

No. 22-6448

IN THE SUPREME COURT OF THE UNITED STATES

RICKEY THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, § 403(a), 132 Stat. 5221-5222, Congress amended the penalties for violations of 18 U.S.C. 924(c). 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. Petitioner contends (Pet. 1-3) that Congress’s decision not to extend the First Step Act’s amendment to Section 924(c) to offenders who have already been sentenced can constitute an “extraordinary and compelling reason[]” for reducing a previously imposed final sentence under 18 U.S.C. 3582(c) (1) (A).

Although courts of appeals have reached different conclusions about whether a change in the law can constitute an extraordinary and compelling reason for a sentence reduction under Section 3582(c)(1)(A), see Br. in Opp. at 19-20, Fraction v. United States, cert. denied, No. 22-5859 (Apr. 24, 2023),¹ this Court has repeatedly and recently denied petitions for writs of certiorari raising that issue.² The Court should likewise deny the petition here.

This Court's review is particularly unwarranted because on April 5, 2023, the Sentencing Commission voted to amend Sentencing Guidelines § 1B1.13. See U.S. Sentencing Comm'n, Adopted Amendments (Effective November 1, 2023), Proposed Amendment: First Step Act -- Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A).³ The amendment would revise Section 1B1.13 to render it applicable

¹ We have served petitioner with a copy of the government's brief in opposition in Fraction.

² See, e.g., Eye v. United States, No. 22-6096 (Apr. 24, 2023); Tovar v. United States, No. 22-5958 (Apr. 24, 2023); Gibbs v. United States, No. 22-5894 (Apr. 24, 2023); King v. United States, No. 22-5878 (Apr. 24, 2023); Fraction v. United States, No. 22-5859 (Apr. 24, 2023); 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).

³ https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230405_prelim-RF.pdf.

to all Section 3582(c)(1)(A) motions, including those filed by prisoners. Id. at 2. In addition, the amendment would describe "a new category" of extraordinary and compelling reasons, which would provide that:

if a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law (other than an amendment to the Guidelines Manual that has not been made retroactive) may be considered in determining whether the defendant presents an extraordinary and compelling reason, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

Id. at 3.

On April 27, 2023, the Commission submitted its amendment to Section 1B1.13 to Congress, and if Congress does not act to disapprove the amendment, the amendment will take effect on November 1, 2023. The Commission's amendment has yet to take effect, and no court of appeals has squarely addressed the validity of its approach.⁴ Further review would be particularly inappropriate in this case, in which the court below relied on the current version of Section § 1B1.13 to reject petitioner's characterization of the First Step Act's nonretroactive change to

⁴ In United States v. Rodriguez-Mendez, No. 22-2399, 2023 WL 3067050 (Apr. 25, 2023), the Eighth Circuit expressed a view on what the Sentencing Commission "appears" to be "propos[ing] to adopt" in its amendment to Section 1B1.13, id. at *4, but the Eighth Circuit did not squarely address the validity of an amended policy statement that would allow for consideration of changes in the law in determining whether an extraordinary and compelling reason exists.

the sentencing scheme in Section 924(c) as an extraordinary and compelling reason for a sentence reduction. See Pet. App. B5 (citing United States v. Bryant, 996 F.3d 1243, 1248 (11th Cir. 2021), cert. denied, 142 S. Ct. 583 (2021)).

This case would also be a poor vehicle for further review for two additional reasons. First, any sentence reduction under Section 3582(c)(1)(A) must be supported not only by "extraordinary and compelling reasons," but also by "the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable." 18 U.S.C. 3582(c)(1)(A). As the district court recognized, "[t]he imposed sentence was fair and just and needed to promote respect for the law and act as a deterrent for this defendant." Pet. App. A2. And the court of appeals identified the district court's determination that "the § 3553(a) factors did not merit relief" as an additional reason for upholding its denial of relief. Id. at B6. Thus, regardless of this Court's resolution of the question presented, petitioner's sentence on his Section 924(c) offenses would remain the same.

Second, any reduction of the term of imprisonment on those offenses would be unlikely to reduce the amount of time petitioner will spend in prison. Petitioner was convicted on 30 counts, including three counts of smuggling resulting in death, in violation of 8 U.S.C. 1324(a)(1)(B)(iv); three counts of second-degree murder, in violation of 18 U.S.C. 1111; and two counts of brandishing a firearm during and in relation to a crime of

violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii). Judgment 1-2. Petitioner received a life sentence on each of the smuggling-resulting-in-death and murder counts. Judgment 3. Nothing suggests that the imposition of those lifetime terms of imprisonment depended on his separate 32-year term of imprisonment for the Section 924(c) counts, ibid., such that reduction of the latter would suggest a total term of imprisonment of less than life. See Dean v. United States, 581 U.S. 62, 71 (2017) (permitting a sentencing court to "consider[] a mandatory minimum under § 924(c) when calculating an appropriate sentence for the predicate offense"). Accordingly, even if petitioner's consecutive 32-year sentence for his Section 924(c) convictions were reduced under Section 3582(c)(1)(A), he would still serve the rest of his life in prison.

The petition for a writ of certiorari should be denied.⁵

Respectfully submitted.

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⁵ The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.