No. 22-5958

IN THE SUPREME COURT OF THE UNITED STATES

RAUL TOVAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH 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 centered on a statutory sentencing amendment to 21 U.S.C. 841(b)(1)(A) that Congress made clear does not apply to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D.N.D.):

United States v. Keller, No. 12-cr-31 (May 2, 2013)

Tovar v. United States, No. 15-cv-78 (June 3, 2016)

United States v. Keller, No. 12-cr-31 (July 7, 2022)

United States District Court (D. Ariz.):

Tovar v. Howard, No. 21-cv-270 (Mar. 18, 2022)

United States Court of Appeals (8th Cir.):

United States v. Tovar, No. 13-2062 (July 11, 2014)

Tovar v. United States, No. 16-2802 (Oct. 13, 2016)

Tovar v. United States, No. 17-1528 (July 31, 2017)

Tovar v. United States, No. 18-1813 (June 20, 2018)

Supreme Court of the United States:

Tovar v. United States, No. 14-6641 (Nov. 10, 2014)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19) is not published in the Federal Reporter. The order of the district court (Pet. App. 17-18) is unreported. A prior opinion of the court of appeals (Pet. App. 15) is not published in the Federal Reporter but is available at 2022 WL 16631177. A prior order of the district court (Pet. App. 4-14) is not published in the Federal Supplement but is available at 2020 WL 3578579.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2022. A petition for rehearing was denied on August 17, 2022 (Pet.

App. 21). The petition for a writ of certiorari was filed on October 4, 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 District of North Dakota, petitioner was convicted on one count of conspiring to possess with intent to distribute and to distribute a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841 and 846. Judgment 1; Presentence Investigation Report (PSR) ¶¶ 1-2. The district court sentenced petitioner to a term of life imprisonment, to be followed by lifetime supervised release. Judgment 2-3. The court of appeals affirmed. 569 Fed. Appx. 478. The district court denied petitioner's subsequent motion to vacate his sentence under 28 U.S.C. 2255, D. Ct. Doc. 431 (Nov. 16, 2015); D. Ct. Doc. 458 (June 3, 2016), and the court of appeals denied petitioner's application for a certificate of appealability. No. 16-2802, C.A. Order (Oct. 13, 2016). The court of appeals also denied petitioner's subsequent requests for approval to file successive Section 2255 motions. No. 17-1528, C.A. Order (July 31, 2017); No. 18-1813, C.A. Order (June 20, 2018).

In May 2020, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 513 (May 21, 2020). The district court denied the motion. Pet. App. 4-14. Petitioner filed a motion for reconsideration, id. at 1-2, which

the district court denied, id. at 3. The court of appeals affirmed. Id. at 15. In 2022, petitioner filed a renewed motion to reconsider the order denying his motion to reduce his sentence, which the district court denied. Id. at 16-18. The court of appeals affirmed. Id. at 19.

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 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).

In addition, the First Step Act amended the penalties for certain drug offenses. § 401, 132 Stat. 5220-5221. Before the First Step Act, 21 U.S.C. 841(b)(1)(A) (2012) prescribed a minimum sentence of 20 years of imprisonment for a violation of Section 841(a) and (b)(1)(A) committed "after a prior conviction for a

felony drug offense has become final." Section 401(a) of the First Step Act amended the statute to prescribe a minimum sentence of 15 years for a violation of Section 841(a) and (b)(1)(A) committed "after a prior conviction for a serious drug felony or serious violent felony has become final." § 401(a)(2)(A)(i), 132 Stat. 5220; see § 401(a)(1), 132 Stat. 5220 (21 U.S.C. 802(57)) (defining "serious drug felony"). Congress specified that the amendment "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." First Step Act § 401(c), 132 Stat. 5221.

2. In 2007, petitioner was convicted and sentenced for multiple North Dakota state felony drug offenses, including two counts of possessing a controlled substance with intent to deliver. Pet. App. 4-5. As early as 2009, however, petitioner began acquiring methamphetamine from Texas and distributing it in Sioux Falls, South Dakota. PSR ¶ 25. Sometime around 2011, petitioner started selling methamphetamine to a co-conspirator for redistribution, and -- after that co-conspirator found alternate sources -- petitioner entered into an agreement with the co-conspirator under which each man would sell methamphetamine to the other if his supply ran out. PSR ¶ 26. Petitioner and other members of the conspiracy trafficked more than 500 grams of a mixture containing a detectable amount of methamphetamine in North Dakota and other states. PSR ¶ 20.

A federal grand jury in the District of North Dakota charged petitioner with conspiring to possess with intent to distribute and to distribute a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. 841 and 846. Indictment 1-3. The government notified petitioner that he was subject to a statutory sentencing enhancement under 21 U.S.C. 841(b)(1)(A) based on his prior convictions for "felony drug offenses." D. Ct. Doc. 88 (Apr. 26, 2012); PSR ¶ 7; see 21 U.S.C. 841(b)(1)(A). Following a jury trial, petitioner was convicted of conspiring to distribute methamphetamine. PSR ¶¶ 1, 8.

In advance of sentencing, the Probation Office determined that, as a result of petitioner's prior convictions, his statutory-minimum term of imprisonment was life under 21 U.S.C. 841(b)(1)(A). PSR ¶ 91. At sentencing, the district court determined that if petitioner were not subject to a statutory term of imprisonment, his advisory Sentencing Guidelines range would be 188 to 235 months of imprisonment. Pet. App. 5; Sent. Tr. 6. But the court determined that the statutory term applied, and after stating that he would "sentence to less than life in prison" if it were possible, Sent. Tr. 9, the court sentenced petitioner to life imprisonment, Judgment 1. The court of appeals affirmed, 569 Fed. Appx. 478, and this Court denied a petition for a writ of certiorari.

Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, which the district

court denied. D. Ct. Doc. 431; D. Ct. Doc. 458. The court of appeals denied a certificate of appealability and denied petitioner's subsequent motions to file a successive Section 2255 motion. No. 16-2802, C.A. Order (Oct. 13, 2016); No. 17-1528, C.A. Order (July 31, 2017); No. 18-1813, C.A. Order (June 20, 2018).

3. In May 2020, petitioner filed a pro se motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 513 (May 21, 2020). Petitioner's asserted "extraordinary and compelling" reasons for such a reduction included his rehabilitation efforts, a risk of contracting COVID-19, and intervening amendments to the sentencing statutes. Id. at 8. In respect to the sentencing amendments, petitioner claimed that he had not served a term of more than 12 months imprisonment for any of his state offenses, and that the First Step Act exempted such prior offenses from classification as sentence enhancing predicates. Id. at 8-9. Petitioner acknowledged, however, that the relevant "First Step Act[] sentencing provisions were not made retroactive." Id. at 9.

The district court denied petitioner's motion. Pet. App. 4-14. As to petitioner's sentencing arguments, the court concluded that petitioner would not face a statutory minimum of life imprisonment if sentenced under the First Step Act's amendments because he "no longer would have the requisite two or more prior convictions [for a serious drug felony]." Id. at 10. But the

court recognized that the "potential of a lower sentence" could not provide an "extraordinary and compelling reason" for a sentence reduction because that would "amount to retroactive application of" the prospective sentencing amendment in "Section 401 of the [First Step Act], which would contravene the intent of Congress." Ibid. The court of appeals summarily affirmed. Id. at 15.

In June 2022, petitioner moved for reconsideration of the district court's order denying his motion for a reduced sentence. See Pet. App. 16. Petitioner asserted that reconsideration was warranted in light of this Court's decision in United States v. Concepcion, 142 S. Ct. 2389 (2022), which considered the scope of a district court's discretion when adjudicating a motion for a reduced sentence under Section 404 of the First Step Act. See Pet. App. 16. The district court denied the motion, observing that neither petitioner's conviction nor his sentence for trafficking methamphetamine was "implicated by Section 404 of the First Step Act," which provides a mechanism for applying certain changes to crack-cocaine sentencing retroactively. Id. at 18.

4. The court of appeals summarily affirmed. Id. at 21.

ARGUMENT

Petitioner contends (Pet. 7-8) that the First Step Act's amendment to Section 841(b)(1)(a), which is not applicable to preexisting sentences like petitioner's, can nevertheless serve as an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A)(i). That contention lacks merit. And

although courts of appeals have reached different conclusions on whether non-retroactive changes in sentencing law can provide an "extraordinary and compelling reason" for a sentence reduction under 18 U.S.C. 3582(c)(1)(A), 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. Nothing would prevent petitioner from renewing his motion for a sentence reduction following the Commission's promulgation of a new policy statement. This Court has recently denied petitions for writs of certiorari raising similar issues.[1] The same result is warranted here.

1. Petitioner contends (Pet. 7-8) that Congress's decision not to extend the First Step Act's amendment to Section 841(b)(1)(A) to defendants like him can constitute an "extraordinary and compelling" reason for a sentence reduction

[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); Gibbs v. United States, No. 22-5894 (filed Oct. 19, 2022); Eye v. United States, No. 22-6096 (filed Apr. 7, 2022); Thompson v. United States, No. 22-6448 (filed Dec. 15, 2022).

under Section 3582(c)(1)(A). That contention lacks merit for the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Tomes v. United States, No. 21-5104. See Br. in Opp. at 14-17, Tomes, supra (No. 21-5104).[2]

Petitioner also suggests (Pet. 8) that the decision below conflicts with this Court's recent decision in Concepcion v. United States, 142 S. Ct. 2389 (2022). 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 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, Section 3582(c)(1)(A) contains a threshold requirement that a district court identify an "extraordinary and compelling" reason 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

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

in which "Congress expressly cabined district courts' discretion." 142 S. Ct. at 2401. Petitioner's reliance on Concepcion is therefore misplaced.

2. The courts of appeals are divided over whether district courts may rely on changes in sentencing law that do not otherwise apply to a defendant's sentence in finding "extraordinary and compelling" reasons for a sentence reduction under Section 3582(c)(1)(A). But for the reasons explained in the government's brief in opposition to the petition for a writ of certiorari in Fraction v. United States, No. 22-5859, 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]

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

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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