

No. 22-6096

IN THE SUPREME COURT OF THE UNITED STATES

GARY EYE, 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 18 U.S.C. 924(c) that specifically does not apply to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mo.):

United States v. Eye, No. 05-cr-344 (Sept. 11, 2008)

Eye v. United States, No. 11-cv-1130 (May 22, 2013)

Eye v. United States, No. 14-cv-405 (May 8, 2014)

United States v. Eye, No. 05-cr-344 (Nov. 29, 2021)

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

Eye v. Streeval, No. 20-cv-272 (Dec. 8, 2021)

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

United States v. Eye, No. 08-3164 (Jan. 29, 2010)

Eye v. United States, No. 13-2936 (Jan. 9, 2014)

Eye v. United States, No. 19-1559 (July 2, 2019)

Eye v. United States, No. 20-1361 (Apr. 15, 2020)

Eye v. United States, No. 20-1988 (July 23, 2020)

Eye v. United States, No. 22-2116 (June 7, 2022)

Eye v. United States, No. 22-2649 (Sept. 6, 2022)

United States Court of Appeals (4th Cir.):

Eye v. Streeval, No. 21-7729 (Apr. 29, 2022)

Supreme Court of the United States:

Eye v. United States, No. 09-11403 (Oct. 4, 2010)

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. B1) is not published in the Federal Reporter. The order of the district court (Pet. App. A1-A4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2022. The petition for a writ of certiorari was filed on April 7, 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 Western District of Missouri, petitioner was convicted on two counts of interfering with federally protected activities, in violation of 18 U.S.C. 245(b)(2)(B); one count of using or discharging a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(a)(iii); two counts of murder through the use or discharge of a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii) and (j)(1); one count of witness tampering, in violation of 18 U.S.C. 1512(a)(1)(C) and (a)(3)(A); one count of obstructing justice, in violation of 18 U.S.C. 1519; and one count of using fire to commit a felony, in violation of 18 U.S.C. 844(h)(1). Judgment 1. The district court sentenced petitioner to four terms of life imprisonment, as well as four lesser terms of imprisonment. Judgment 2-3. The court of appeals affirmed, 594 F.3d 634, and this court denied a petition for a writ of certiorari, 131 S. Ct. 192. The district court denied petitioner's subsequent motion for relief under Section 2255, and the court of appeals denied a certificate of appealability. Pet. App. A2. The court of appeals also denied three subsequent requests for authorization to file successive Section 2255 motions. Ibid.

In November 2021, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 587 (Oct.

25, 2021). The district court denied the motion, Pet. App. A1-A4, and the court of appeals affirmed, id. at B1.

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).

d. The First Step Act additionally amended the penalties for using a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). § 403(a), 132 Stat. 5221-5222. Before the First Step Act, Section 924(c) provided for a minimum consecutive sentence of 20 years of imprisonment -- later revised to 25 years, see Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat.

3469 -- in the case of a "second or subsequent conviction" under Section 924(c), including when that second or subsequent conviction was obtained in the same proceeding as the defendant's first conviction under Section 924(c). 18 U.S.C. 924(c)(1) (Supp. IV 1992); see Deal v. United States, 508 U.S. 129, 132-137 (1993). In the First Step Act, Congress amended Section 924(c) to provide for a minimum consecutive sentence of 25 years of imprisonment only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5222. Congress specified that the amendment "shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222.

2. a. In March 2005, petitioner "drove around Kansas City, Missouri, in a stolen car" with Steven Sandstrom and Regennia Rios "looking for another car to steal." United States v. Sandstrom, 594 F.3d 634, 639 (8th Cir. 2010). The trio stole a second car, and then petitioner and Rios briefly separated from Sandstrom. Ibid. When the three later reconnected, Sandstrom announced that "'he just shot a n* * * *r at 7-Eleven.'" Ibid. (alteration in original). After smoking methamphetamine, the trio picked up a fourth person and drove around looking for a third car to steal. Id. at 639-640. During that time, petitioner announced

that "he 'would kill a n* * * *r quick.'" Id. at 640 (alteration in original).

A few hours later, as Sandstrom, Rios, and petitioner were again driving around, Rios spotted an African American man, William McCay. Sandstrom, 594 F.3d at 640. Petitioner directed Sandstrom, who was driving, to turn toward McCay, who was walking. Ibid. Petitioner also asked Sandstrom for a gun. Ibid. Sandstrom then drove towards McCay, and petitioner "put his arm out the window and fired at least two shots at McCay from roughly three to four feet away." Ibid. "After shooting at McCay, [petitioner] told Sandstrom to drive around the block." Ibid. They eventually spotted McCay again, and petitioner left the car, walked toward McCay, and again fired at him -- this time, killing him. Id. at 640-641. The trio then fled the scene and later set the car they had been driving on fire. Ibid.

b. A federal grand jury in the Western District of Missouri charged petitioner with two counts of interfering with federally protected activities, in violation of 18 U.S.C. 245(b) (2) (B); one count of using or discharging a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (iii); two counts of murder through the use or discharge of a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1) (A) (iii) and (j) (1); one count of witness tampering, in violation of 18 U.S.C. 1512(a) (1) (C) and (3) (A); one count of obstruction of justice, in violation of 18 U.S.C. 1519; and one count of using fire to commit

a felony, in violation of 18 U.S.C. 844(h) (1). Superseding Indictment 1-8. A jury found petitioner guilty on all counts. Judgment 1.

Before sentencing, the Probation Office determined that Section 924(c) (1) (C) required a statutory-minimum term of twenty-five years imprisonment on each of his two Section 924(j) convictions. Presentence Investigation Report (PSR) ¶ 65. The district court sentenced petitioner to concurrent terms of life imprisonment on one of the counts of interfering with federally protected activities and on the witness tampering count; lesser concurrent terms on the other counts of interfering with federally protected activities and on the obstruction of justice count; 120 months on the 924(c) count and on the arson count, to be served consecutively with each other and with every other count; and life imprisonment on each of the Section 924(j) counts, to be served concurrently with each other and consecutively with the terms for the other counts. Judgment 1. Petitioner appealed, and the court of appeals affirmed. Sandstrom, 594 F.3d at 639.

In 2013, the district court denied petitioner's motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, and both the district court and the court of appeals denied a certificate of appealability. D. Ct. Doc. 553, at 1 (May 22, 2013); D. Ct. Doc. 554, at 1 (May 22, 2013); 13-2936 C.A. Judgment 1 (Jan. 9, 2014). The court of appeals also denied subsequent requests for authorization to file successive Section 2255

motions. 19-1559 C.A. Judgment 1 (July 2, 2019); 20-1361 C.A. Judgment 1 (Apr. 15, 2020); 20-1988 C.A. Judgment 1 (8th Cir. July 23, 2020).

Petitioner later filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the Western District of Virginia, where he was incarcerated. 20-cv-272 D. Ct. Doc. 1, at 13-15 (May 11, 2020). The district court there denied his motion on procedural and jurisdictional grounds. 20-cv-272 D. Ct. Doc. 26, at 5-16 (Aug. 5, 2021).

3. In November 2021, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 587, at 8, 12. That motion asserted that changes to the sentencing scheme for Section 924(c) and (j) offenses provided an "extraordinary and compelling reason" for a sentence reduction. 18 U.S.C. 3582(c)(1)(A); see D. Ct. Doc. 587, at 12.

The district court denied the motion. Pet. App. A1-A4. The court first found that petitioner had established "no extraordinary or compelling reasons justifying modification of his sentence." Id. at A3. It explained that, while petitioner alleged that the First Step Act had amended "the way [his] § 924(c) convictions stack," that amendment did not apply retroactively to petitioner's case. Ibid. The district court then "further f[ou]nd that [petitioner] has not shown that the Section 3553(a) factors support his release," explaining that petitioner was serving a life sentence for a "violent crime," and had presented no facts

"to indicate that he is not a danger to the community." Id. at A4.

4. The court of appeals summarily affirmed. Pet. App. B1.

ARGUMENT

Petitioner contends (Pet. 5-7) that the First Step Act's amendment to Section 924(c), 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. Were the Court nevertheless inclined to consider the question presented, this case would be a poor vehicle in which to do so, because petitioner would not be entitled to a sentence reduction even if the question were resolved in his favor. This Court has repeatedly and recently denied petitions for writs of certiorari raising similar issues.¹ The same result is warranted here.

¹ See, e.g., Thacker v. United States, 142 S. Ct. 1363 (2022) (No. 21-877); Williams v. United States, 142 S. Ct. 1207

1. Petitioner contends (Pet. Pet. 5-7) that Congress's decision not to extend the First Step Act's amendment to Section 924(c) to defendants like him can constitute an "extraordinary and compelling reason" for a sentence reduction 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 Jarvis v. United States, 142 S. Ct. 760 (2022) (No. 21-568). See Br. in Opp. at 12-16, Jarvis, supra (No. 21-568).²

The courts of appeals are divided about whether district courts may rely on changes in sentencing law that do not otherwise apply to a defendant's sentence to find "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

(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); Tovar v. United States, No. 22-5958 (filed Oct. 4, 2022); Thompson v. United States, No. 22-6448 (filed Dec. 15, 2022).

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

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

2. Even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it, because the issue would not be outcome determinative. Under Section 3582(c)(1)(A), any sentence reduction must be supported not only by "extraordinary and compelling reasons," but also by "the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. 3582(c)(1)(A). Here, after considering factors under Section 3553(a), the court determined that a sentence reduction was not warranted. Pet. App. A4. As the court explained, given "the potential risk of danger [petitioner's] release would pose to the community and the nature and circumstances of [his] offense[s]," the Section 3553(a) factors weighed against granting a sentence reduction. Ibid.

In addition, a decision in petitioner's favor would have no practical effect on his sentence. Although the First Step Act altered the statutory-minimum penalty applicable to certain successive Section 924(c) offenses, which the Probation Office determined to be applicable to petitioner's Section 924(j) convictions here, see PSR ¶ 65, petitioner was sentenced to two

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

concurrent terms of life imprisonment on those counts -- well above the statutory minimum. Judgement 2. And petitioner is also serving two separate, concurrent life sentences for other offenses. Ibid. Accordingly, even if the First Step Act's amendment applied to petitioner's case and the district court might have imposed a lower sentence on his Section 924(j) convictions, the modification of those sentences would have no practical effect on petitioner's concurrent life sentences, nor would it warrant any reduction in his effective term of imprisonment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2023