

No 21-6128

CONFIDENTIAL

IN THE
SUPREME COURT OF THE
UNITED STATES

Supreme Court, U.S.
FILED

OCT 18 2021

OFFICE OF THE CLERK

TOMMY PABELLON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Mr. Tommy Pabellon
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LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v. Bob Harry Fowler, 248 F.3d. 1136 (4th Cir. 2001)

QUESTION PRESENTED

Whether a lower court's failure to apply the proper standard of review effects its judgment in reviewing a petitioner's case based on clear intervening changes in the law when entertaining a First Step Act motion.

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals for the Fourth Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court for the District of South Carolina, Greenville Division appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 21, 2021.

No timely petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution, Amendment V

Title 18 U.S.C. §3582(c)(1)(A)—as amended in First Step Act

STATEMENT OF THE CASE

Following the enactment of the First Step Act of 2019, this petitioner sought compassionate relief from his conviction and sentence in the United States District Court for the District of District of South Carolina. Upon submission of petitioner's motion under 18 U.S.C. §3582(c)(2) seeking a reduction in his sentence on December 4, 2020.

Counsel was appointed to represent petitioner; however, counsel did not submit any amendment or supplement to petitioner's motion for compassionate relief. On December 23, 2020, the government filed a response to petitioner's pro se motion, but did not completely address the arguments raised in his compassionate release motion. The district court denied petitioner's motion for compassionate release based on the government's response. The district court's order then prompted court-appointed counsel to file a motion for reconsideration which was submitted on January 22, 2021.

The government did not file a response to counsel's motion for reconsideration on petitioner's behalf. However, the district court immediately issuing an opinion and order on January 22, 2021 finding petitioner's health conditions failed to establish the extraordinary and compelling reasons necessary to reduce his sentence. The district court additionally found that petitioner's argument that a change in law similarly was insufficient to support extraordinary and compelling reasons to reduce his sentence. The district court subsequently found that petitioner's motion for reconsideration should be denied based on the factors listed in 18

U.S.C. §3553(a).

Petitioner timely filed a notice of appeal, and was given an informal briefing schedule by the Fourth Circuit court of appeals. Petitioner's informal brief was signed and forwarded to the appellate court on March 9, 2021, and a three judge panel affirmed the district court's decision in a per curiam opinion on July 21, 2021.

This Petition for a Writ of Certiorari follows the appellate court's decision seeking review in this Court.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition, vacate the judgment and remand to the lower court to apply the proper standard of review based on the intervening change in law applicable to his First Step Act motion under §3582(c)(1)(A)

This Court has long recognized its power to order a grant of certiorari, then vacate a lower court's judgment, and to remand the matter to the respective court. See Lawrence v. Chater, 516 U.S. 163 (1996). This process have been recognized as a "GVR Order" and allows lower courts to essentially review an earlier decision that it may have made, without fully considering intervening developments in law (or existing requirements), which could have had an effect on the decision. Id. at p. 167 (stating that "[w]here intervening developments, [which give this Court] reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR Order is, ... potentially appropriate").

In this case, petitioner sought compassionate release pursuant to 18 U.S.C. §3582(c)(1)(A), as amended by the First Step Act of 2018. The bases of petitioner's §3582(c)(1)(A) motion was two-fold and based on the COVID-19 pandemic and the intervening changes in by this Court announced in Apprendi v. New Jersey, 530 U.S. 466. (2000); Crawford v. Washington, 541 U.S. 36 (2004); United States v. Booker, 543 U.S. 220 (2005); and Alleyne v. United States, 570 U.S. 99 (2013).

As a matter of law, courts review the denial of a motion under §3582(c)(1)(A) for an abuse of discretion. See United States v. Batiste, 980 F.3d. 466, 469 (5th Cir. 2020)(recognizing a court abuses its discretion as a general matter when a defendant's request for a reduction of sentence under the First Step Act); United States v. Holloway, 956 F.3d. 660, 664 (2nd Cir. 2020); United States v. Sutton, 962 F.3d. 979, 986 (7th Cir. 2020); United States v. McDonald, 944 F.3d. 769, 771 (8th Cir. 2020); see also, Pepper v. United States, 562 U.S. 476 (2011)(acknowledging that this Court has long recognized that sentencing judges exercise wide discretion in the types of evidence they may consider when imposing a sentence and that highly—if not essential—to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics)(internal quotations and alterations omitted)(citing Williams v. New York, 337 U.S. 241, 246-47 (1949)).

Significantly, the appellate court reviewed petitioner's appeal in this matter, and simply issued a per curiam affirmance, stating in pertinent part, that:

"Tommy Pabellon appeals the district court's orders denying his motions for compassionate release and reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court."

United States v. Pabellon, 2021 U.S. App. Lexis 21583 (4th Cir. July 21, 2021)(Appended here at Appendix A).

Clearly, the appellate court failed to review petitioner's appeal under the proper standard—which required it to determine if the district court abused its discretion; see Cooter & Gell v.

Hartmax Corp., 496 U.S. 384, 405 (1990)(establishing a court abuses its discretion if it based its ruling on an erroneous view of the law, or on a clearly erroneously assessment of the evidence); see also, Batiste, *supra* p. 468 (same). Consequently, in this particular instance, the appellate court failed to apply the proper standard of review, and completely "sidestepped" its juridisdictional responsibility in considering petitioner's §3582(c)(1)(A) claim presenting extraordinary and compelling reasons for Compassionate Release based on his serious medical conditions and the intervening changes in law.

It is obvious that the lower court completely ignored its judicial responsibility in properly reviewing a live case and controversy lawfully placed before it. See e.g., United States v. Warnock, 851 F.3d. Fed. Appx. 1012, 1013 (11th Cir. 2021)(recognizing that courts retain jurisdiction to hear only live cases and controversies under Article III of the United States Constitution). Especially in light of the Fourth Circuit's own precedent, which involves its clear recognition that under §3582(c)(1)(A), "there currently exist no 'no applicable policy statement[.]'" that governs a defendant's motion for Compassionate Release. United States v. McCoy, 981 F.3d. 271, 281 (4th Cir. 2020).

Because under the amended statute, a defendant can be eligible for relief if the court finds that "extraordinary and compelling reasons" warrant such relief is a concept predicated the First Step Act; see e.g., Sester v. United States, 566 U.S. 231 (2012)(acknowledging even prior to the First Step Act, that the §3582(c) always allowed for extraordinary and compelling reasons as a principled bases which could warrant a reduction in sentence).

More importantly, as stated previously, the lower court failed to apply the abuse of discretion standard in reviewing petitioner's case, which amounted to error and this Court should GVR the matter so that it can properly do so. See United States v. Kibble, 992 F.3d. 326, 329 (4th Cir. 2021)(recognizing that the Fourth Circuit has not decided in a published opinion what standard governs its review of a grant or denial of Compassionate Release, but applying the abuse of discretion standard).

In Kibble, the Fourth Circuit held that COVID-19 spread in the Federal Bureau of Prisons amounted to extraordinary and compelling circumstance which could warrant §3582(c)(1)(A) relief. Id. However, not only did petitioner set forth his extraordinary and compelling reasons he set forth were based on COVID-19—which raised health concerns due to his verifiable serious health conditions, i.e., Diabetes, Asthma and Obesity increasing his chances of suffering fatal complications from COVID; petitioner additionally set forth the fact of intervening changes in law as reasons to reduce his current sentence.

It is beyond dispute, that courts have relied on non-retroactive changes in law to support reducing a defendant's sentence under §3582(c)(1)(A), as amended by the First Step Act. See e.g., United States v. Stanback, 377 F.Supp.3d. 618, 623 (W.D.Va. 2019) (joining other courts in finding Apprendi and Alleyne are applicable to the First Step Act in the context of §3582(c)(1)(A)); see also, United States v. Maxwell, 991 F.3d. 685 (2021)(citing United States v. Ware, 964 F.3d. 482, 489 (6th Cir. 2020)(“In the First Step Act, Congress has provided express authority to disturb the finality of [a defendant's judgment] and has done so without limit-

ing the consideration that the Court may contemplate in utilizing this authority").

Consequently, other non retroactive laws were found to constitute extraordinary and compelling reasons and viewed as sufficient intervening changes in law to support under the First Step Act. See McCoy, *supra* (acknowledging that the Fourth Circuit took a view that a disparity in sentencing which resulted from an intervening change in law by the amendment to eliminate stacking in the context of §924(c) can support an extraordinary and compelling reason for release); see also, United States v. McGee, 992 F.3d. 1035, 1048 (10th Cir. 2021) (adopting a middle ground in determining that disparities in a case resulting from a non retroactive change in law which can serve along with other rationales for early release that are based on extraordinary and compelling reasons); United States v. Black, 999 F.3d. 1071 (7th Cir. 2021) (stating a primary concern with whether a court should weight changes in law when applying the §3553(a) factors after identifying serious medical concerns as an independent extraordinary and compelling reason for release).

These principles should have been recognized and weighed in the appellate court's review of petitioner's compassionate release claim based on the intervening non retroactive change in law concerning the improper testimonial evidence used to convict him; see Whorton v. Bockting, 549 U.S. 406 (2007) (finding Crawford v. Washington, decision held not to apply retroactively to cases that were final on direct review), in the same manner other non retroactive cases have applied in the context of the First Step Act. See Stanback, *supra*; and Maxwell, *supra*.

Clearly, the lower court's failure to apply the proper abuse of discretion standard in reviewing the district court's denial of petitioner's First Step Act motion seeking compassionate release should prompt this Court to exercise its power to GVR the matter. This would allow the lower court to properly review petitioner's claim for compassionate release based on his serious health issues and the Crawford error during his trial in the context of §3582(c). Especially given, that without the excludable testimonial evidence presented at his trial no reasonable juror would have convicted him.

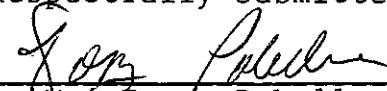
Moreover, the failure of the appellate court to properly review his issues sought to be reviewed on appeal under the First Step Act, not only amounts to an abuse of discretion—but violates this pro se petitioner's fundamental right to the due process of law which requires that he is given an opportunity to be heard. See Mathews v. Eldridge, 424 U.S. 319, 333-34 (1976).

In sum, this Pro se Petitioner respectfully seeks this Court liberally construe these pleadings under Erickson v. Pardus, 551 U.S. 89, 91 (2005), and Grant, Vacate and Remand this matter to the Fourth Circuit so that it can apply the proper standard in reviewing his case by fully considering the intervening change in law that could have effected its decision to deny his First Step Act motion.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Mr. Tommy Pabellon
Pro se Petitioner