No. 23-555

IN THE

Supreme Court of the United States

LOUIS A. WILSON, ALSO KNOWN AS SPUDS,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE ISSUE IN THIS CASE IS NOT THE SAME AS IN *FERGUSON*

The Government asserts that this case presents the same question as the just-denied petition in *Ferguson v. United States,* No. 22-1216 (petition denied on Feb. 26, 2023), and the other recent *Ferguson*-like petitions. *E.g.*, *West v. United States*, No. 23-5698 (petition denied on Feb 26, 2023). It does not. As the Government, no less, described the proceedings in *Ferguson* (in its Opposition to Wilson's Petition), the question in *Ferguson* was whether "an asserted legal error in the *original* sentencing" may "serve as an extraordinary and compelling reason for a sentence reduction under Section 3582(c)(1)(A)." *Wilson v. United States*, No. 23-555, Mem. for U.S. in Opp'n 2 (emphasis added) ["*Wilson* Opp."]. Litigation regarding that type of error was "available in the original proceedings," raising the specter of subsequent consideration of the error under § 3582(c)(1)(A) constituting a challenge "to the legal invalidity of the conviction or sentence." *Ferguson v. United States*, No. 22-1216, Br. for U.S. in Opp'n 17 (filed Nov. 1, 2023) ["*Ferguson* Opp."]; *see also United States v. Trenkler*, 47 F.4th 42, 45-46 (1st Cir. 2022) (identifying the proffered extraordinary and compelling reason as error knowable at time of trial).

Wilson, however, did not, in his motion for sentence reduction under § 3582(c)(1)(A), ask the lower court to reduce his sentence because of legal oversight in his original sentencing. He instead maintains that certain changes in law, which do not apply retroactively, have occurred *after* he was sentenced and should factor into a court's analysis of whether

he has shown extraordinary and compelling reasons for a reduction in sentence. Specifically, Wilson contends that "if *United States v. Booker*, 543 U.S. 220 (2005), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), had been decided before he was sentenced, he would have received a shorter sentence" – a sentence he would already have completed. *Wilson* Opp. 1; *see* Pet. 6 & 19 n.6. Wilson's sentencing occurred in 1997, well before *Booker* and *Apprendi*. *Compare* Pet. 5 (noting Wilson's sentencing in 1997, before *Booker* and *Apprendi*) *with West v. United States*, No. 23-5698, Br. for U.S. in Opp'n 20 (filed Jan. 19, 2024) ("petitioner relies on *Apprendi*, which had already been decided by the time of petitioner's trial and appeal").

The Fourth Circuit in *Ferguson* itself emphasized the distinction between the issue there presented and whether (as in Wilson's Petition) post-sentencing changes in the law can be considered under § 3582(c)(1)(A). When rejecting the *Ferguson* movants' efforts to analogize their cases to *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020), which is one of the decisions Wilson notes is part of the Circuit split on the question in *his* case, the Fourth Circuit said:

> Appellant compares the arguments in his compassionate release motion to those made by the defendants in *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020), . . . but those comparisons are inapt. The defendants in *McCoy* argued that a change in the sentencing law that occurred *after* their sentencings (but did not apply retroactively) merited a reduction in their sentences to conform to that change. . . . By contrast, the

> arguments Appellant makes in his § 3582(c)(1)(A) motion constitute quintessential collateral attacks on his convictions and sentence that must be brought via § 2255 [*i.e.*, the habeas-channeling statute]. Appellant's arguments are clearly different in kind from the arguments made by the defendants in *McCoy* . . . because they would require the district court, in determining whether "extraordinary and compelling reasons" for compassionate release exist, to evaluate whether Appellant's convictions . . . were valid.

United States v. Ferguson, 55 F.4th 262, 271 (4th Cir. 2022), *cert. denied*, No. 22-1216, 2024 WL 759802 (Feb. 26, 2024) (emphasis added).

The distinction is important because it goes to the cert-worthiness of the various petitions. Not only is the split in the Circuits minimal on the *Ferguson* issue, *see Ferguson* Opp. 16-17 (maintaining that First Circuit's *Trenkler* decision is the outlier), any split lacks much practical significance. As a result of the additional proviso in § 3582(c)(1)(A) that no reduction in sentence can occur unless "consistent with applicable policy statements of the Sentencing Commission," the view of any Circuit that a legal error at original sentencing can qualify as an extraordinary and compelling reason must – to have any effect – be consonant with the Commission's governing policy statement. 18 U.S.C. § 3582(c)(1)(A). But the Commission's new policy statement, effective as of November 2023, nowhere endorses consideration of asserted legal errors at original sentencing under § 3582(c)(1)(A). *See Ferguson* Opp. 18-19.

In contrast, the Commission's new policy statement *does* endorse consideration of non-retroactive

changes in the law as potential extraordinary and compelling reasons under § 3582(c)(1)(A), *see* Pet. 4-5, so that the split on that issue – which is far deeper in the first place – maintains its currency. If anything, as noted later, the split on Wilson's issue has become even more intractable with the Commission's new policy statement: because the Government contends that the Commission acted unauthorizedly by including non-retroactive changes in the law as possible extraordinary and compelling reasons for a sentence reduction, a new, divisive angle complicates the pre-existing split. *See infra* pp. 7-9.

In sum, this case, unlike *Ferguson*, presents the core question that has vexed the Circuits since the First Step Act's enactment: whether non-retroactive changes in the law occurring *post-sentencing* can constitute extraordinary and compelling reasons for a sentence reduction under § 3582(c)(1)(A). On that question, as the Petition showed, and the Government has nowhere refuted, five Circuits (the First, Second, Fourth, Ninth, and Tenth) have answered "yes," of which at least three (the First, Fourth, and Ninth) have also definitively held that habeas is not exclusive to § 3582(c)(1)(A); and six (the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits) have answered "no" and also require resort to habeas. *See* Pet. 10, 12, 14, 16; *cf. id.* at 16 n.5 (noting current state of law in Tenth Circuit on whether habeas is exclusive); *id.* at 13-14 n.4 (noting different approach taken by the Eleventh Circuit).

II. THE DEEP CIRCUIT SPLIT EXTENDS TO POST-SENTENCING CHANGES IN DECISIONAL LAW

At one point in its Opposition, addressing Wilson's Petition on its own terms, the Government

asserts that "a legal error of the sort asserted here" does not "qualify as a change in the law within [the] scope [of the Commission's new policy statement]," because the policy statement "purports to allow a district court to consider a statutory amendment enacted by Congress." *Wilson* Opp. 3. If, with that, the Government means to say the Commission drew a distinction between post-sentencing changes in *decisional* and *statutory* law, or to contend that the Circuit split does not extend to whether changes in decisional law can constitute extraordinary and compelling reasons, the Government is mistaken on both fronts.

First of all, the new policy statement nowhere on its face is limited to statutory changes in the law. *See, e.g.*, 18 U.S.C. app. § 1B1.13(b)(6) (Nov. 1, 2023) (referring generically to "a change in the law"). Quite to the contrary, when noting that it was siding with the Circuits Wilson favors, the Commission openly rejected the D.C. Circuit's *Jenkins* decision, which refused to find as an extraordinary and compelling reason a change in decisional law (and was the key decision for disposition of Wilson's appeal in the D.C. Circuit). *See* 88 Fed. Reg. 28,254, 28,258 (May 3, 2023); *see also United States v. Jenkins*, 50 F.4th 1185, 1194 (D.C. Cir. 2022); Pet. 9.

Furthermore, courts across the country address § 3582(c)(1)(A) motions raising arguments about changes in decisional law as standard change-in-the-law arguments. *See, e.g.*, *United States v. Roper*, 72 F.4th 1097, 1101-03 (9th Cir. 2023) (surveying case law under § 3582(c)(1)(A) concerning changes in decisional law). Thus, courts in the First, Second, Fourth, Ninth, and Tenth Circuits – in other words, all the Circuits that have held changes in the law

may properly constitute extraordinary and compelling reasons – have demonstrated amenability to § 3582(c)(1)(A) motions based on changes in decisional law. *See, e.g., id.*; *United States v. Quirós-Morales*, 83 F.4th 79, 82-83 (1st Cir. 2023); *United States v. Russo*, 643 F. Supp. 3d 325, 333-34 (E.D.N.Y. 2022); *United States v. Brice*, No. 07-cr-0261, 2023 WL 2035959, at *2 (D. Md. Feb. 16, 2023); *United States v. Maxwell*, No. 23-5068, 2023 WL 8109696, at *1 (10th Cir. Nov. 22, 2023).

And on the other side of the split, the Sixth, Seventh, Eighth, and D.C. Circuits have expressly found that decisional law may not constitute an extraordinary and compelling circumstance. *See Roper*, 72 F.4th at 1101 (collecting cases); *Jenkins*, 50 F.4th at 1192 (treating similarly three types of changes in the law there raised: "[o]ne is a statute that only prospectively reduces penalties for the defendant's offense"; "[a]nother is a judicial decision that retroactively establishes legal error at sentencing"; and "[a] third is a judicial decision that, if rendered earlier, might have affected the negotiation of a plea bargain by reducing the defendant's exposure"). Likewise, change-in-the-law arguments are generally disfavored in the Third and Fifth Circuits. *See, e.g.*, *United States v. Gatson*, No. 23-1660, 2023 WL 6139559, at *1 (3d Cir. Sept. 20, 2023); *United States v. Thompson*, No. 11-cr-70, 2023 WL 2913446, at *5 (E.D. La. Apr. 12, 2023); *but see United States v. Solomon*, No. 14-cr-340, 2023 WL 2920945, at *4 (N.D. Tex. Apr. 11, 2023) (granting motion based on change in decisional law and finding that Fifth Circuit precedent did not foreclose relief because the change in law at issue was "jurisprudential," not statutory).

Accordingly, there is no merit to the Government's contention that Wilson "overstates" the Circuit split. *Wilson* Opp. 3. Courts in half the country have authorized consideration of changes in decisional law under § 3582(c)(1)(A); courts in the other half have not.

III. THE GOVERNMENT'S POSITION ON THE SENTENCING COMMISSION'S NEW POLICY STATEMENT ENSURES THAT THE CIRCUIT SPLIT WILL ENDURE

As in *Ferguson*, the Government argues with regard to Wilson's Petition that the Commission's new policy statement "undermines the practical significance of prior circuit disagreement." *Id.* Again, this argument derives from the Government's wrongheaded view that the Commission's policy statement covers just changes to statutory law, not decisional law. *See supra* p. 5. Because the Commission, in reality, has not limited its policy statement in this manner, there is no prospect of the (pre-existing) allowance for consideration of post-sentencing changes in decisional law in the Circuits favoring Wilson's position now being negated by § 3582(c)(1)(A)'s condition that a sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

But what is most audacious about the Government's assertion on this topic is that it invokes the Commission's new policy statement *at all*. What the Government leaves out is that, in case after case since the Commission adopted its new policy statement, the Government has asserted that the Commission's endorsement of consideration of changes in the law is unauthorized and "invalid." *See, e.g.*,

United States v. Allen, No. 09-cr-320, 2024 WL 631609, at *4-5 (N.D. Ga. Feb. 12, 2024) (collecting cases); *United States v. Ottinger*, No. 10-cr-5016, 2023 WL 8719458, at *6 n.2 (S.D. Cal. Dec. 18, 2023); *United States v. Carter*, No. 07-cr-374-1, 2024 WL 136777, at *4-6 (E.D. Pa. Jan. 12, 2024); *United States v. Padgett*, No. 06-cr-13, 2024 WL 676767, at *2-3 (N.D. Fla. Jan. 30, 2024); *United States v. Black*, No. 05-cr-70-4, 2024 WL 449940, at *10 (N.D. Ill. Feb. 6, 2024); *United States v. Brooks*, No. 08-cr-61, 2024 WL 689766, at *5 (N.D. Okla. Feb. 20, 2024); *United States v. King*, No. 01-cr-210, 2024 WL 761894, at *3 (W.D.N.C. Feb. 21, 2024).[1]

In these cases, the Government has contended that U.S.S.G. § 1B1.13(b)(6) "exceeds" the Sentencing Commission's authority because it supposedly "conflicts with § 3582(c)(1)(A)'s plain text, context, and purpose," *Brooks*, 2024 WL 689766, at *5, and even with the Constitution's demand for the separation of powers. *See Allen*, 2024 WL 631609, at *4. Not unpredictably, courts have begun to accept the Government's contention, leaving in place the rule against consideration of non-retroactive changes in the law under § 3582(c)(1)(A) in the Circuits previously having adopted that position, even where the movant "falls within the scope of the amended version of § 1B1.13(b)(6)." *Black*, 2024 WL 449940, at *5; *see* Pet. 21-22 (discussing *United States v. Rodriguez-Mendez*, 65 F.4th 1000 (8th Cir. 2023), and

[1] To give the Government some credit, it does not entirely hide in its opposition to Wilson's Petition its disdain for the Commission's new policy statement. *See Wilson* Opp. 3 (describing the Commission as "*purport[ing]* to allow a district court to consider a statutory amendment enacted by Congress") (emphasis added).

noting that Eighth Circuit had already rejected argument that Commission's new policy statement alters its prior precedent against considering non-retroactive changes in the law under § 3582(c)(1)(A)).

The Government's national litigation stance ensures that the uniformity in § 3582(c)(1)(A)'s application, hoped for with a new policy statement from the Commission, *see Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (stmt. of Sotomayor, J., respecting denial of cert.), will not transpire. Instead, at the Government's behest, the Circuits rejecting changes in the law as extraordinary and compelling reasons are bound to continue to do so (as *Rodriguez-Mendez* reflects and *Black* invites), in the face of the Circuits favoring Wilson's position authorizing consideration of changes in the law under the circumstances outlined in U.S.S.G. § 1B1.13(b)(6). *See* Pet. 21-24. Now, though, the situation among the Circuits promises to become even more chaotic, with Circuits not only addressing the viability of their prior precedent against the actual terms of the Commission's new statement, but in light of the Government asserting that the statement is statutorily and constitutionally unauthorized.[2]

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[2] Even under an assumption of immediate and complete unanimity among the Circuits that the Commission's new policy statement governs the extraordinary-and-compelling reasons analysis, Wilson's Petition would remain cert-worthy because the Circuits nonetheless are badly split over whether habeas is exclusive in such situations. *See* Pet. 14-18. Whereas, within the D.C. Circuit, Wilson cannot seek a § 3582(c)(1)(A) reduction in sentence while meeting the Commission's criteria, but must proceed through habeas, a prisoner in the First, Fourth, and Ninth Circuits could. *See id.* at 14.

IV. WILSON'S CASE IS AN IDEAL VEHICLE FOR THE COURT TO ADDRESS THE QUESTION PRESENTED

Notwithstanding the Government's protestations, Wilson's case is an ideal one for addressing the Question Presented. On other occasions that the issue of § 3582(c)(1)(A)'s proper application has arisen in petitions to this Court, the Government has similarly responded that the given case is a poor vehicle for plenary review. *E.g.*, *Ferguson* Opp. at 21-22; *Thacker v. United States*, No. 21-877, Mem. for U.S. in Opp'n 3 (filed Feb. 14, 2022); *Chantharath v. United States*, No. 21-6397, Mem. for U.S. in Opp'n 3 (filed Jan. 24, 2022); *Sutton v. United States*, No. 21-6010, Mem. for U.S. in Opp'n 3 (filed Dec. 20, 2021); *Jarvis v. United States*, 21-568, Br. for U.S. in Opp'n 12 (filed Dec. 8, 2021); *Gashe v. United States*, No. 20-8284, Br. for U.S. in Opp'n 24 (filed Nov. 12, 2021). One wonders if the Government will ever discern a suitable vehicle. In any event, at least this time, the Government gets it wrong.

Except for trying incorrectly to limit the Commission's new policy statement to statutory changes in the law, the Government does not dispute that Wilson's case fits the circumstances the new policy statement outlines for consideration of changes in the law, *see* Pet. 19 n.6, 31-32; nor does the Government contest that Wilson's situation involves both the legal landscape after, as well as prior to, the Commission's new policy statement. *See id.* at 31. Instead, the Government claims that – even if he were to prevail on the Question Presented – Wilson still would not obtain a sentence reduction because of the district court's discussion of whether he satisfies the factors articulated in 18 U.S.C. § 3553(a).

See Wilson Opp. 3-4; *see also* 18 U.S.C. § 3582(c)(1)(A) (providing that sentence reduction should occur "after considering the factors set forth in section 3553(a)").

The Government, however, misconstrues the district court's analysis. In finding that the § 3553(a) factors did not weigh in Wilson's favor, the district court addressed a sentencing-disparity argument that it elsewhere had asserted could not constitute an extraordinary and compelling reason. *See* Pet. App. 18a. Yet, it only considered Wilson's sentence duration in order to determine whether he had served "almost all" of it, out of an apparent belief that it could not address other aspects relevant to the sentence imposed, such as intervening changes in the law. *Id.* at 22a-23a. In other words, the district court's analysis of Wilson's motion was thoroughly infected by its assumption that change-in-the-law arguments could not factor into its analysis at all, and it is by no means clear that it would come to the same conclusion if permitted to add the change-in-the-law arguments somewhere in the § 3582(c)(1)(A) calculus. *See Roper*, 72 F.4th 1097, 1103 (9th Cir. 2023) (finding remand appropriate because district court "should consider in the first instance whether the changes in decisional law tip the balance in Roper's favor"); *United States v. Vaughn*, 62 F.4th 1071, 1073 (7th Cir. 2023) ("[A] combination of factors may move any given prisoner past [the threshold for relief], even if one factor alone does not.").

For that reason, the D.C. Circuit did not affirm on an alternative ground that the § 3553(a) factors allegedly called for rejection of a sentence reduction. Rather, it affirmed solely on the basis that non-

retroactive changes in the law are not available for consideration under § 3582(c)(1)(A), including in connection with the § 3553(a) factors. *See* Pet. App. 9a (not "reach[ing] Wilson's contention that his change in law arguments should still be considered as Section 3553(a) factors").

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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