No. 22-5894

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE GIBBS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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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 a decision of this Court that does not apply retroactively to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. Coleman, No. 96-cr-539 (Sept. 16, 1997)

Gibbs v. United States, No. 00-cv-3989 (Jan. 23, 2001)

Gibbs v. United States, No. 06-cv-21 (Feb. 7, 2006)

Gibbs v. United States, No. 07-cv-2397 (June 29, 2007)

United States v. Coleman, No. 96-cr-539 (Sept. 2, 2021)

United States District Court (E.D. Va.):

Gibbs v. Wilson, No. 12-cv-128 (Dec. 17, 2012)

United States Court of Appeals (3d Cir.):

United States v. Gibbs, No. 97-1374 (Aug. 26, 1999)

United States v. Gibbs, No. 01-1262 (Sept. 18, 2003)

United States v. Gibbs, No. 03-4854 (Aug. 27, 2004)

United States v. Gibbs, No. 04-1380 (May 26, 2005)

Gibbs v. United States, No. 06-1883 (Nov. 16, 2006)

United States v. Gibbs, No. 07-3305 (May 6, 2008)

United States v. Gibbs, No. 08-1187 (May 21, 2008)

United States v. Gibbs, No. 14-3165 (Mar. 10, 2015)

United States v. Gibbs, No. 16-1123 (Apr. 21, 2016)

United States v. Gibbs, No. 18-1938 (July 31, 2018)

United States v. Gibbs, No. 19-2915 (Dec. 11, 2019)

United States v. Gibbs, No. 20-1636 (Sept. 29, 2020)

United States v. Gibbs, No. 21-3025 (July 21, 2022)

United States Court of Appeals (4th Cir.)

Gibbs v. Wilson, No. 13-6506 (June 26, 2013)

Supreme Court of the United States:

Gibbs v. United States, No. 99-7454 (Jan. 18, 2000)

Gibbs v. United States, No. 03-8530 (Feb. 23, 2004)

Gibbs v. United States, No. 05-5071 (Oct. 3, 2005)

Gibbs v. Wilson, No. 13-7967 (Jan. 27, 2014)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is not published in the Federal Reporter but is available at 2022 WL 14338304. The district court's order (Pet. App. B2) and opinion are not published in the Federal Supplement but its opinion is available at 2021 WL 3929727.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2022. The petition for a writ of certiorari was filed on October 19, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiring to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1); 846; one count of bribing a public official, in violation of 18 U.S.C. 201(b)(1); one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); 15 counts of using a telephone to facilitate a drug felony, in violation of 21 U.S.C. 843(b); and two counts of conspiring to launder monetary instruments, in violation of 18 U.S.C. 1956(h). Judgment 1-2. The district court sentenced petitioner to life imprisonment, to be followed by 5 years of supervised release. Judgment 3-4. The court of appeals affirmed, 190 F.3d 188, and this Court denied a petition for a writ of certiorari, 528 U.S. 1131.

Petitioner thereafter filed multiple unsuccessful motions for post-conviction relief, including under 28 U.S.C. 2255, 28 U.S.C. 2241, Federal Rule of Civil Procedure 60(b), 18 U.S.C. 3582(c)(2), and Section 404 of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-39, Tit. IV, 32 Stat. 5222. See 96-cr-539 D. Ct. Doc. 1277, at 2 & n.3 (Sept. 2, 2021). In February 2020, petitioner filed a pro se motion seeking a sentence reduction under 18 U.S.C. 3582(c)(1)(A), which the district court denied. 96-cr-539 D. Ct. Doc. 1263 (Mar. 5, 2020). After the district court granted petitioner's motion to appoint counsel, petitioner filed a renewed

motion for a sentence reduction under Section 3582(c)(1)(A). 96-cr-539 D. Ct. Doc. 1275 (Aug. 3, 2021); see 96-cr-539 D. Ct. Doc. 1277, at 2-3. The district court denied the renewed motion, Pet. App. B1, and the court of appeals summarily affirmed, id. at A1.

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 and 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, 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, 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)). 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)).

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, Amend. 799.

c. In the First Step Act, 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. From 1992 to 1995, petitioner participated in a conspiracy in the Philadelphia area that distributed more than 150 kilograms of cocaine and generated more than $3 million in illegal proceeds. Presentence Investigation Report (PSR) ¶ 8. The operation obtained cocaine from various suppliers, processed some of the drug into crack, and sold it in both powder and crack form.

PSR ¶¶ 10-11, 15, 24; see 190 F.3d at 195. Petitioner assumed a leadership role in the operation in April 1994, in which he managed the business and recruited individuals to distribute the drugs and collect proceeds. PSR ¶ 9; 190 F.3d at 195. The drug operation's proceeds were laundered through a salon business and the purchase of several vehicles and apartments. PSR ¶¶ 26-27. Petitioner used violence to further the conspiracy by, for example, attempting to kill adversaries of the operation. PSR ¶¶ 18-21.

A federal grand jury in the Eastern District of Pennsylvania returned a 28-count indictment charging petitioner with various drug, bribery, and money laundering offenses. Superseding Indictment 1-47. Following a jury trial, petitioner was convicted on 20 counts. PSR ¶ 4. In advance of sentencing, the Probation Office calculated petitioner's then-mandatory Sentencing Guidelines range. PSR ¶¶ 33-38. The Probation Office determined that the conspiracy involved more than 150 grams of cocaine, and based on that quantity and several sentencing enhancements, it calculated petitioner's guidelines range as life imprisonment. PSR ¶ 68; see Sentencing Guidelines § 2D1.1(c)(1) (1997). At sentencing, the district court found petitioner responsible for more than 150 kilograms of cocaine and more than 1.5 kilograms of crack cocaine, see 125 F. Supp. 2d 700, 702 (summarizing sentencing rulings), and it sentenced petitioner to life imprisonment on the drug conspiracy count and lesser terms of imprisonment on the remaining counts, Judgment 3.

In 2000, the court of appeals affirmed petitioner's convictions and sentence, 190 F.3d at 194-195, and this Court denied a petition for a writ of certiorari, 528 U.S. 1131.

3. Petitioner subsequently filed several motions challenging his convictions and sentence.

Petitioner first moved under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, arguing that this Court's then-recent decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), should be given retroactive effect on collateral review. 96-cr-539 D. Ct. Doc. 729, at 36-42 (Aug. 8, 2000). The district court denied the motion, 125 F. Supp. 2d at 703-707; the court of appeals affirmed, 77 Fed. Appx. 107, 108-109; and this Court denied certiorari, 540 U.S. 1210. The district court also denied a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) that raised a similar Apprendi claim, 07-cv-2397 D. Ct. Doc. 2 (June 29, 2007); 96-cr-539 D. Ct. Doc. 1013 (July 23, 2007), and the court of appeals declined to grant a certificate of appealability, 07-3305 C.A. Order (May 6, 2008).

Petitioner later filed a separate Rule 60(b) motion seeking relief based on this Court's then-recent decision in United States v. Booker, 543 U.S. 220 (2005), in which the Court held that the Sixth Amendment requires treating the mandatory Sentencing Guidelines as advisory. 06-cv-21 D. Ct. Doc. 1 (Jan. 4, 2006). The district court denied the motion, explaining that Booker does not apply retroactively to a final judgment on collateral review

under Section 2255. 06-cv-21 D. Ct. Doc. 2, at 3 (Feb. 7, 2006). The court of appeals affirmed on the ground that petitioner's motion was an unauthorized second or successive Section 2255 petition. See 06-1883 Docket Entry (3d Cir. Nov. 16, 2006) (Order), C.A. Order (Nov. 16, 2006); see 28 U.S.C. 2255(h). Petitioner thereafter filed additional Rule 60(b) motions raising other claims, all of which were denied. See, e.g., 96-cr-539 D. Ct. Doc. 1020 (Nov. 28, 2007); 96-cr-539 D. Ct. Doc. 1024 (Jan. 8, 2008); 96-cr-539 D. Ct. Doc. 1243 (Apr. 2, 2018).

While incarcerated in Virginia in 2012, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the Eastern District of Virginia, again seeking relief based on Booker. 12-cv-128 D. Ct. Docs. 1-2 (Mar. 9, 2012). The district court denied the motion, reasoning that petitioner's claim did not fall within the scope of habeas petitions permitted under 28 U.S.C. 2255(e). 12-cv-128 D. Ct. Docs. 9 (Nov. 6, 2012) and 11 (Dec. 17, 2012). The Fourth Circuit affirmed, 531 Fed. Appx. 307, 308 (2013), and this Court denied a petition for a writ of certiorari, 571 U.S. 1184 (2014). In 2014, petitioner filed a petition for a writ of error audita querela in his criminal case, again raising a Booker claim. 96-cr-539 D. Ct. Doc. 1131 (Jan. 28, 2014). The district court denied the motion, 96-cr-539 D. Ct. Doc. 1134 (Feb. 5, 2014), and the Third Circuit affirmed. 598 Fed. Appx. 814, 815 (2015).

In 2016, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(2), claiming eligibility for a sentence reduction under retroactive amendments to the Sentencing Guidelines that would entitle him to a two-level reduction in his offense level for his drug offenses. 96-cr-539 D. Ct. Doc. 1175 (Dec. 4, 2015). The district court denied the motion, explaining that even after applying the offense-level reduction, petitioner's guidelines sentence is still life imprisonment. 96-cr-539 D. Ct. Doc. 1180, at 2 (Jan. 7, 2016). The court of appeals affirmed, 647 Fed. Appx. 133, and in 2019 it similarly affirmed the district court's denial of a motion to appoint counsel to press the same sentencing claim under Section 404 of the First Step Act, 787 Fed. Appx. 71, 72-73.

4. In February 2020, petitioner filed a pro se motion for a sentence reduction under Section 3582(c)(1)(A), which the district court denied. 96-cr-539 D. Ct. Doc. 1263. After the district court appointed counsel, 96-cr-539 D. Ct. Doc. 1273 (Mar. 30, 2020), petitioner filed a renewed request under Section 3582(c)(1)(A). 96-cr-539 D. Ct. Doc. 1275. The counseled motion asserted that petitioner's alleged vulnerability to COVID-19 and the changes in sentencing law resulting from this Court's decisions in Apprendi and Booker provided "extraordinary and compelling" circumstances warranting a sentence reduction. Id. at 1, 12-13.

The district court denied the renewed motion. 96-cr-539 D. Ct. Doc. 1277. The court explained that because petitioner had

been vaccinated against COVID-19, his potential exposure to the virus did not represent an "extraordinary and compelling reason" for a sentence reduction under Section 3582(c)(1)(A). Id. at 8. The court also rejected petitioner's contention that he could establish an "extraordinary and compelling reason for compassionate release" based on the possibility that his sentence could be different if he were resentenced under Apprendi and Booker. Id. at 8-10. The court explained that, under the Third Circuit's decision in United States v. Andrews, 12 F.4th 255 (2021), cert. denied, 142 S. Ct. 1446 (2022), intervening changes in federal sentencing law do not qualify as extraordinary and compelling reasons justifying a sentence reduction. 96-cr-539 D. Ct. Doc. 1277, at 9. And the court observed that petitioner had "concede[d]" that, even under the current sentencing regime, the advisory guidelines would "still allow for a maximum sentence of life as a result of the large quantity of cocaine involved in [his] drug conspiracy." Ibid.

5. The court of appeals summarily affirmed in an unpublished order. Pet. App. A1.

ARGUMENT

Petitioner contends (Pet. 5-6, 13-15) that a nonretroactive change in the 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. In any event, this case would be a poor vehicle to address the question presented because the only change in sentencing law that petitioner cites before this Court is United States v. Booker, 543 U.S. 220 (2005), and petitioner has acknowledged that he could receive the same sentence under the current advisory Sentencing Guidelines.

This Court has recently denied petitions for writs of certiorari raising similar issues.[1] It should follow the same course here.

1. Petitioner contends (Pet. 5-6, 13-15) that the change in the law effectuated by this Court's decision in Booker, which was decided five years after petitioner's sentence became final, constitutes an "extraordinary and compelling" reason for a

[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); King v. United States, No. 22-5878 (filed Oct. 11, 2022); Tovar v. United States, No. 22-5958 (filed Oct. 4, 2022); Eye v. United States, No. 22-6096 (filed Apr. 7, 2022).

sentence reduction under Section 3582(c)(1)(A). Petitioner does not assert that Booker is either directly or retroactively applicable to his sentence, and it is not. See, e.g., Lloyd v. United States, 407 F.3d 608, 614 (3d Cir.) ("Every federal court of appeals to have considered" the issue "has held that Booker does not apply retroactively to cases on collateral review."), cert. denied, 546 U.S. 916 (2005); see also Schriro v. Summerlin, 542 U.S. 348, 351-358 (2004) (holding that case in same line of Sixth Amendment decisions was not retroactive).

Instead, petitioner contends (Pet. 15) that even a "non-retroactiv[e]" change in the law may constitute an "extraordinary and compelling" reason for a sentence reduction in an individual case. For the reasons stated in the government's brief in opposition to the petition for a writ of certiorari in Fraction v. United States, No. 22-5859 (filed Oct. 11, 2022), the lower courts correctly recognized that a nonretroactive change in law does not constitute an "extraordinary and compelling reason[]" for a sentence reduction under Section 3582(c)(1)(A). Br. in Opp. at 14-19, Fraction, supra (No. 22-5859).[2]

2. Petitioner also contends (Pet. 9-12) that the courts of appeals are divided as to whether a nonretroactive change in the law constitutes an "extraordinary and compelling" reason for a sentencing reduction under Section 3582(c)(1)(A). As the

[2] We have served petitioner with a copy of the government's brief in opposition in Fraction.

government's brief in opposition in Fraction explains, the divergence of views on that issue does not warrant this Court's review because the Sentencing Commission is currently considering whether and how to address the issue in a proposed amendment to the Guidelines. See Br. in Opp. at 19-24, Fraction, supra (No. 22-5859).

3. In any event, this case would be a poor vehicle to consider the question presented because it is unlikely to be outcome determinative. Booker is the only change in the law on which petitioner now relies, and -- as the district court observed -- petitioner has acknowledged that he could still be sentenced to life in prison under the advisory guidelines. 96-cr-539 D. Ct. Doc. 1277, at 9.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] In the district court, petitioner invoked the Court's decision in Apprendi as an intervening decision which he likewise claimed supported a finding of extraordinary and compelling reasons for a sentence reduction. See 96-cr-539 D. Ct. Doc. 1277, at 8-9. Petitioner did not press that argument in the court of appeals or in his petition for certiorari before this Court. See Pet. 5-6; Pet. C.A. Br. 7, 12.

MARCH 2023