ("Doc.") 42, Superseding Indictment; PageID#120-134.

After conviction, the district court had jurisdiction under 18 U.S.C. § 3582(c)(1)(A) when Petitioner filed his motion to reduce sentence. Doc. 244, Motion to Reduce Sentence. The Sixth

Circuit Court of Appeals obtained jurisdiction under 18 U.S.C. § 3742(a), 28 U.S.C. § 1291, and Fed. R. App. P. 4(b)(1)(A)(i), when the district court issued a final order denying that motion and Petitioner timely filed a notice of appeal. See Doc. 250 Order; Doc. 252 Notice of Appeal.

This Court has jurisdiction under 28 U.S.C. § 1254(1), as the Sixth Circuit rendered an opinion affirming the decision to deny Petitioner's motion to reduce sentence on March 9, 2021. See Opinion and Order United States v. Tomes, No. 20-6056 (6th Cir. 3/9/21), reported at 990 F.3d 500 (6th Cir. 2021), attached. The Sixth Circuit subsequently denied petition for rehearing en banc in an unreported order dated April 8, 2021. Petitioner is filing this petition within 90 days from that decision. See, Order, United States v. Tomes, No. 20-6056 (6th Cir. 2021), attached.

VI. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

> (c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> * * *
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission;

18 U.S.C. § 3582(c)(1)(A)(i)

VII. STATEMENT OF THE CASE

On January 18, 2017, Petitioner was named in a 21-Count Superseding Indictment charging him with: conspiracy to distribute five hundred grams or more of methamphetamine and one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(l), (b)(1)(A) and 846 (Count 1); possession with intent to distribute five hundred grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(l), 841(b)(l)(A)(viii), and 18 U.S.C. § 2 (Count 11); possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 13); felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) and 924(a)(2) (Count 14); conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956 (Count 15); and money laundering, in violation of 18 U.S.C. §§ 1957 and 2 (Counts 16-18). Doc. 42, Superseding Indictment.

On September 19, 2017, the government filed an Information and Notice of Felony Drug Conviction, pursuant to 21 U.S.C. § 851. Doc. 114, Information and Notice; PageID#620-621. The notice had the effect of increasing the mandatory minimum penalty to a term of 20 years imprisonment for the drug offense under § 841(b)(1).

On March 2, 2018, Tomes entered a plea of guilty to Counts 1, 11, and 14-18. Doc. 169, Plea Agreement; Doc. 188 PSR. Sentencing took place on June 7, 2018 before the Honorable Thomas B. Russell. Doc. 201, Sentencing Transcript. The Court accepted the plea agreement and imposed a sentence of 240 months imprisonment in accordance with the terms of the agreement. Doc. 196 Judgment. Tomes did not appeal following sentencing.

On May 26, 2020 Tomes filed a motion to reduce sentence under 18 U.S.C. § 3582(c)(1)(A). Doc. 244 Motion. Tomes asserted that extraordinary and compelling reasons called for a modified sentence under § 3582(c)(1)(A)(i). Id. In support of his request for a reduced sentence, Mr. Tomes

pointed to an indisputable fact—the *mandatory* 20-year term of confinement he received for his crimes was no longer authorized for defendants sentenced after the First Step Act and that if he were sentenced under current law his sentence would be lower. Id. Tomes argued that an unjust disparity in punishment resulted from the fact he received an enhanced mandatory minimum penalty that is not applied to defendants convicted today of the same offense with the same criminal history at Tomes. Id. He argued that this unjust and disparity in punishment is an extraordinary and compelling reason for a reduced sentence under § 3582(c)(1)(A)(i). Tomes also argued that he had engaged in rehabilitative efforts and that a reduced or modified sentence was consistent with the goals of sentencing under 18 U.S.C. § 3553(a)(2). Id.

The district court denied Tomes' motion in a written order dated, August 31, 2020. Doc RE. Order. The court found that "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." Id. Further, the court found that the "compassionate-release motion under § 3582(c)(1)(A)(i) is not the proper legal mechanism for arguments about whether the sentencing court should have imposed—or would impose today—a shorter sentence." Id.

The district court did not question the fact Tomes would receive a lower sentence if he were sentenced under current law. Nor did the district court dispute that Mr. Tomes had engaged in rehabilitative efforts during his incarceration. Instead, the court erroneously reasoned that Mr. Tomes did not satisfy the criterion of U.S.S.G. § 1B1.13, and therefore was ineligible for a reduced sentence. In the context of making that decision, the district court reasoned that neither the unjust disparity in punishment nor the rehabilitative efforts of Petitioner could be "extraordinary or compelling reasons" to reduce his sentence under § 3582(c)(1)(A)(i).

Petitioner appealed to the Sixth Circuit Court of Appeals and raised the following arguments:

I. The District Court erred in denying Appellant's motion under 18 U.S.C. § 3582(c)(1)(A) when Appellant's medical vulnerabilities coupled with the BOP's documented inability to adequately address the COVID-19 outbreak make it likely Appellant will contract the virus and suffer irreparable harm or death; and when the law with respect to the criminal history enhancements changed so that if Appellant were sentenced today he could receive a sentence of less than 20 years.

II. The District Court erred in determining that it Could Not Consider the fact that Appellant would receive a lower sentence in determining whether extraordinary and compelling reasons existed calling for a reduced sentence under 18 U.S.C. § 3582(c)(1)(A)(i).

On appeal, Petitioner argued that the district court erred in restricting its analysis of "extraordinary and compelling reasons" to factors under U.S.S.G. § 1B1.13. Petitioner pointed to dozens of cases where courts found that a combination of an extremely long sentence and strong post-conviction rehabilitative efforts can be extraordinary and compelling reasons to reduce a defendant's sentence under § 3582(c)(1)(A)(i).

On March 9, 2021, the Sixth Circuit issued a decision affirming the district court's decision. See, United States v. Tomes, No. 20-6056 (6th Cir. 3/9/21), reported at 990 F.3d 500 (6th Cir. 2021), attached. In affirming the district court's decision, the Sixth Circuit recognized that as a result of Section 401 of the First Step Act and the new minimum mandatory penalties under § 841(b)(1), Petitioner would not be subject to a minimum mandatory 20-year sentence if he were sentenced under current law. The decision appears to recognize that defendants convicted of the exact same offense and with the exact criminal record as the Petitioner will receive a lower sentence than the sentence Petitioner received. However, because Section 401 of the First Step is not retroactively applicable, the court found that the unjust disparity in punishment apparent in Petitioner's case could never be considered an extraordinary or compelling reason for a reduced sentence under §

3582(c)(1)(A). Id. The opinion concludes, "we will not render § 401(c) useless by using § 3582(c)(1)(A) as an end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms." Opinion at 7. In affirming the district court, the Tomes opinion failed to address the circuit split created by its holding.

VIII. STATEMENT OF FACTS

According to the information contained in the PSR, the following occurred:

> During the course of the investigation, law enforcement officials learned that 5202 Marty Lane, Apt. # 102, Louisville, Kentucky was being used as a "stash house" by Derrick Perkins and John Tomes for the storage and distribution of narcotics. The investigation indicates that Perkins and Tomes worked together as partners. On August 18, 2016, a state search warrant was executed at 5202 Marty Lane, Apt. 102. *** A search of the apartment was conducted and the following items were seized: a .40 caliber Glock semi-automatic pistol ***; two square packages wrapped in black tape in a suitcase that were on the floor near the living room that contained *** 870.3 grams of methamphetamine (actual); one clear baggie containing .380 grams of heroin from a top kitchen drawer; one clear bag containing *** 0.639 grams of methamphetamine (actual) in a top kitchen drawer; a clear baggie containing *** 51.7 grams of methamphetamine (actual); a clear baggie containing *** 22.5 grams of methamphetamine (actual); a hydraulic press (Tarin 12 ton press) on the floor outside the kitchen closet; various photographs of John Tomes to include a photograph of Tomes, Baker, Perkins, and an unindicted individual together at a club; and various documents consisting of mail, an airline ticket, and banking receipts belonging to Tomes were located on a bedroom stand. Further investigation regarding the apartment revealed that neither Perkins, Tomes, or Baker resided there at the time of the search warrant. Furthermore, the apartment was leased in Baker's name and the Louisville Gas and Electric (LG&E) account was in Perkins' name.

Id ¶39; PageID#1154-1155.

> During the course of the investigation, money laundering was detected. The investigation revealed that between September 1, 2015 and September 20, 2016, Baker, Tomes, and Perkins conspired to conduct financial transactions affecting interstate commerce which involved cash proceeds from distribution of controlled substances with the intent to promote the carrying on of that unlawful activity and to conceal and disguise the nature, location, source, ownership and control of the proceeds from the unlawful activity. Among other things, records relating to lease agreements; LG&E utility accounts and payments; airline flight records; rental car

> records; credit card records; bank records; tax records; employment records; and car payment records. These items evidence Baker's agreement and participation with Tomes and Perkins to conceal and disguise the nature, source, ownership and/or control of drug proceeds in order to promote Perkins' and Tomes' drug distribution. Essentially, Baker made various payments for Tomes and Perkins and conducted financial transactions/arrangements for Tomes and Perkins (i.e. lease agreements, car rentals) with money provided by Perkins and Tomes. In addition, Baker conducted money transactions with financial institutions on Perkins' behalf. More specifically, on January 25, 2016, Baker engaged in monetary transactions with PNC Bank when she exchanged and deposited $16,461 that had been derived from the distribution of a controlled substance. On January 25, 2016, Baker engaged in monetary transactions with JP Morgan Chase Bank when she exchanged and deposited $10,220 that had been derived from the distribution of a controlled substance. On February 22, 2016, Baker engaged in monetary transactions with PNC Bank when she exchanged and deposited $11,700 that had been derived from the distribution of a controlled substance.

Id ¶40; PageID#1155.

IX. Argument Addressing Reasons for Allowing the Writ

Under Supreme Court Rule 10, the Court will review a United States Court of Appeals decision for compelling reasons. A compelling reason exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.Ct.R. 10(a).

In affirming the decision to deny Petitioner' motion to reduce sentence under 18 U.S.C. § 3582(c)(1)(A), the Sixth Circuit found that an unjust disparity in punishment resulting from a non-retroactive change in law can never be an "extraordinary and compelling reason" for a court to reduce a sentence under § 3882(c)(1)(A)(i). The opinion creates a conflict with the Second, Fourth,

and Tenth Circuits, all of which have specifically found that a defendant's lengthy sentence which is no longer authorized after the enactment of the First Step Act combined with a defendant's rehabilitative efforts can be extraordinary and compelling reasons to reduce a defendant's sentence. See, United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); United States v. Brooker, 976 F.3d 228, 237 (2nd Cir. 2020); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021). The Sixth Circuit's opinion also conflicts with the Fifth, Seventh and Ninth Circuits, all of which have found "[t]here is as of now no 'applicable' policy statement governing compassionate-release motions filed by defendants under the recently amended § 3582(c)(1)(A), and as a result, district courts are empowered . . . to consider any extraordinary and compelling reason for release that a defendant might raise." United States v. Aruda,993 F.3d 797, 801 (9th Cir. April 8, 2021)(quoting McCoy and Brooker); United States v. Gunn, 980 F.3d 1178, 180-181 (7th Cir. 2020); United States v. Shkambi, 993 F.3d 388 (5th Cir. 2021).

Because six different United States court of appeals have entered decisions in conflict with the decision of the Sixth Circuit in Tomes on the same important matter, certiorari should be granted under S.Ct.R.10(a).

A. "Extraordinary and Compelling Reasons" to Reduce a Defendant's Sentence under 18 U.S.C. § 3582(c)(1)(a)(i) may be based on any Factor a Court Finds Relevant, Including Unjust Sentencing Disparities in Punishment and an Exceedingly Long Sentences that No Longer Fulfills Legitimate Sentencing Purpose under 18 U.S.C. § 3553(a)(2).

"Federal courts are forbidden, as a general matter, to modify a term of imprisonment once it has been imposed, but th[at] rule of finality is subject to a few narrow exceptions." Freeman v. United States, 564 U.S. 522, 526, 131 S. Ct. 2685, 180 L. Ed. 2d 519 (2011) (internal quotation marks and citation omitted). One such exception is contained in 18 U.S.C. § 3582(c)(1). Congress

first enacted 18 U.S.C. § 3582(c)(1) as part of the Comprehensive Crime Control Act of 1984 to serve as a "safety valve" for judges to assess whether a sentence reduction was warranted by factors that previously would have been addressed through the abolished parole system. S. Rep. No. 98-225, at 121 (1983). "This legislative history demonstrates that Congress, in passing the Comprehensive Crime Control Act of 1984, intended to give district courts an equitable power to employ on an individualized basis to correct sentences when 'extraordinary and compelling reasons' indicate that the sentence initially imposed on an individual no longer served legislative objectives." United States v. Millan, No. 91-CR-685 (LAP), 2020 WL 1674058, at * 5 (S.D.N.Y. 2020).

The statute empowers courts to reduce a defendant's sentence whenever "extraordinary and compelling reasons warrant such a reduction." § 3582(c)(1)(A)(i). Congress delegated to the U.S. Sentencing Commission the responsibility of defining what were "extraordinary and compelling reasons." See 28 U.S.C. § 994(t) ("The Commission…shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."). However, it was not until 2007, more than two decades after the statute was enacted, that the Commission responded. It issued a guideline stating that "extraordinary and compelling reasons" include medical conditions, age, family circumstances, and "other reasons." U.S.S.G. § 1B1.13, app. n.1(A)-(D).

As originally enacted, the statute left sole discretion for filing compassionate release motions with the Director of the BOP, who adopted a program statement governing compassionate release that in many ways narrowed the criteria established by the Commission. See BOP Program Statement 5050.49. During the span of more than three decades, the BOP rarely filed motions on behalf of inmates who met the eligibility criteria. The Office of the Inspector General for the

Department of Justice concluded in 2013 that "[t]he BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."[1] Recognizing this injustice, Congress eventually acted with the passage of the First Step Act.

The title of Section 603(b) of the First Step Act—"Increasing the Use and Transparency of Compassionate Release"—leaves no doubt as to Congress' intent in modifying 18 U.S.C. § 3582(c)(1)(A). Through the First Step Act, enacted December 21, 2018, Congress sought to resuscitate compassionate release by, inter alia, allowing defendants to directly petition courts for relief, rather than leaving that power solely in the hands of the BOP. Under the amended statute, a court may conduct such a review upon motion of the defendant. United States v. Mauma, 993 F.3d 821, 830 (10th Cir. 2021).

The Passage of the First Step Act amended § 3582(c)(1)(A) so that inmates for the first time could file a motion for reduced sentence. Id. Before that time only the Bureau of Prisons could determine what constitutes "extraordinary and compelling reasons" for a reduced sentence under § 3582(c)(1)(A)(i). In the time since the passage of the First Step Act, courts throughout the country have determined that there is no constraint on a court's independent assessment of whether extraordinary and compelling reasons warrant a sentence reduction under § 3582(c)(1)(A) in a given case. See United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020) ("The fact that Congress chose not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for

[1]Dep't of Justice, Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program (April 2013), at 11, available at https://oig.justice.gov/reports/2013/e1306.pdf;

compassionate release under § 3582(c)(1)(A)(i)"); United States v. Brooker, 976 F.3d 228, 237 (2nd Cir. 2020)("[T]he First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D), nor anything else in the now-outdated version of § 1B1.13, limits the district court's discretion."); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021)(affirming district courts decision to reduce sentence below mandatory minimum when such a sentence is no longer authorized for defendants being sentenced under current law); United States v. Gunn, 980 F.3d 1178, 180-181 (7th Cir. 2020); United States v. Wrice, 834 Fed.Appx. 267, 268 (7th Cir. 2021)(district court erred when it believed court was "prohibited it from considering whether a favorable but non-retroactive statutory amendment constitutes an extraordinary and compelling reason to reduce Wrice's sentence"); United States v. Aruda,993 F.3d 797, 801 (9th Cir. April 8, 2021)(quoting McCoy and Brooker); United States v. Shkambi, 993 F.3d 388 (5th Cir. 2021)(neither the policy statement nor the commentary to it binds a district court addressing a prisoner's own motion under § 3582); United States v. Aruda, 993 F.3d 797 (9th Cir. 2021).

This consensus is consistent with lawmakers' intent that "extraordinary and compelling reasons" for a sentence reduction should not be limited to medical condition, age, and family circumstances. In particular, legislators explained how some defendants may warrant a sentence reduction (after service of some period of incarceration) based on any number of circumstances:

> The [Senate Judiciary] Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.

See S. Rep. No. 98-225, at 55-56(1983). See also, United States v. Dimasi, 220 F. Supp. 3d 173, 175 (D. Mass. 2016) (discussing the progression from the OIG report to new "encouraging" guidelines).

Although the power to reduce sentences provided for by § 3582(c)(1)(A) has most often been used to reduce the prison terms of elderly and/or terminally ill defendants, nothing in the statutory language or legislative history of 18 U.S.C. § 3582(c) indicates that Congress intended to limit its application to elderly defendants or defendants with compelling medical circumstances. Rather, if a judge finds the existence of any "extraordinary and compelling reasons" those reasons could form the legal basis for the reduction of an unusually long sentence. See, United States v. Maumau, 2020 U.S. Dist. LEXIS 28392 (D. Utah Feb. 18, 2020)(2019)("Congress indicated thirty-five years ago that it would be appropriate to provide compassionate releases when sentences are 'unusually long'"), affirmed United States v. Maumau, 993 F.3d 821 (10th Cir. 2021).

As noted by the district court in United States v. Young, 2020 U.S. Dist. LEXIS 37395 *8-9(M.D. Tenn. 2020), the Senate Committee believed that some individual cases might still warrant an eventual reduction of a sentence, a possibility that § 3582(c) was intended to address:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, *and some cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment*.

S. Rep No. 98-225, at 55-56, 1983 WL 25404 (1983).

The Sentencing Commission later identified several categories of "extraordinary and compelling reasons," including medical condition, age, family circumstances and "[o]ther reasons, for circumstances in which the Director of the BOP determines that there is an extraordinary and

compelling reason other than, or in combination with," medical condition, age and family circumstances. U.S.S.G. § 1B1.13, Application Note 1(A). However, as noted by the Seventh Circuit and others, when a defendant brings a motion for a sentence reduction under the amended § 3582(c)(1)(A), a district court can determine whether any extraordinary and compelling reasons other than those delineated in U.S.S.G. § 1B1.13 cmt. n.1(A)-(C) warrant granting relief. Gunn, supra. And, as the district court correctly recognized in Maumau, extraordinary and compelling reasons are interpreted on a case by case basis, and can include the fact a defendant has received an "exceedingly long sentence." 2020 U.S. Dist. LEXIS 28392 *14, 17 (D. Utah 2020), see also, United States v. Maumau, 993 F.3d 821 (10th Cir. 2021)(affirming district court's decision to reduce sentence below mandatory minimum when such a sentence is no longer authorized for defendants being sentenced under current law).

As demonstrated above, the clear consensus within the courts of appeals is that "extraordinary and compelling reasons" calling for a reduced sentence may be based on any factor a court finds relevant, including unjust sentencing disparities, post-offense rehabilitative efforts and an exceedingly long sentence that no longer fulfills the goals of sentencing under 18 U.S.C. § 3553(a)(2). This is true even if an unjust disparity in punishment is based on a non-retroactive change to the penalty statutes brought about by the First Step Act. See, United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); United States v. Brooker, 976 F.3d 228, 237 (2nd Cir. 2020); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021).

(1) The Sixth Circuit's Holding that Non-Retroactive Changes in the Law Demonstrating that a Sentence is Disparately Long Can Never Be an Extraordinary and Compelling Reason to Reduce a Defendant's Sentence Under 18 U.S.C. § 3582(c)(1)(a)(i) Squarely Conflicts with Second, Fourth, Seventh, and Tenth Circuit Precedent.

Petitioner argued in both the district court and the Sixth Circuit that the unjust and disparately harsh punishment he received is an extraordinary and compelling reason for a reduced sentence under § 3582(c)(1)(A)(i). In support of his claim Petitioner pointed to facts never in dispute—the 20-year minimum mandatory sentence he received is no longer authorized under First Step Act because the prior drug conviction used to increase his statutory minimum sentence does not qualify as a "serious drug felony."[2] Therefore, if he were sentenced after the Fair Sentencing Act was enacted, he would not be subject to a minimum mandatory sentence of 240 months' imprisonment and he would receive a lower sentence. This assertion has never been disputed, either in the district court or on appeal.

Accordingly, an unjust disparity in punishment exists as a result of the fact Petitioner received an enhanced mandatory minimum penalty of 20-years' imprisonment that is not applied to defendants being sentenced today who are convicted of the same offense and with the same criminal history as the Petitioner. It is this unjust and disparately harsh punishment that qualifies as an extraordinary and compelling reason to reduce Petitioner's sentence under § 3582(c)(1)(A)(i).

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[2]The First Step Act impacted the minimum penalty Tomes faced under 21 U.S.C. § 841(b)(1)(A), by changing qualifying convictions from a "felony drug offense" to a "serious drug felony" as defined by the First Step Act. Pub. L. No. 115-391, 132 Stat. 5194, § 401(a)(2)(A) & (B). A "serious drug felony" under the First Step Act and 21 U.S.C. § 802(57) covers a smaller set of crimes, offenses "described in [18 U.S.C. §] 924(e)(2) for which-- (A) the offender served a term of imprisonment of more than 12 months; and (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense." Pub. L. No. 115-391, 132 Stat. 5194, § 401(a)(1); 21 U.S.C. § 802(57).

The government characterized this claim as a collateral attack on Petitioner's sentence, and thus, not valid considerations under § 3582(c)(1)(A)(i). And the Sixth Circuit's opinion characterizes the claim as "an end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms." Opinion at 7. Because of this erroneous characterization, the Sixth Circuit decreed that disparities in punishment resulting from non-retroactive provisions of the First Step Act reducing penalty statutes can never be an extraordinary and compelling reason under § 3582(c)(1)(A)(i). Id.

As noted above, the Sixth Circuit's opinion is squarely in conflict with decisions from several courts that have held district courts have full discretion to determine whether extraordinary and compelling reasons are present. The opinion erroneously limits a district court's "full discretion" so that it can never address non-retroactive changes in the law that may produce an unjust disparity in punishment in a particular case. The decision directly conflicts with circuits that have determined that disparities caused by non-retroactive changes to penalty statutes under Section 403 and 601 of the First Step Act can be "extraordinary and compelling reasons" to reduce an inmate's sentence under § 3582(c)(1)(a)(i). See, United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020) ("The fact that Congress chose not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release under § 3582(c)(1)(A)(i)"); United States v. Brooker, 976 F.3d 228, 237 (2nd Cir. Sept. 25, 2020)("[T]he First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D), nor anything else in the now-outdated version of § 1B1.13, limits the district court's discretion."); United States v. Maumau,

993 F.3d 821 (10th Cir. 2021)(affirming district courts decision to reduce sentence below mandatory minimum when such a sentence is no longer authorized for defendants being sentenced under current law); United States v. Wrice, 834 Fed.Appx. 267, 268 (7th Cir. 2021)(district court erred when it believed court was "prohibited it from considering whether a favorable but non-retroactive statutory amendment constitutes an extraordinary and compelling reason to reduce Wrice's sentence").

Accordingly, the Sixth Circuit's decision that the reduced penalties brought about by Section 401 of the First Step Act could never be an extraordinary and compelling reason for a reduced sentence squarely is in conflict with the Second, Fourth, Seventh and Tenth Circuits. See Brooker, McCoy, Wrice, and Maumau, supra. Additionally, the opinion conflicts with dozens of district courts across the United States that have granted reduced sentences based on a combination of the change in penalties brought about by the FSA and the rehabilitative efforts of the defendant. See United States v. O'Bryan, 2020 U.S. Dist. LEXIS 29747 *2; 2020 WL 869475 (D. Kan. 2020)(finding that "the FSA's modification of the § 924(c) sentencing regime constitute an 'extraordinary and compelling reason' for a sentencing reduction" and granting reduction to time served noting, "[h]ad O'Bryan been convicted of the same firearms offenses today, he would be facing ten years imprisonment rather than twenty-five"); United States v. Urkevich, 2019 U.S. Dist. LEXIS 197408, at *8, 2019 WL 6037391 (D. Neb. Nov. 14, 2019) ("A reduction in [defendant's] sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed."); United States v. Marks, 450 F.Supp.3d 17 (WD NY. 2020)(granting reduction based on length of sentence and rehabilitation stating, "[a]lthough the First Step Act's retroactivity provisions with respect to the Fair Sentencing Act do not directly apply to Marks (since he was convicted prior to

the effective date of the Fair Sentencing Act) the First Step Act is instructive, inasmuch as it evidences Congress's intent to mitigate the harsh and sometimes unjust effects of the sentencing laws."); United States v. Maumau, 2020 U.S. Dist. LEXIS 28392, 2020 WL 806121, at *6-*7 (D. Utah Feb. 18, 2020) ("the length of sentence imposed, and the fact that Congress has subsequently reduced the sentencing guidelines that apply to the same crimes" constitute extraordinary and compelling reasons to reduce sentence); United States v. O'Bryan, 2020 U.S. Dist. LEXIS 29747, 2020 WL 869475, at *2 (D. Kansas Feb. 21, 2020)(same); United States v. Young, 458 F.Supp.3d 838 (M.D. Tenn. Mar. 4, 2020)(same); United States v. Wade-Waiver, 2020 U.S. Dist.LEXIS 69474 *5-6 (C.D.Cal. Apr. 13, 2020) (concluding that the combination of factors raised by defendant's motion, including her rehabilitation and changes to the "stacking" provisions of § 924(c), established extraordinary and compelling conditions that qualified her for sentence reduction); United States v. Schmitt, 2020 U.S. Dist. LEXIS 2832 (N.D. Iowa Jan. 8, 2020)(Defendant's sentence of 351 months' imprisonment, which was based largely on the pre-FSA approach of "stacking" § 924(c) offenses, reduced to 171 months); United States v. Decator,452 F. Supp. 3d 320, 325 (D.Md. Apr. 6, 2020) (concluding that "Decatur's continued incarceration under a sentencing scheme that has since been substantially amended is a permissible 'extraordinary and compelling' reason to consider him for compassionate release"); United States v. Chan, 2020 U.S. Dist. LEXIS 56232 (N.D.Cal. Mar. 31, 2020) (defendant's "rehabilitation efforts in combination with the amendments to Section 924(c)'s stacking provisions" provide "extraordinary and compelling reasons to reduce his sentence"); United States v. Redd, 444 F.Supp.3d 717, 723 (E.D. Va. 2020)("There is no doubt that there is a gross disparity between the sentence Mr. Redd received and the sentence he would have received after the First Step Act. That disparity is primarily the result of Congress' conclusion that sentences like Mr.

Redd's are unfair and unnecessary, in effect, a legislative rejection of the need to impose sentences under § 924(c), as originally enacted, as well as a legislative declaration of what level of punishment is adequate. These are, the Court finds, extraordinary and compelling developments that constitute extraordinary and compelling reasons that warrant a reduction to Mr. Redd's sentence of incarceration.").

In sum, the clear consensus within the courts of appeals is that "extraordinary and compelling reasons" calling for a reduced sentence may be based on any factor a court finds relevant, including unjust sentencing disparities, post-offense rehabilitative efforts and an exceedingly long sentence that no longer fulfills the goals of sentencing under 18 U.S.C. § 3553(a)(2). This is true even if an unjust disparity in punishment is based on a non-retroactive change to the penalty statutes brought about by the First Step Act. See, United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); United States v. Brooker, 976 F.3d 228, 237 (2nd Cir. 2020); United States v. Maumau, 993 F.3d 821 (10th Cir. 2021). Because the Sixth Circuit's opinion in Tomes squarely conflicts with this consensus, and because the district court denied Petitioner's motion to reduce sentence erroneously believing that non-retroactive changes in the law demonstrating that Petitioner's sentence was disparately long could never be an extraordinary and compelling reason to reduce a sentence under § 3582(c)(1)(a), this Court should grant certiorari.

X. CONCLUSION

Petitioner respectfully submits that he has demonstrated compelling reasons to grant writ of certiorari in this case. Accordingly, certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a on July 7, 2021, a true and accurate copy of the foregoing petition for writ of certiorari was electronically filed and was sent via U.S. Mail with sufficient postage affixed to Assistant U.S. Attorney, L. Jay Gilbert, United States Attorney's Office 717 W. Broadway, Louisville, KY 40202; Jay.Gilbert@usdoj.gov; and Office of the Solicitor General, Room 5614, 950 Pennsylvania Ave., NW, Washington, D.C. 20530-0001 and a PDF copy was emailed to the Office of the Solicitor General to SupremeCtBriefs@USDOJ.gov.

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