No. _____

IN THE
Supreme Court of the United States

VIENGXAY CHANTHARATH,
a/k/a OG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(1)(A)(i), district courts have the authority to reduce a sentence based on "extraordinary and compelling reasons."

In the First Step Act of 2018, Congress amended the mandatory minimum penalties for certain offenses, including eliminating mandatory life sentences for most drug offenses. This amendment was not retroactive.

The question presented is:

Can a nonretroactive change in the sentencing law satisfy the "extraordinary and compelling reasons" standard for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i)?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

RELATED PROCEEDINGS

The following proceedings relate to Petitioner's motion for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i):

- *United States v. Chantharath*, No. 4:10-cr-40004, United States District Court for the District of South Dakota. Order denying motion for compassionate release entered April 21, 2021.

- *United States v. Chantharath*, No. 21-1999, United States Court of Appeals for the Eighth Circuit. Judgment entered May 7, 2021.

The following proceedings relate to Petitioner's underlying criminal conviction and sentence:

- *United States v. Chantharath*, No. 4:10-cr-40004, United States District Court for the District of South Dakota. Judgment entered January 30, 2012.

- *United States v. Chantharath*, No. 12-1273, United States Court of Appeals for the Eighth Circuit. Judgment entered January 28, 2013.

- *Chantharath v. United States*, No. 12-10840, Supreme Court of the United States. Petition for a writ of certiorari denied October 7, 2013.

The following proceedings relate to Petitioner's motion to vacate his sentence under 28 U.S.C. § 2255:

- *Chantharath v. United States*, No. 4:13-cv-04117, United States District Court for the District of South Dakota. Judgment entered November 25, 2014.

- *Chantharath v. United States*, No. 14-3831, United States Court of Appeals for the Eighth Circuit. Judgment entered April 8, 2015.

- *Chantharath v. United States*, No. 15-6035, Supreme Court of the United States. Petition for a writ of certiorari denied October 19, 2015.

The following proceedings relate to Petitioner's previous motion to reduce his sentence under the First Step Act:

- *United States v. Chantharath*, No. 4:10-cr-40004, United States District Court for the District of South Dakota. Order denying motion to reduce sentence entered December 16, 2019.

- *United States v. Chantharath*, No. 20-1017, United States Court of Appeals for the Eighth Circuit. Judgment entered January 6, 2020.

- *Chantharath v. United States*, No. 19-8469, Supreme Court of the United States. Petition for a writ of certiorari denied June 8, 2020.

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TABLE OF AUTHORITIES

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Viengxay Chantharath respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order and judgment of the court of appeals (App. 1a) is unreported. The district court's order denying Chantharath's motion for compassionate release (App. 2a-14a) is also unreported.

JURISDICTION

The court of appeals entered judgment on May 7, 2021. Chantharath received an extension of time to file a petition for rehearing. The court of appeals denied his timely petition for rehearing *en banc* on June 25, 2021. This petition is timely filed under the Court's March 19, 2020 and July 19, 2021 orders, which extended the deadline for all petitions for writs of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing if said judgment or order was issued prior to July 19, 2021. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582(c)(1)(A) provides, in relevant part:

> (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) 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 . . . .

INTRODUCTION

Petitioner Viengxay Chantharath is serving a mandatory life sentence for a drug offense that he would not face if he were sentenced today. After Congress expanded access to "compassionate release" by allowing individual defendants to file motions for a reduction in sentence based on "extraordinary and compelling reasons," Chantharath filed such a motion based in part on the dramatic disparity between the mandatory life sentence he received and the lower sentence he would face today. The district court denied his motion, finding that it lacked the authority to find "extraordinary and compelling reasons" based on a nonretroactive change in the law. The court of appeals summarily affirmed.

The question of whether nonretroactive changes in the law can meet the "extraordinary and compelling reasons" standard for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)(i) is an important question that has divided the circuits. This case presents the ideal opportunity for the Court to settle this important question.

STATEMENT OF THE CASE

1. In 2011, Chantharath was convicted of conspiracy to distribute 500 grams or more of a mixture or substance containing methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 in the United States District Court for the District of South Dakota. Dist. Ct. Dkt. 497; Dist. Ct. Dkt. 614. Ordinarily, the statutory penalty for this offense was 10 years to life. 21 U.S.C. § 841(b)(1)(A)(viii) (2010). But because Chantharath had two prior convictions for methamphetamine offenses, his

statutory penalty was enhanced to mandatory life in prison. Dist. Ct. Dkt. 590; PSR ¶¶ 58-60; 21 U.S.C. § 841(b)(1)(A)(viii) (2010).

On January 30, 2012, the district court sentenced Chantharath to life in prison. Dist. Ct. Dkt. 680. The court stated that but for the statutory mandatory minimum, it would not have imposed this sentence: "I must say, though, that when I look at your past, if Congress hadn't told me that I have to impose a life sentence, I would not be imposing a life sentence." Transcript of Sentencing Hearing (Sent. Tr.), Dist. Ct. Dkt. 694, p. 17. Chantharath's conviction and sentence were affirmed on direct appeal. *See United States v. Chantharath*, 705 F.3d 295 (8th Cir. 2013).

2. About seven years after Chantharath was sentenced, Congress enacted the First Step Act of 2018. Pub. L. No. 115-391, 132 Stat. 5194. The First Step Act affected Chantharath's case in two ways.

First, Congress eliminated mandatory life sentences for most drug offenses. *Id.* § 401(a)(2), 132 Stat. at 5220-21. These changes were not retroactive. *Id.* § 401(c), 132 Stat. at 5221. As relevant here, Chantharath would likely face a mandatory minimum sentence of 25 years if he were sentenced today. *See id.* § 401(a)(2), 132 Stat. at 5220-21.[1]

Second, Congress amended the "compassionate release" statute in 18 U.S.C. § 3582(c)(1)(A) to allow defendants to file motions for compassionate release for the first time. *See* First Step Act, § 603(b), 132 Stat. at 5239 (entitled "INCREASING

[1] In 2019, Chantharath filed a motion for reduction in sentence under the First Step Act. Dist. Ct. Dkt. 950. The district court denied his motion because § 401(a)(2) does not, by its terms, apply retroactively. Dist. Ct. Dkt. 955.

THE USE AND TRANSPARENCY OF COMPASSIONATE RELEASE"). Before the First Step Act, only the director of the Bureau of Prisons could move for a reduction in sentence under this statute. *See* 18 U.S.C. § 3582(c)(1)(A) (2012). In an effort to increase the use of compassionate release, Congress amended the statute to allow defendants to file motions directly with the court after satisfying the administrative exhaustion requirement. First Step Act, § 603(b), 132 Stat. at 5239. The statute now allows the sentencing court to reduce the defendant's prison sentence after considering the applicable 18 U.S.C. § 3553(a) sentencing factors if it finds that "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).

3. In 2021, Chantharath filed a motion for a reduction in sentence under § 3582(c)(1)(A)(i) based on the COVID-19 pandemic. Dist. Ct. Dkt. 978. Through counsel, Chantharath raised a second independent extraordinary and compelling reason for a reduction in sentence—the disparity between his mandatory life sentence and the sentence he would face today. Dist. Ct. Dkt. 994. Chantharath argued that the district court was not bound by the definition of "extraordinary and compelling reasons" in the Sentencing Guidelines and that the court could find that the disparity between Chantharath's pre-First Step Act life sentence and the sentence he would face today was an extraordinary and compelling reason for a reduction in sentence. *Id.* at 5-12. Chantharath asked for a sentence of time served or, in the alternative, a reduction in sentence to a term of months. *Id.* at 12, 20.

The district court denied Chantharath's motion in its entirety. App. 2a-14a. The district court held that it could not consider Congress's nonretroactive changes to mandatory minimum sentences as "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i):

> The court concludes it cannot circumvent the clear directive of Congress by granting a sentencing reduction to Chantharath for "extraordinary and compelling reasons" under 18 U.S.C. § 3852(c)(1)(A)(i).

App. 9a.

4. Chantharath appealed, and the court of appeals summarily affirmed. App. 1a. The court of appeals had jurisdiction under 28 U.S.C. § 1291. Chantharath timely filed a petition for rehearing *en banc*. The court of appeals denied his petition in a summary order. App. 15a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

The question of whether nonretroactive changes to mandatory minimum sentences can be "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i) is an important question of federal law that must be settled by this Court. The courts of appeals are divided on this question, with two circuits holding that nonretroactive changes to the sentencing law can be extraordinary and compelling reasons and three circuits holding that it cannot. This case presents the ideal opportunity for the Court to resolve this deep and fully developed split of authority on this important question.

I. The circuits are divided on the question presented.

The courts of appeals are divided on the question of whether the disparity between a defendant's mandatory minimum sentence and the sentence he would face today can meet the "extraordinary and compelling reasons" standard under § 3582(c)(1)(A)(i).

A. The Fourth and Tenth Circuits recognize that nonretroactive changes in the sentencing law can be "extraordinary and compelling reasons" for relief.

Two circuits have held that the disparity between the mandatory minimum sentence that applied at sentencing and the mandatory minimum sentence that would apply after the First Step Act can be an extraordinary and compelling reason for relief under § 3582(c)(1)(A)(i).

In *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020), the Fourth Circuit held that district courts can find "extraordinary and compelling reasons" based on the disparity between mandatory minimum sentences that applied at the time of sentencing and the sentences available under later nonretroactive sentencing reforms. *McCoy* involved a change to the "stacking" provisions of 18 U.S.C. § 924(c). *Id.* at 275. Before the First Step Act, a defendant who was convicted of more than one § 924(c) offense received a mandatory consecutive 25-year sentence for each additional count, even if the convictions were obtained in the same case. *Id.* The First Step Act clarified that the 25-year mandatory minimum applies only when the prior § 924(c) conviction was from another case with a final conviction. *Id.* In *McCoy*, for example, the defendant faced a mandatory

sentence of 32 years in prison for two § 924(c) convictions in the same case (7 years for the first count and 25 years for the second count). *Id.* at 277. If he had been sentenced after the First Step Act, his mandatory minimum sentence would have been 14 years (7 years for each count). *See McCoy v. United States*, No. 2:03-CR-197, 2020 WL 2738225, at *2 (E.D. Va. May 26, 2020) ("If he were sentenced today, Petitioner would be subjected to a mandatory minimum of 168 months on [the § 924(c) counts].").

The Fourth Circuit found that district court "legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair." *McCoy*, 981 F.3d at 285-86. This is true, the Fourth Circuit reasoned, even though Congress chose not to make the sentencing reforms retroactive in every case. "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)." *Id.* at 286. The Fourth Circuit emphasized that there is a "significant difference" between automatic resentencing of an entire class of sentences and allowing for a finding of extraordinary and compelling reasons in individual, grievous cases. *Id.* at 286-87. There is "nothing inconsistent about Congress's paired First Step Act judgments: that not all defendants convicted under § 924(c) should receive new sentences, but that the courts should be empowered to

relieve some defendants of those sentences on a case-by-case basis." *Id.* at 287 (cleaned up).

In *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021), the Tenth Circuit agreed with the Fourth Circuit that district courts can, "on an individualized, case-by-case basis" grant sentence reductions under § 3582(c)(1)(A)(i) based in part on the fact that the defendant is serving a pre-First Step Act mandatory life sentence that he would not face today. The defendant in *McGee* was sentenced to mandatory life imprisonment under 21 U.S.C. § 841(b)(1)(A) and would have faced a 25-year mandatory minimum sentence after the First Step Act. *Id.* at 1039. The Tenth Circuit held that such a sentencing disparity "cannot, standing alone, serve as the basis for a sentence reduction," but can in combination with the defendant's other "unique circumstances" constitute extraordinary and compelling reasons for relief. *Id.* at 1048.

B. Three other circuits disagree.

On the other side of the split, the Third, Sixth, and Seventh Circuits have all held that nonretroactive changes in the sentencing law cannot serve as "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i). *See United States v. Andrews*, 12 F.4th 255, 261-62 (3d Cir. 2021) ("The nonretroactive changes to the § 924(c) mandatory minimums also cannot be a basis for compassionate release."); *United States v. Jarvis*, 999 F.3d 442, 443 (6th Cir. 2021) (holding that nonretroactive statutory changes cannot serve as "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i)); *United States v. Thacker*, 4 F.4th 569, 574 (7th

Cir. 2021) ("[T]he discretionary authority conferred by § 3582(c)(1)(A) . . . cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively.").

The circuits are deeply divided on the important question of whether a nonretroactive change in the sentencing law can, under the unique circumstances of the defendant's case, satisfy the "extraordinary and compelling reasons" standard under § 3582(c)(1)(A)(i). Only this Court can resolve this split of authority.

II. The decision below was wrongly decided.

Here, the district court held that it did not have the authority to find extraordinary and compelling reasons based on the fact that Chantharath would no longer face a mandatory life sentence if he were sentenced today. App. 9a. The court of appeals summarily affirmed. App. 1a. Both courts had it wrong.

Section § 3582(c)(1)(A) does not prohibit district courts from finding extraordinary and compelling reasons on this basis. The statute does not define "extraordinary and compelling reasons." But it also does not prohibit courts from finding such reasons based on a change in the sentencing law and the disparity between the defendant's mandatory sentence and the sentence he would face today.

Further, the fact that the First Step Act's sentencing reforms do not apply retroactively does not mean that the elimination of mandatory life sentences for most drug offenses cannot provide a basis for finding extraordinary and compelling reasons in an individual case. Indeed, "the very purpose of § 3582(c)(1)(A) is to

provide a 'safety valve' that allows for sentence reductions when there is *not* a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction." *McCoy*, 981 F.3d at 287. In other words, while "Congress chose not to afford relief to *all* defendants who, prior to the First Step Act, were sentenced to mandatory life imprisonment under § 841(b)(1)(A) . . . nothing in § 401(c) or any other part of the First Step Act indicates that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A)(i) to *some* of those defendants." *McGee*, 992 F.3d at 1047. It is entirely consistent with the text of § 3582(c)(1)(A)(i) and all of the provisions of the First Step Act (retroactive and nonretroactive) to interpret the compassionate release statute as providing an avenue for relief from pre-First Step Act mandatory sentences in "truly extraordinary and compelling cases." *See McCoy*, 981 F.3d at 287.

Similarly, the Sentencing Guidelines' policy statement on compassionate release does not prohibit the court from finding extraordinary and compelling reasons based on a nonretroactive change in the law. Before the enactment of the First Step Act, Congress delegated to the Sentencing Commission the authority to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). The policy statement issued in exercise of that authority, USSG § 1B1.13, provides examples of "extraordinary and compelling reasons" only in the application notes. The examples generally fall into four

categories based on a defendant's (1) terminal illness, (2) debilitating physical or mental health condition, (3) advanced age and deteriorating health in combination with the amount of time served, and (4) compelling family circumstances. USSG § 1B1.13, comment. (n.1(A)-(C)). The commentary also includes a fifth catch-all provision for "an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)" as determined by the Director of the Bureau of Prisons. USSG § 1B1.13, comment. (n.1(D)). The policy statement does not list a change in the sentencing law as an extraordinary and compelling reason for compassionate release.

Section 1B1.13, however, has not been amended since the enactment of the First Step Act and is not an "applicable" policy statement for defendant-filed motions under § 3582(c)(1)(A). By its terms, the policy statement only applies to motions brought by the Director of the Bureau of Prisons. It begins: "*Upon motion of the Director of the Bureau of Prisons* under 18 U.S.C. 3582(c)(1)(A) . . . ." USSG § 1B1.13 (emphasis added). The application notes confirm that the policy statement applies *only* to motions brought by the Director of the Bureau of Prisons, not to motions brought by individual defendants: "A reduction *under this policy statement* may be granted *only upon motion by the Director of the Bureau of Prisons* pursuant to 18 U.S.C. § 3582(c)(1)(A)." USSG § 1B1.13, comment. (n.4) (emphasis added). In short, § 1B1.13 does not apply to defendant-filed motions, and there currently is no applicable policy statement for this situation.

For these reasons, the courts of appeals nearly unanimously agree that § 1B1.13 is not binding in cases where the defendant filed a motion for a reduction in sentence under § 3582(c)(1)(A). *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020); *Andrews*, 12 F.4th at 259; *McCoy*, 981 F.3d at 284; *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Marcussen*, 15 F.4th 855, 859 (8th Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam); *McGee*, 992 F.3d at 1050; *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). Only the Eleventh Circuit disagrees. *United States v. Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021), *pet'n for cert. filed* (June 10, 2021) (holding that § 1B1.13 is an applicable policy statement). Under this near-uniform line of authority, the fact that the policy statement does not define "extraordinary and compelling reasons" to include nonretroactive changes in the sentencing law does not bar courts from granting relief on this basis under the unique circumstances of each case. The decision of the lower courts was wrong.

III. This case is an ideal vehicle for the question presented.

This case squarely presents the issue of whether the sentencing court can grant relief under § 3582(c)(1)(A)(i) based on the disparity between the defendant's mandatory minimum sentence and the lower sentencing range he would face today. Chantharath raised this issue in his motion. The district court explicitly held that it

did not have the authority to grant relief on this basis. The issue is clearly and squarely presented in this case.

The disparity between Chantharath's mandatory life sentence and the sentence he would face after the First Step Act, considered in combination with his personal history and limited criminal history, presents extraordinary and compelling reasons for relief. The sentencing court did not wish to impose a mandatory life sentence. Sent. Tr., p. 17. The court noted that this sentence overstated the seriousness of his prior convictions and was a dramatically more severe penalty than he had ever faced before. *See id.* The court further explained that Chantharath was born in Laos and grew up in refugee camps. *Id.* He came to the United States, worked hard, and did well until his methamphetamine addiction caused his life to fall apart. *Id.* at pp. 17-18. The court only imposed a life sentence because "unfortunately that's what Congress has decided." *Id.* at p. 17.

Congress has finally eliminated mandatory life sentences for people like Chantharath. The Court should grant certiorari and resolve the question of whether sentencing courts can grant relief from unduly harsh mandatory sentences under § 3582(c)(1)(A)(i). This case is an ideal vehicle for the question presented.

IV. Several other pending petitions involve the same question presented.

Finally, in the alternative, the Court could hold this petition in abeyance pending resolution of several petitions raising essentially the same question presented. *See Gashe v. United States*, No. 20-8284 (filed Apr. 19, 2021); *Watford v. United States*, No. 21-551 (filed Oct. 12, 2021); *Sutton v. United States*, No. 21-6010 (filed Oct. 14, 2021); *Jarvis v. United States*, No. 21-568 (filed Oct. 15, 2021). The resolution of these cases may impact the Court's resolution of the present petition.

CONCLUSION

The question of whether district courts may find "extraordinary and compelling reasons" for relief under § 3582(c)(1)(A)(i) based on nonretroactive changes in the statutory sentencing regime is one that only this Court can resolve. The petition for a writ of certiorari should be granted.

Dated this 19th day of November, 2021.

Respectfully submitted,

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