No. 22-5878

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM D. KING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

ANDREW C. NOLL
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in finding that "extraordinary and compelling reasons" did not support reducing petitioner's preexisting sentence under 18 U.S.C. 3582(c)(1)(A), where his motion was premised on the contention that the sentencing court misapplied the Sentencing Guidelines in light of an intervening decision of the court of appeals.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Ill.):

United States v. King, No. 97-cr-20016 (Sept. 24, 2007)

United States v. King, No. 07-cr-20055 (Sept. 24, 2007)

King v. United States, No. 16-cv-2072 (Aug. 22, 2016)

United States v. King, No. 07-cr-20055 (Nov. 24, 2021)

United States Court of Appeals (7th Cir.):

United States v. King, No. 21-3196 (7th Cir. July 7, 2022)

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-4a) is published at 40 F.4th 594. The opinion of the district court (Pet. App. 5a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2022. The petition for a writ of certiorari was filed on October 11, 2022 (Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner was convicted on three counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. The district court sentenced petitioner to 216 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. Petitioner did not appeal. The district court denied petitioner's subsequent motion under 28 U.S.C. 2255 to vacate his sentence and denied a certificate of appealability (COA). 16-cv-2072 D. Ct. Doc. 10 (Aug. 22, 2016).

In 2021, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). See D. Ct. Doc. 28 (Mar. 2, 2021); D. Ct. Doc. 36 (Apr. 6, 2021). The district court denied the motion. D. Ct. Doc. 42 (Apr. 27, 2021). Petitioner subsequently filed a renewed motion for a sentence reduction under Section 3582(c)(1)(A). See D. Ct. Doc. 43 (May 4, 2021); D. Ct. Doc. 44 (May 19, 2021). The district court denied the motion, Pet. App. 5a-12a, and the court of appeals affirmed, id. at 1a-4a.

1. a. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 et seq.), "overhaul[ed] federal sentencing practices." Tapia v. United States, 564 U.S. 319, 325 (2011). To make prison terms more determinate, Congress "established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue

policy statements." Dillon v. United States, 560 U.S. 817, 820 (2010); see 28 U.S.C. 991, 994(a).

Congress also abolished the practice of federal parole, specifying that a "court may not modify a term of imprisonment once it has been imposed" except in certain enumerated circumstances. 18 U.S.C. 3582(c); see Tapia, 564 U.S. at 325. One such circumstance is when the Sentencing Commission has made a retroactive amendment to the sentencing range on which the defendant's term of imprisonment was based. 18 U.S.C. 3582(c)(2); see Hughes v. United States, 138 S. Ct. 1765, 1772-1773 (2018). Another such circumstance is when "extraordinary and compelling reasons" warrant the defendant's "compassionate release" from prison. Sentencing Guidelines App. C Supp., Amend. 799 (Nov. 1, 2016); see 18 U.S.C. 3582(c)(1)(A).

As originally enacted in the Sentencing Reform Act, Section 3582(c)(1)(A) stated:

> the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, 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.

Sentencing Reform Act § 212(a)(2), 98 Stat. 1998-1999. Congress made clear that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

Congress also directed the Sentencing Commission to promulgate "general policy statements regarding * * * the appropriate use of * * * the sentence modification provisions set forth in [Section] 3582(c)." 28 U.S.C. 994(a)(2)(C); see Sentencing Reform Act § 217(a), 98 Stat. 2019. Congress instructed "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, [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); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

b. In 2006, the Sentencing Commission promulgated a new policy statement -- Sentencing Guidelines § 1B1.13, p.s. -- as a "first step toward implementing the directive in 28 U.S.C. § 994(t)" that required the Commission to "'describe what should be considered extraordinary and compelling reasons for sentence reduction.'" Sentencing Guidelines App. C, Amend. 683 (Nov. 1, 2006) (citation omitted). Although the initial policy statement primarily "restate[d] the statutory bases for a reduction in sentence under [Section] 3582(c)(1)(A)," ibid., the Commission updated the policy statement the following year "to further effectuate the directive in [Section] 994(t)," id. App. C, Amend. 698 (Nov. 1, 2007). That amendment revised the commentary (or "Application Notes") to Section 1B1.13 to describe four

circumstances that should be considered extraordinary and compelling reasons for a sentence reduction under Section 3582(c)(1)(A). Ibid.

In 2016, the Commission further amended the commentary to Section 1B1.13 to "broaden[] the Commission's guidance on what should be considered 'extraordinary and compelling reasons'" that might justify a sentence reduction. Sentencing Guidelines App. C Supp., Amend. 799. In its current form, Application Note 1 to Section 1B1.13 describes four categories of reasons that should be considered extraordinary and compelling: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons." Id. § 1B1.13, comment. (n.1(A)-(D)) (emphasis omitted). Application Note 1(D) explains that the fourth category -- "Other Reasons" -- encompasses any reason "determined by the Director of the Bureau of Prisons" (BOP) to be "extraordinary and compelling" "other than, or in combination with," the reasons described in the other three categories. Id. § 1B1.13, comment. (n.1(D)) (emphasis omitted).

In its 2016 amendment to Section 1B1.13, the Commission also added a new Application Note "encourag[ing] the Director of the Bureau of Prisons" to file a motion under Section 3582(c)(1)(A) whenever "the defendant meets any of the circumstances set forth in Application Note 1." Sentencing Guidelines § 1B1.13, comment. (n.4). The Commission explained that it had "heard testimony and received public comment concerning the inefficiencies that exist

within the Bureau of Prisons' administrative review of compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility." Id. App. C Supp., Amend. 799.

c. In the First Step Act of 2018, Pub. L. No. 115-391, Tit. VI, § 603(b), 132 Stat. 5239, Congress amended Section 3582(c)(1)(A) to allow defendants, as well as the BOP itself, to file motions for a reduced sentence. As modified, Section 3582(c)(1)(A) now states:

> 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 * * * , after considering the factors set forth in section 3553(a) to the extent that they are applicable, 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) (emphasis added).

The First Step Act also added a new Section 3582(d), which imposes additional obligations on the BOP with respect to motions for a Section 3582(c)(1)(A) sentence reduction. Sections 3582(d)(2)(A) and (B) require the BOP, when a defendant is "diagnosed with a terminal illness" or "is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)," to notify the defendant's attorney,

partner, and family members that they may prepare and submit a request for a sentence reduction on the defendant's behalf, and to assist in the preparation of such requests. 18 U.S.C. 3582(d)(2)(A)(i), (iii), (B)(i), and (iii). Section 3582(d)(2)(C) requires the BOP to provide notice to all defendants of their ability to request a sentence reduction, the procedures for doing so, and their "right to appeal a denial of a request * * * after all administrative rights to appeal within the Bureau of Prisons have been exhausted." 18 U.S.C. 3582(d)(2)(C).

2. In 2007, the Decatur Police Department used a confidential source to conduct controlled purchases of heroin from petitioner. Presentence Investigation Report (PSR) ¶¶ 7-9. Petitioner sold heroin to a confidential source on three separate occasions. Ibid.

A federal grand jury in the Central District of Illinois indicted petitioner on three counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Indictment 1-2. The government filed a notice under 21 U.S.C. 851 of its intent to seek enhanced penalties based on petitioner's prior conviction for a "felony drug offense," 21 U.S.C. 841(b)(1)(C) -- namely, a 1992 Illinois conviction for possessing cocaine with intent to deliver. D. Ct. Doc. 10, at 1 (June 18, 2007); see PSR ¶ 29. Petitioner pleaded guilty to all counts. Judgment 1. Because of his prior conviction for a "felony drug offense," petitioner faced a

statutory-maximum 30-year term of imprisonment. 21 U.S.C. 841(b)(1)(C).

Applying the 2006 version of the Sentencing Guidelines, the Probation Office's presentence report calculated an advisory guidelines range of 188 to 235 months of imprisonment. PSR ¶¶ 13, 88. In calculating petitioner's advisory guidelines range, the Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a) (2006). PSR ¶ 24. The Probation Office further determined that because petitioner's offense statutory maximum was 25 years or more, petitioner's offense level under the career-offender guideline was 34. Sentencing Guidelines § 4B1.1(b) (2006); see PSR ¶ 24.

The district court adopted the Probation Office's guidelines calculation and sentenced petitioner to 216 months of imprisonment on each count, to be served concurrently. Judgment 2. Petitioner did not appeal. In 2016, petitioner moved under 28 U.S.C. 2255 to vacate his sentence, contending that he no longer qualified as a career offender under the Sentencing Guidelines in light of this Court's intervening decision in Johnson v. United States, 576 U.S. 591 (2015). 16-cv-2072 D. Ct. Doc. 1, at 4 (Mar. 22, 2016). The district court denied the motion and a certificate of appealability (COA). 16-cv-2072 D. Ct. Doc. 10. Petitioner did not seek a COA from the court of appeals.

3. In 2020, the court of appeals determined that possessing cocaine with intent to distribute, in violation of 720 Ill. Comp.

Stat. Ann 570/401(c)(2) (2004), did not qualify as a "felony drug offense" under 21 U.S.C. 841(b)(1)(C). See United States v. Ruth, 966 F.3d 642, 645-651 (7th Cir. 2020), cert denied. 141 S. Ct. 1239 (2021). The court took the view that Illinois's definition of cocaine is categorically broader than the federal definition of cocaine because the "Illinois statute defines cocaine to include its positional isomers, whereas the federal definition covers only cocaine's optical and geometric isomers." Ruth, 966 F.3d at 644.

In February 2021, petitioner moved for a sentence reduction under Section 3582(c)(1)(A). D. Ct. Doc. 28; D. Ct. Doc. 36. Petitioner contended that the COVID-19 pandemic, alleged medical conditions, and "changes in his guideline range" due to the court of appeals' intervening decision in Ruth constituted "extraordinary and compelling reasons" warranting a sentence reduction. D. Ct. Doc. 36, at 1. In particular, petitioner argued that if he were sentenced today under Ruth, his Illinois conviction for possessing cocaine with intent to deliver would not qualify as a "felony drug offense" under Section 841(b)(1)(C), and that because his offense statutory maximum would be 20 years of imprisonment, not 30 years, his offense level would be 32 under the career-offender guideline, resulting in an advisory guidelines range of 151 to 188 months. Id. at 16-17.

The district court denied the motion, finding that the number of COVID-19 cases at petitioner's prison did not constitute an extraordinary and compelling reason for a sentence reduction and

that petitioner had failed to exhaust his administrative remedies with respect to his argument based on Ruth. D. Ct. Doc. 42, at 3-5.

In May 2021, petitioner filed a renewed motion for a sentence reduction under Section 3582(c)(1)(A). D. Ct. Doc. 43; D. Ct. Doc. 44. Petitioner made arguments similar to those in his prior motion and contended that he had since exhausted his argument that he should be granted a sentence reduction because of the "sentencing disparity that exists based on changes in the law." D. Ct. Doc. 44, at 3.

The district court denied the motion. Pet. App. 5a-12a. The court again determined that the number of COVID-19 cases at petitioner's prison did not constitute an extraordinary and compelling reason for a sentence reduction. Id. at 9a-10a. The court then rejected petitioner's reliance on "changes in the law that would affect [his] sentencing guideline range if he was sentenced today" as an "extraordinary and compelling reason" for a sentence reduction. Id. at 6a (footnote omitted); see id. at 11a-12a. The court explained that allowing petitioner to challenge "the length and validity of [his] sentence" under Section 3582(c)(1)(A) would "create 'tension with the principal path and conditions Congress established for federal prisoners to challenge their sentences' through 28 U.S.C. § 2255." Id. at 11a (quoting United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021), cert. denied, 142 S. Ct. 1363 (2022)).

4. The court of appeals affirmed. Pet. App. 1a-4a. The court rejected petitioner's "effort to use Ruth as a door opener" under Section 3582(c)(1)(A) through a claim that Ruth furnished an "extraordinary and compelling" reason for a sentence reduction. Id. at 4a. The court observed that circuit precedent foreclosed reliance on "non-retroactive statutory changes or new judicial decisions" in determining whether extraordinary and compelling reasons exist for a Section 3582(c)(1)(A) sentence reduction. Id. at 1a (citing United States v. Thacker, supra, and United States v. Brock, 39 F.4th 462 (7th Cir. 2022)). The court explained that there is "nothing 'extraordinary' about new statutes or case law, or a contention that the sentencing judge erred in applying the Guidelines," because "these are the ordinary business of the legal system, and their consequences should be addressed by direct appeal or collateral review under 28 U.S.C. § 2255." Id. at 2a. The court emphasized that petitioner could have made the argument that prevailed in Ruth "on appeal after his own sentencing but did not." Ibid.

ARGUMENT

Petitioner contends (Pet. 21-24) that an intervening development in sentencing law can serve as an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). That contention lacks merit. And although courts of appeals have reached different conclusions on the issue, the Sentencing Commission is currently considering the issue during

the guidelines amendment cycle ending May 1, 2023, and could promulgate a new policy statement that would deprive a decision by this Court of practical significance. This Court has recently and repeatedly denied petitions for writs of certiorari raising similar issues.[1] It should follow the same course here.

1. The court of appeals correctly rejected petitioner's contention that an intervening development in sentencing law can constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). Pet. App. 1a-4a.

a. The overarching principle of federal sentencing law is that a "federal court generally 'may not modify a term of imprisonment once it has been imposed.'" Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. 3582(c)). Section 3582(c)(1)(A) provides a limited "except[ion]" to that rule. 18 U.S.C. 3582(c). To disturb the finality of a federal sentence under that provision, the district court typically must identify

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[1] See, e.g., Thacker v. United States, 142 S. Ct. 1363 (2022) (No. 21-877); Williams v. United States, 142 S. Ct. 1207 (2022) (No. 21-767); Chantharath v. United States, 142 S. Ct. 1212 (2022) (No. 21-6397); Tingle v. United States, 142 S. Ct. 1132 (2022) (No. 21-6068); Sutton v. United States, 142 S. Ct. 903 (2022) (No. 21-6010); Corona v. United States, 142 S. Ct. 864 (2022) (No. 21-5671); Tomes v. United States, 142 S. Ct. 780 (2022) (No. 21-5104); Jarvis v. United States, 142 S. Ct. 760 (2022) (No. 21-568); Watford v. United States, 142 S. Ct. 760 (2022) (No. 21-551); Gashe v. United States, 142 S. Ct. 753 (2022) (No. 20-8284). Other pending petitions for writs of certiorari raise similar issues. See, e.g., Fraction v. United States, No. 22-5859 (filed Oct. 11, 2022); Gibbs v. United States, No. 22-5894 (filed Oct. 19, 2022); Tovar v. United States, No. 22-5958 (filed Oct. 4, 2022); Eye v. United States, No. 22-6096 (filed Apr. 7, 2022); Thompson v. United States, No. 22-6448 (filed Dec. 15, 2022).

"extraordinary and compelling reasons" for doing so. 18 U.S.C. 3582(c)(1)(A)(i); see 18 U.S.C. 3582(c)(1)(A)(ii) (providing specific statutory criteria for reducing the sentence of certain elderly prisoners who have already served lengthy terms).

The extraordinary and compelling reason that petitioner asserts here is a "change[] in the law that would affect [his] sentencing guideline range if he was sentenced today." Pet. App. 6a (footnote omitted). In particular, petitioner argues that if he were sentenced today, his Illinois conviction for possessing cocaine with intent to deliver would not qualify as a "felony drug offense" under Section 841(b)(1)(C) in light of the court of appeals' intervening decision in United States v. Ruth, 966 F.3d 642, 645-651 (7th Cir. 2020), cert denied. 141 S. Ct. 1239 (2021). D. Ct. Doc. 36, at 16-17. He further argues that because his offense statutory maximum would be 20 years of imprisonment, not 30 years, if he were sentenced today, his offense level would be two points lower under the career-offender guideline -- resulting in an advisory guidelines range of 151 to 188 months, rather than a range of 188 to 235 months of imprisonment. Ibid.[2]

Such an intervening development in sentencing law is neither an "extraordinary" nor a "compelling" reason for a sentence reduction under Section 3582(c)(1)(A). Consistent with the

[2] Petitioner does not contend that his sentence exceeds the applicable statutory penalty that would apply under Ruth. Petitioner's sentence of 216 months of imprisonment is below the 20-year maximum that would have applied without any enhancement based on petitioner's prior Illinois drug conviction. Judgment 2.

"'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute,'" Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (citation omitted), the word "extraordinary" should be understood "to mean 'most unusual,' 'far from common,' and 'having little or no precedent,'" United States v. McCall, 56 F.4th 1048, 1055 (6th Cir. 2022) (en banc) (quoting Webster's Third New International Dictionary of the English Language 807 (1971) (Webster's)). There is "nothing 'extraordinary' about new * * * caselaw, or a contention that the sentencing judge erred in applying the Guidelines" in light of new case law, because such developments "are the ordinary business of the legal system." Pet. App. 2a; see Gonzalez v. Crosby, 545 U.S. 524, 536 (2005) (observing that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of a federal statute).

An intervening development in sentencing law likewise cannot constitute a "compelling" reason for a Section 3582(c)(1)(A) sentence reduction. When Congress enacted the Sentencing Reform Act of 1984, "[c]ompelling" meant "forcing, impelling, driving." McCall, 56 F.4th at 1055 (quoting Webster's 463). Thus, for a reason to be "compelling" under Section 3582(c)(1)(A), it must provide a "powerful and convincing" reason to disturb the finality of a federal sentence. United States v. Jenkins, 50 F.4th 1185,

1197 (D.C. Cir. 2022) (citation omitted). "But given the availability of direct appeal and collateral review under section 2255 of title 28," there is no powerful and convincing reason to allow prisoners to pursue claims of sentencing error under Section 3582(c)(1)(A). Id. at 1200. As the court of appeals observed, petitioner "could have" argued that Illinois defines "cocaine" more broadly than the federal definition "on appeal after his own sentencing," but he "did not." Pet. App. 4a. "[N]or did he file a collateral attack based on the way Illinois defines cocaine." Ibid.

Indeed, Section 2255 is the "principal path" that "Congress established for federal prisoners to challenge their sentences." United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021), cert. denied, 142 S. Ct. 1363 (2022). Treating an intervening development in sentencing law as an "extraordinary and compelling" reason for a sentence reduction would permit defendants to "avoid the restrictions of the post-conviction relief statute by resorting to a request for compassionate release instead." United States v. Crandall, 25 F.4th 582, 586 (8th Cir.), cert. denied, 142 S. Ct. 2781 (2022). And it "would wholly frustrate explicit congressional intent to hold that [defendants] could evade" those restrictions "by the simple expedient of putting a different label on their pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

Accordingly, an intervening development in sentencing law cannot serve as an "extraordinary and compelling reason[]" for a sentence reduction either in isolation or as adding to a package of such "reasons." 18 U.S.C. 3582(c)(1)(A)(i). Whether considered alone or in combination with other asserted factors, an intervening development in sentencing law is a "legally impermissible" consideration for purposes of determining whether an extraordinary and compelling reason exists. Jenkins, 50 F.4th at 1202 (citation omitted); see United States v. Jarvis, 999 F.3d 442, 444 (6th Cir. 2021) (explaining that a prospective change to sentencing law is a "legally impermissible ground" for finding an "extraordinary and compelling reason," even when it is "combined with" other considerations), cert. denied, 142 S. Ct. 760 (2022).

b. Petitioner's counterarguments lack merit. Petitioner contends (Pet. 9, 12) that, beyond specifying that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason," 28 U.S.C. 994(t), Congress placed no textual limit on the reasons that might warrant a sentence reduction. That contention disregards the express textual requirement that the reason for a reduction be both "extraordinary and compelling." 18 U.S.C. 3582(c)(1)(A)(i). That requirement ensures that the ordinary development of sentencing law does not have the self-contradictory effect of opening, or widening, the door for Section 3582(c)(1)(A) motions by everyone sentenced before the development in the law.

Petitioner also suggests (Pet. 10) that the decision below conflicts with this Court's recent decision in Concepcion v. United States, 142 S. Ct. 2389 (2022). That suggestion is misplaced. In Concepcion, the Court considered the scope of a district court's discretion under Section 404 of the First Step Act, which provides an explicit statutory mechanism for a court to revisit the sentence of a defendant convicted of a crack-cocaine offense "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." First Step Act § 404(a), 132 Stat. 5222; see § 404(b), 132 Stat. 5222; Concepcion, 142 S. Ct. at 2397. The Court explained that, in adjudicating a motion under Section 404 of the First Step Act, a district court "may consider other intervening changes" of law or fact, beyond the changes made by those Sections of the Fair Sentencing Act. Concepcion, 142 S. Ct. at 2396.

Unlike Section 404 of the First Step Act, which directly authorizes sentence reductions for a specifically defined subset of previously sentenced drug offenders, Section 3582(c)(1)(A)(i) contains a threshold requirement that a district court identify "extraordinary and compelling reasons" warranting a sentence reduction. 18 U.S.C. 3582(c)(1)(A)(i). Indeed, the Court in Concepcion identified Section 3582(c)(1)(A) as a statute in which "Congress expressly cabined district courts' discretion" in a way that Section 404 does not. 142 S. Ct. at 2401. Petitioner's reliance on Concepcion therefore is misplaced.

2. Petitioner asserts (Pet. 14-19) that the courts of appeals are divided on whether an intervening development in sentencing law may constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). But a divergence of views on that issue does not warrant this Court's review at this time because the Sentencing Commission is currently considering whether and how to address the issue in a proposed amendment to the Guidelines.

a. In accord with the decision below, the Third, Sixth, Eighth, and D.C. Circuits have recognized that intervening developments in sentencing law, whether considered alone or in connection with other facts and circumstances, cannot constitute an "extraordinary and compelling" reason for a sentence reduction. See United States v. Andrews, 12 F.4th 255, 260-261 (3d Cir. 2021), cert. denied, 142 S. Ct. 1446 (2002); McCall, 56 F.4th at 1050 (6th Cir.); Crandall, 25 F.4th at 585-586 (8th Cir.); Jenkins, 50 F.4th at 1198-1200 (D.C. Cir.). The Eleventh Circuit has reached a similar outcome, reasoning that Sentencing Guidelines § 1B1.13's description of what should be considered "extraordinary and compelling" reasons is applicable to prisoner-filed Section 3582(c)(1)(A) motions. See United States v. Bryant, 996 F.3d 1243, 1257 (11th Cir.), cert. denied, 142 S. Ct. 583 (2021).

The First, Fourth, Ninth, and Tenth Circuits have taken the view that intervening developments in sentencing law can form part of an "individualized assessment[]" of whether "'extraordinary and

compelling reasons'" exist in a particular defendant's case. United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); see United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022); United States v. Chen, 48 F.4th 1092, 1097-1098 (9th Cir. 2022); United States v. McGee, 992 F.3d 1035, 1047-1048 (10th Cir. 2021). Those circuits have nevertheless held, however, that "the mere fact" that a defendant might receive a lower sentence if the defendant were sentenced today "'cannot, standing alone, serve as the basis for a sentence reduction.'" Ruvalcaba, 26 F.4th at 28 (citation omitted); see McCoy, 981 F.3d at 287; Chen, 48 F.4th at 1100; McGee, 992 F.3d at 1048.

b. This Court's review is not warranted at this time because the Sentencing Commission is actively considering the issue. Under Section 3582(c)(1)(A), any sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(A). Every circuit that has held that intervening developments in sentencing law can constitute extraordinary and compelling reasons for a sentence reduction has done so on the premise that the current version of Section 1B1.13 is inapplicable to sentence-reduction motions filed by prisoners. See Ruvalcaba, 26 F.4th at 19-24; McCoy, 981 F.3d at 283; Chen, 48 F.4th at 1095; McGee, 992 F.3d at 1050. Nobody disputes, however, that the Commission has the power to amend Section 1B1.13 to make that policy statement applicable to prisoner-filed motions and to rule out intervening developments in

sentencing law as a possible basis for finding "extraordinary and compelling reasons" for a Section 3582(c)(1)(A) sentence reduction.

The Sentencing Commission is currently in the process of considering revisions to Section 1B1.13. On February 2, 2023, the Sentencing Commission published a proposed amendment to Section 1B1.13 and invited public comment on its proposal by March 14, 2023. 88 Fed. Reg. 7180, 7180 (Feb. 2, 2023). The proposed amendment would revise the policy statement to render it applicable to all Section 3582(c)(1)(A) motions, including those filed by prisoners. See id. at 7183. The proposed amendment also "brackets the possibility of adding" "[c]hanges in [l]aw" as a "new" category of "extraordinary and compelling" reasons. Ibid. The proposed language of the amendment would permit courts to reduce a sentence whenever "[t]he defendant is serving a sentence that is inequitable in light of changes in the law." Ibid.

On February 15, the Department of Justice (Department) submitted comments on the proposed amendment to Section 1B1.13. See Letter from Jonathan J. Wroblewski, Director, Office of Policy & Legislation, Criminal Div., U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sentencing Commission 2, 6-8 (Feb. 15, 2023).[3] In those comments, the Department reiterated the position that it has taken in the courts -- and with which a

[3] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf.

majority of circuits to have considered the issue have agreed -- that Section 3582(c)(1)(A) "does not authorize courts to reduce sentences based on a nonretroactive development in sentencing law." Id. at 2. Consistent with that position, the Department urged the Commission to "reject the proposed 'changes in law' provision." Ibid. The Department further explained that the Commission's proposal would "risk[] undermining the principles of finality and consistency that are the hallmarks of the Sentencing Reform Act" and would create intolerable burdens on courts and victims, id. at 7, and therefore should be rejected for policy as well as legal reasons.

At least so long as the Sentencing Commission remains engaged in considering revisions to Section 1B1.13 regarding what should be considered "extraordinary and compelling" reasons, this Court's review of the question presented would be premature. The Commission may decide to exclude intervening developments in sentencing law as a permissible basis for a Section 3582(c)(1)(A) sentence reduction because such changes are not "extraordinary and compelling" as a statutory matter, do not warrant a reduction as a policy matter, or both. Such a decision would resolve the circuit disagreement and obviate the need for this Court's review. Excluding intervening developments in sentencing law as a policy matter would also deprive a decision by this Court that adopted petitioner's view of Section 3582(c)(1)(A) of practical significance.

Intervention is likewise unwarranted solely to advise the Commission as to whether it would be precluded, as a statutory matter, from including intervening developments in sentencing law as a potential "extraordinary and compelling" reason for a sentence reduction. As an initial matter, the current amendment cycle's amendments or modifications to the Sentencing Guidelines must be sent to Congress by May 1, 2023, and will take effect, absent congressional action, no later than November 1, 2023. See 28 U.S.C. 994(p). An amended policy statement therefore would be promulgated by the Commission, and likely take effect, before the Court would issue any decision on the merits in petitioner's case. The express congressional preference for Commission-based decisionmaking on the specific issue of what extraordinary and compelling reasons warrant a sentence reduction, together with the Commission's ongoing attention to the issue during the current amendment cycle, make petitioner's efforts to urge judicial intervention at this juncture particularly unsound.

c. Finally, nothing in Section 3582(c)(1)(A) or the current guidelines precludes prisoners from filing successive motions for a sentence reduction. Thus, if the Commission were to revise the description of "extraordinary and compelling reasons" without reliance on intervening developments in sentencing law, or prisoners like petitioner became eligible for relief in the future in some other permissible way, the current statutory and guidelines

scheme would not preclude petitioner from filing another Section 3582(c)(1)(A) motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

ANDREW C. NOLL
Attorney

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