NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

LEETAVIOUS GAINES,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTION PRESENTED FOR REVIEW

Whether Section 1B1.13 of the United States Sentencing Guidelines is an "applicable" policy statement that binds the district court in considering a defendant-filed motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Leetavious Gaines, No. 96-06159-Cr-Moore (February 16, 2022)

United States Court of Appeals (11th Cir.):

United States v. Leetavious Gaines, No. 22-10587 (October 6, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTORY AND OTHER AUTHORITY:

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Leetavious Gaines respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 22-10587 in that court on October 6, 2022. The Eleventh Circuit affirmed the order of the United States District Court for the Southern District of Florida denying Mr. Gaines's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit (App. A-1), is unreported but available at 2021 WL 4947105. The district court's order denying Petitioner's 18 U.S.C. § 3582(c)(1)(A) motion for compassionate release (App. A-2) is unreported.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on October 6, 2022.

STATUTORY AND OTHER PROVISIONS INVOLVED

First Step Act, Section 403

Section 403 of the First Step Act, Pub. L. 115-391, § 403, 132 Stat. 5194, 5221-11 (Dec. 21, 2018), titled "Clarification of Section 924(c) of Title 18, United States Court," states:

> (a) In General.— Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".
>
> (b) Applicability to Pending Cases.—This section, and the amendments made by this section, 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, Section 603(b)

Section 603(b) of the First Step Act states, Pub. L. 115-391, § 603, 132 Stat. 5194, 5238-5241 (Dec. 21, 2018), states, in relevant part:

> (b) Increasing The Use and Transparency Of Compassionate Release.—Section 3582 of title 18, United States Code, is amended—
>
> > (1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after "Bureau of Prisons," the following: "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."

18 U.S.C. § 3582(c)(1)(A)

Title 18, U.S.C. § 3582 states, in relevant part:

> (c) Modification of an Imposed Term of Imprisonment.— The court may not modify a term of imprisonment once it has been imposed except that—
>
> > (1) in any case—
> >
> > > (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
> > >
> > > > (i) extraordinary and compelling reasons warrant such a reduction; . . .

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

U.S.S.G. § 1B1.13

United States Sentencing Guideline § 1B1.13 provides, in relevant part:

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that –

(1) (A) extraordinary and compelling reasons warrant the reduction; . . .

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2) extraordinary and compelling reasons exist under any of the circumstances set forth below:

   (A) Medical Condition of the Defendant.—

      (i) The defendant is suffering from a terminal illness . . .

      (ii) The defendant is –

         (I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family circumstances.—
(i) The death or incapacitation of the caregiver of the defendant's minor children.
(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only caregiver for the spouse or registered partner.

(D) Other reasons.—As determined by the Director of the Bureau of Prisons, there exists in defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

* * *

4. Motion by Director of the Bureau of Prisons. A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). . . .

STATEMENT OF THE CASE

This petition presents an important question of statutory interpretation which has resulted in a recognized, intractable, ten-to-one circuit split, with the court below standing alone. Moreover, this case presents a perfect vehicle for resolution of this lopsided split. The petition should be granted.

1. In 1997, a jury convicted Petitioner of fourteen robbery and firearm charges arising out of his involvement in the armed robberies of six fast-food restaurants. Six of the charges were for using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). App. A-2 at 1-2.

2. At the time, § 924(c) imposed mandatory minimum consecutive sentences of five years for the first violation of § 924(c) and twenty years for "second or subsequent" § 924(c) offenses. *See* 18 U.S.C. § 924(c) (1994). The twenty-year consecutive minimum applied to every violation of § 924(c) after the first, even if the defendant – like Petitioner – was a first-time offender charged with multiple § 924(c) violations in the same indictment. *See Deal v. United States*, 508 U.S. 129-130-37 (1993).

3. The district court sentenced Petitioner to a total term of imprisonment of 1330 months – nearly 111 years. App. A-2 at 2. One hundred and five of those years arose from the consecutive sentences the district court was required to impose for Petitioner's six § 924(c) convictions: a consecutive 60-month sentence for the first § 924(c) conviction, and five consecutive 20-year sentences for the others.

4. More than 20 years after Petitioner's convictions became final, Congress passed the First Step Act of 2018. *See* Pub. L. 115-391, 132 Stat. 5194 (Dec. 21, 2018). Section 403 of the Act amended § 924(c) to provide that the minimum consecutive penalty for second or subsequent offenses applies only after a prior conviction had become final. *Id.*, § 403(b), 132 Stat. at 5221-22. As a result of this change, if Petitioner were sentenced today, he would face mandatory minimum five-year consecutive sentences for each of his six § 924(c) violations – for a total consecutive sentence of 30 years – rather than the 105 years the district court was required to impose under the law at the time. But Congress did not make this First Step Act amendment to § 924(c) retroactively applicable. *See id.*, 132 Stat. at 5222.

5. The First Step Act also significantly expanded access to compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). As originally enacted, § 3582(c)(1)(A) allowed a district court to reduce a defendant's sentence, "upon motion of the Director of the Bureau of Prisons, . . . 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." § 3582(c)(1)(A)(i). Sentencing Reform Act, § 212(a)(2), 98 Stat. 1998-1999. At the time it enacted the compassionate release statute, 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(c)(2)(C).

In 2006, the Sentencing Commission finally promulgated a policy statement addressing § 3582(c) motions – Sentencing Guideline § 1B1.13. Section 1B1.13 lists specific circumstances related to a defendant's age, medical conditions, or family circumstances as "extraordinary and compelling reasons" for a sentence reduction, as well as a catch-all category for other reasons determined by the Director of the Bureau of Prisons (BOP) to be extraordinary and compelling. U.S.S.G. § 1B1.13, cmt. n.1. It also requires that the district court find that the "defendant is not a danger to the safety of any other person or to the community" before granting a motion for compassionate release. *Id.* § 1B1.13(2). Finally, § 1B1.13 expressly restricts relief to motions filed by the Director of the BOP. *Id.* § 1B1.13, cmt. n.4 ("A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A).")

6. After the First Step Act, however, § 3582(c)(1)(A) no longer limits relief only to motions filed by the Director of the BOP. Section 603 of the Act amended § 3582(c)(1)(A) to give courts the authority to also grant compassionate release motions filed by defendants, so long as the defendant exhausted administrative remedies before seeking judicial review. *See* Pub. L. 115-391, § 603(b), 132 Stat. at 5238-5241.

7. However, due to the absence of a quorum at the Sentencing Commission, neither § 1B1.13 nor its accompanying application notes have been amended since passage of the First Step Act. As a result, the current version of § 1B1.13 continues to mandate deference to the BOP in evaluating compassionate release requests, even though Congress expressly rejected that deference by enacting Section 603(b) of the First Step Act. The Sentencing Commission recently obtained a quorum, but to date has made no changes to § 1B1.13 or its application notes.

7. On December 21, 2020, Petitioner filed in the district court a motion for compassionate release pursuant to § 3582(c)(1)(A). He argued that after the First Step Act's amendments to § 3582(c)(1)(A), district courts were no longer bound by the policy statements in U.S.S.G. § 1B1.13 when considering motions for compassionate release. Specifically, he argued that the policy statements in § 1B1.13 expressly applied only to compassionate release motions filed by the Director of the BOP. Therefore, he argued, the district court could consider the harshness of his § 924(c) sentences to be an "extraordinary and compelling reason[]" for his release, even though those circumstances fell outside those listed in § 1B1.13 and its application notes. Nonetheless, the district court applied the policy statements in § 1B1.13 to find that Petitioner failed to present "extraordinary and compelling" reasons justifying release. App. A-2: 5-8. It also determined that the

factors found in 18 U.S.C. § 3553(a) did not weigh in favor of release. *Id.* at 8-9. Petitioner timely appealed.

8. The Eleventh Circuit granted the government's motion for summary affirmance, holding that result was compelled by prior precedent – its decision in *United States v. Bryant*, 996 F.3d 1243 (11th Cir.), *cert. denied*, 142 S. Ct. 583 (2021). *Bryant* held that because "§ 1B1.13 is the applicable policy statement that governs all motions under Section 3582(c)(1)(A)[,] . . . district courts may not reduce a sentence under Section 3582(c)(1)(A) unless the reduction would be consistent with 1B1.13." *Bryant*, 996 F.3d at 1262. Therefore, the court of appeals reasoned, the district court properly followed *Bryant* when it rejected Petitioner's argument that, after the First Step Act amendments, district courts considering defendant-filed compassionate release motions were no longer limited by the policy statements in U.S.S.G. § 1B1.13. App. A-1 at 4. Specifically, the court of appeals held that "under *Bryant*, Gaines cannot show extraordinary and compelling reasons justifying his release, and so he cannot prevail in his appeal as a matter of law." *Id.*

And because the Eleventh Circuit found that *Bryant* required summary affirmance, it expressly declined to address the government's additional argument that the district court properly weighed the § 3553(a) factors, finding consideration of that argument "unnecessary." *Id.* at 3.

REASON FOR GRANTING THE WRIT

I. The circuits are intractably split on the question presented.

To date, ten circuits have held that following enactment of the First Step Act, district courts considering § 3582(c)(1)(A) motions filed by defendants are not bound by the criteria listed by the Sentencing Commission in U.S.S.G. § 1B1.13. *See United States v. Ruvalcaba*, 26 F.4th 14, 21 (1st Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (*per curiam*); *United States v. Shkambi*, 993 F.3d 388, 392-393 (5th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281-83 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1108-11 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020). The Eleventh Circuit, with its contrary holding in *Bryant*, stands alone. *See Bryant*, 996 F.3d at 1262. Indeed, in *Bryant* itself, the Eleventh Circuit expressly acknowledged its lone wolf status. *See id*. at 1259-1261.

This conflict is not only openly acknowledged but intractable. Since the Eleventh Circuit's decision in *Bryant*, the First, Third, and the District of Columbia Circuits have all joined the majority. *See Ruvalcaba*, 26 F.4th at 21; *Andrews*, 12 F.4th at 259; *Long*, 997 F.3d at 355. The Third Circuit deemed the question so straightforward that it addressed it in two sentences, stating that "the text of the

policy statement [in U.S.S.G. § 1B1.13] explicitly limits its application to Bureau-initiated motions. Thus, according to its plain language, the existing policy statement is not applicable—and not binding—for courts considering prisoner-initiated motions." *Id.* The Third Circuit noted that "[i]In reaching this conclusion, we align with nearly every circuit court to consider the issue," except the Eleventh. *See id.*

The First Circuit's analysis was similarly curt. Calling *Bryant* an "outlier," it stated that although the Eleventh Circuit's holding was premised on a "tautological approach" that "may have a certain superficial appeal," the context and overall statutory scheme "make luminously clear that the current policy statement cannot be 'applicable' to prisoner-initiated motions." *Ruvalcaba*, 26 F.4th at 21-22.

The D.C. Circuit's discussion was lengthier, but no less unequivocal. *See Long*, 997 F.3d at 355. That court held that the inapplicability of § 1B1.13 is "plain on its face" because, "[b]y its terms, the policy statement applies only to motions for compassionate release filed by the Bureau of Prisons, not by defendants." *Id.* And it expressly disagreed with the reasoning in *Bryant*, faulting the Eleventh Circuit for relying on dictionary definitions of "applicable" while ignoring the express terms of the policy statement. *See id.* at 358 ("But [*Bryant*]'s reliance on dictionary definitions of 'applicable' misses the forest for a tree. The decision ignores all of the other words in Section 1B1.13 that already state in plain and clear terms when the policy statement applies: 'Upon motion of the Director of the Bureau of Prisons[.]'").

The only remaining circuit with jurisdiction to consider § 3582(c) motions, the Eighth, has thus far declined to address the issue. *See United States v. Crandall*, 25 F.4th 582, 584 (8th Cir. 2022) (acknowledging split but expressly declining to address it); *United States v. Vangh*, 990 F.3d 1138, 1141 n.3 (8th Cir. 2021) (noting this was the third time it had "sidestep[ed]" the question of whether § 1B1.13 applied to compassionate release motions filed after passage of the First Step Act). But even if it were to join the Eleventh – something it has yet to indicate it would do – there would nonetheless remain a 10-2 split in the courts of appeal.

This is precisely the type of acknowledged, intractable split in the lower courts that warrants this Court's intervention.

II. The issue is important and recurring.

This lopsided and intractable split in the circuit courts has immense practical implications. Any defendant serving a custodial federal sentence can move for a sentence reduction under the compassionate release provision in § 3582(c)(1)(A). And thousands of defendants are sentenced by district courts in the Eleventh Circuit each year. *See* U.S. Sentencing Commission, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics* tbl. 1 at p.36, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf (hereinafter "2021 Sourcebook") (stating that in Fiscal Year 2021, district courts in the Eleventh Circuit sentenced 4,311 defendants). Accordingly, the Eleventh Circuit's holding

that the policy statements in § 1B1.13 apply to defendant-filed compassionate release motions affects not only Petitioner, but thousands of his fellow federal prisoners who have been sentenced by district courts within the Eleventh Circuit.

In sharp contrast, defendants in the vast majority of circuits – more than 48,000 in 2021, *see* 2021 Sourcebook at 35-36 – have the ability to obtain sentence reductions under § 3582(c) based on "extraordinary and compelling reasons" other than those stated in § 1B1.13, including the unfairness of lengthy § 924(c) sentences that would be substantially shorter today. *See McCoy*, 981 F.3d at 285 ("multiple district courts have concluded that the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an "extraordinary and compelling" reason for relief under § 3582(c)(1)(A)"); *id*. (collecting cases). This is precisely the type of circuit-based disparity of treatment that requires the Court's intervention.

III. The decision below is incorrect.

As ten of her sister circuits have recognized, the Eleventh Circuit's decision is manifestly incorrect. In following its decision in *Bryant* to hold that the policy statements in U.S.S.G. § 1B1.13 apply to defendant-filed compassionate release motions, the Eleventh Circuit has disregarded both the text of § 1B1.13 and the reasons why Congress amended § 924(c) in the First Step Act.

In *Bryant*, the Eleventh Circuit engaged in a flawed inquiry. It focused first on the dictionary definition of the word "applicable," and then wrongly concluded

that simply because *some* of the "substantive standards" within the policy statement *could* be applied by the district court, the entire policy statement was therefore "applicable." *Bryant*, 996 F.3d at 1252-55. But the salient question is whether the policy statement *itself* is applicable to defendant-filed motions.

As the D.C. Circuit recently explained, "[i]t plainly is not." *Long*, 997 F.3d at 359. The first line of § 1B1.13 states that "[u]pon motion of the Director of the Federal Bureau of Prisons," a court may grant relief. The application notes to § 1B1.13 state that a court can grant relief "*only* upon motion by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 app. n.4 (emphasis added). The policy statement does not address defendant-filed motions at all. *See* § 1B1.13. The Eleventh Circuit's dictionary-based theory as to when the policy statement may be "applicable" cannot be reconciled with the statement's plain text, which states with particularity when it actually *is* "applicable." Only by "tak[ing] an eraser to the words [in the policy statement] that say the opposite" could the Eleventh Circuit in *Bryant* hold that the policy statement applies to defendant-filed motions. *Long*, 997 F.3d at 358.

Bryant sidestepped the plain language of § 1B1.13 by concluding that the language referring to motions by the BOP Director was merely "prefatory" and had no "operative function." But § 1B1.13's language allowing only the BOP Director to file a motion was in fact operative language that implemented Congress's command as it existed at the time the policy statement was issued. "To dismiss these words

as inert preface is to ignore a direct textual instruction and central statutory feature of the compassionate release scheme prior to the First Step Act." *Long*, 997 F.3d at 358.

Finally, by holding § 1B1.13 "applicable" to defendant-filed motions, the Eleventh Circuit in *Bryant* subverted Congressional intent. At the time the Sentencing Commission originally promulgated the policy statement, defendant-filed compassionate release motions did not exist. Rather, although § 3582(c)(1) provided district courts the final decision-making authority over whether a sentence would be reduced, that authority could be invoked only upon motion by the Director of the BOP. Congress later amended § 3582(c) through the First Step Act to allow for defendant-filed motions to rectify BOP's failure as gatekeeper of the federal compassionate-release program. In light of Congress's intent to divest the BOP Director of full control over the compassionate-release process, it makes little sense to interpret the First Step Act to effectively revoke a district court's authority to determine when a defendant's circumstances warrant relief.

IV. This case presents an ideal vehicle.

This case squarely and cleanly presents the issue that has divided the circuit courts. Petitioner expressly raised the inapplicability of the policy statements in U.S.S.G. § 1B1.13 to defendant-filed compassionate release motions throughout the proceedings below. *See* App. A-1 at 2-3. Both the district court and the court of

appeals squarely decided the question in the government's favor. *See* App. A-1 at 5-7; App. A-2 at 5-8. And although the district court also determined that Petitioner failed to meet the 18 U.S.C. § 3553(a) factors, App. A-2 at 8-9, the court of appeals expressly declined to reach that issue, and relied entirely upon its prior precedent in *Bryant* to affirm the denial of Petitioner's motion. App. A-1 at 3.

At present, Petitioner is 48 years old, and scheduled to be released from BOP custody in May of 2091, when he is 117 years old. Were Petitioner were to receive a sentence modification compatible with the First Step Act's amendments to § 924(c), his overall sentence would be reduced by decades. If, however, this Court does not intervene, he will languish in prison as the result of a mandatory consecutive sentencing enhancement Congress eliminated due to its unnecessary harshness. And he will do so even though the vast majority of other defendants in the country suffering a similar fate are able to obtain a sentence reduction via § 3582(c).

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Janice L. Bergmann*
Janice L. Bergmann
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
December 20, 2022