

No. 21-6010

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT D. SUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, § 403(b) (1), 132 Stat. 5221-5222, Congress amended the penalties for using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Congress specified that the amendment "shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222.

Petitioner contends (Pet. 11-14) that Congress's decision not to extend the First Step Act's amendment to Section 924(c) to offenders who have already been sentenced can constitute an

“extraordinary and compelling” reason for reducing a previously imposed final sentence under 18 U.S.C. 3582(c)(1)(A).¹ For the reasons stated in the government’s brief in opposition to the petition for a writ of certiorari in Jarvis v. United States, No. 21-568, the decision below correctly recognizes that the First Step Act’s amendment to Section 924(c) cannot serve as an “extraordinary and compelling” reason for a Section 3582(c)(1)(A) reduction to a preexisting sentence, either by itself or as an addition to other proffered factors. See Br. in Opp. at 12-16, Jarvis, supra (No. 21-568). And although courts of appeals have reached different conclusions on the issue, the practical importance of the disagreement is limited, and the Sentencing Commission could promulgate a new policy statement that deprives a decision by this Court of any practical significance. See id. at 16-22; cf. United States v. McCall, No. 21-3400, 2021 WL 5984403, at *3-*5 (6th Cir. Dec. 17, 2021) (suggesting, in case not involving First Step Act, that First Step Act circuit precedent conflicts with earlier circuit decision and is nonbinding).

¹ Other pending petitions for writs of certiorari raise similar issues. See, e.g., Gashe v. United States, No. 20-8284 (filed Apr. 19, 2021); Tomes v. United States, No. 21-5104 (filed July 7, 2021); Corona v. United States, No. 21-5671 (filed Sept. 2, 2021); Watford v. United States, No. 21-551 (filed Oct. 12, 2021); Jarvis v. United States, No. 21-568 (filed Oct. 15, 2021); Tingle v. United States, No. 21-6068 (filed Oct. 15, 2021); Williams v. United States, No. 21-767 (filed Nov. 19, 2021); Chantharath v. United States, No. 21-6397 (filed Nov. 19, 2021). We have served petitioner with a copy of the government’s brief in opposition in Jarvis.

In any event, this case would be a poor vehicle for this Court's review. Even if petitioner could demonstrate "extraordinary and compelling" reasons for a sentence reduction, he would be unable to satisfy the statutory requirement to show that "the factors set forth in [18 U.S.C.] 3553(a)," 18 U.S.C. 3582(c) (1) (A), support such a reduction. Thus, this Court's resolution of the question presented is unlikely to be outcome-determinative.

Petitioner's convictions in this case arose out of "a string of armed robberies in Madison, Wisconsin." Presentence Investigation Report (PSR) ¶ 12; see Pet. App. 2a. Petitioner was a member of a group that "robbed about 13 grocery stores, gas stations, restaurants and banks." PSR ¶ 12. "The crew brandished firearms during most robberies, holding victims at gunpoint and demanding money." Pet. App. 2a; see PSR ¶ 12. Petitioner also has a prior conviction for robbery with use of force, during which he brandished a firearm and tied up the victims with duct tape. PSR ¶ 102. Given the seriousness of petitioner's criminal history, the district court determined that petitioner would "continue[] to pose [a] danger to the community if released." Pet. App. 4a; see id. at 9a. The court could, should, and likely would rely on that same determination to find that the Section 3553(a) factors do not support relief. See 18 U.S.C. 3553(a) (2) (C) (specifying the "need for the sentence imposed * * * to protect the public from further crimes of the defendant" as a factor that a court "shall consider" in "determining the particular sentence to be imposed").

The petition for a writ of certiorari should be denied.²

Respectfully submitted.

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² The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.