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

PETITIONER'S SUPPLEMENTAL BRIEF

ANTHONY F. SHELLEY
Counsel of Record
ALEXANDRA E. BEAULIEU
REBECCA TWEEDIE
MILLER & CHEVALIER CHARTERED
900 Sixteenth St. NW
Washington, DC 20006
(202) 626-5800
ashelley@milchev.com

March 14, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statute

Other Authorities

Petitioner Louis A. Wilson respectfully submits this Supplemental Brief pursuant to Supreme Court Rule 15.8 in support of his Petition for Writ of Certiorari filed on November 20, 2023.

ARGUMENT

Wilson wishes to inform the Court of decisions relevant to the Petition that were decided after or contemporaneously with the filing of his Reply Brief in Support of the Petition for Certiorari on March 6, 2024. The following decisions well-demonstrate the endurance of the Circuit split over consideration of change-in-the-law arguments in § 3582(c)(1)(A) motions, after the Sentencing Commission's new policy statement authorizing such arguments in certain circumstances.

After, as well as one day before and the day of, the filing of Wilson's Reply, lower courts in various parts of the country decided § 3582(c)(1)(A) motions relying on changes in the law, each of which reinforces the Circuit split on the Question Presented. Like Wilson, the movants in each of the below-summarized five cases assert that their circumstances meet the requirements of new U.S.S.G. § 1B1.13(b)(6), such that non-retroactive changes in the law demonstrating the "unusually long" nature of their sentences may be considered as "extraordinary and compelling" reasons for a reduction in sentence. *See* Pet. 19 n.6. In every case, the Government opposed the motion on the grounds that § 1B1.13(b)(6) is invalid and exceeds the Commission's authority, because, in the Government's view, non-retroactive changes in the law can never constitute an extraordinary or compelling reason. *Cf.* Pet. Reply 8-9 (summarizing the Government's litigation stance).

Three cases out of Mississippi, Texas, and Iowa, respectively, accepted the Government's contentions, which align with governing Fifth and Eighth Circuit precedent, *see* Pet. 21-23, and denied the defendants' motions despite the acknowledged applicability of § 1B1.13(b)(6). *See United States v. Immel*, No. 09-CR-09, 2024 WL 965614, at *5 (S.D. Miss. Mar. 6, 2024); *United States v. Gipson*, No. 93-CR-00005, 2024 WL 1048139, at *5-6 (N.D. Tex. Mar. 8, 2024); *United States v. Crandall*, No. 89-CR-21, 2024 WL 945328, at *9 (N.D. Iowa Mar. 5, 2024).

In *Immel*, the district court denied a motion that was based on the gross disparity between defendant's sentence and what he would receive under governing law because "as the Government correctly points out, a defendant's lawfully imposed sentence at the time he was sentenced, without an express retroactive reduction by Congress, is not an extraordinary and compelling reason warranting relief." 2024 WL 965614, at *5. The court reasoned that the policy statement "is not binding" and, further, that it contradicted the Fifth Circuit's view as laid out in *United States v. McMaryion*, No. 50450, 2023 WL 4118015, at *2 (5th Cir. June 22, 2023). *Immel*, 2024 WL 965614, at *4.

Two days later in *Gipson*, another district court in the Fifth Circuit denied a motion on the specific grounds that the policy statement exceeded the Commission's authority. 2024 WL 1048139, at *5-6. The court agreed that the defendant raised an extraordinary and compelling circumstance under § 1B1.13(b)(6), but reasoned that *McMaryion* compelled acceptance of the Government's arguments asserting invalidity of § 1B1.13(b)(6). *Id.* The court opined:

> This Court sympathizes with Gipson. Had Congress authorized a reduced sentence based on a non-retroactive change in law, the Court would not hesitate [to] grant compassionate release to Gipson. While USSG § 1B1.13(b)(6), on its face, authorizes a reduced sentence for unusually long sentences like Gipson's, the Commission exceeded its authority by promulgating it. . . . No measure of sympathy nor desire for justice to be done could legitimize this Court ignoring the legislative prerogative to allow the Commission to exceed its lawful authority.

Id. at *7.

A new case within the Eighth Circuit similarly held fast to Circuit precedent and, in doing so, ruled the policy statement invalid. *See Crandall*, 2024 WL 945328, at *9. The district court there denied a motion based in part on changes in the law, concluding "to the extent defendant seeks compassionate release based on the ground he received an 'unusually long sentence' [as defined by § 1B1.13(b)(6),] the Court denies the motion." *Id.* The district court explained that two Eighth Circuit cases invited finding that the Commission exceeded its authority: *United States v. Rodriguez-Mendez*, 65 F.4th 1000 (8th Cir. 2023), and *United States v. Crandall*, 25 F.4th 582 (8th Cir. 2022). *Crandall*, 2024 WL 945328, at *6-7.

On the other side of the Circuit split, a growing number of cases in the Eleventh Circuit have rejected the Government's arguments against the policy statement. *See United States v. Ware*, No. 97-CR-0009, 2024 WL 1007427, at *7, *10 (N.D. Ga. Mar. 6, 2024); *United States v. Harper*, No. 04-CR-00218, 2024 WL 1053547, at *4, *6 (N.D. Ga. Mar. 11,

2024). In *Ware*, a Georgia district court granted a motion based on changes in statutory and decisional law, after concluding that the policy statement was a valid exercise of the Commission's authority. *See* 2024 WL 1007427, at *7. The court found the Government's opposition to the policy statement uncompelling, because "the federal Courts of Appeals' different interpretations of ['extraordinary and compelling'] in the context of nonretroactive changes in law lends to a conclusion that [the terms] are ambiguous" and thus ripe for the Commission's input. *Id.* at *6.

Likewise in *Harper*, the district court granted a defendant's motion referencing § 1B1.13(b)(6). In rejecting the Government's arguments against the policy statement, the district court reasoned that "[t]here is no inherent incompatibility between Congress's decision to not make a sentencing law retroactive and the Commission's policy giving judges the discretion to consider a change in law as part of a narrow sentencing provision available to only a select set of defendants." 2024 WL 1053547, at *4 (internal quotation marks and citation omitted).

Thus, in the span of just a few days, further developments in the district courts have increased the likelihood that the Circuit split regarding non-retroactive changes in the law will only become further entrenched in the wake of the Commission's new policy statement. Courts in the Circuits that had rejected changes in the law as permissible for inclusion in the extraordinary-and-compelling-reasons calculus are reaffirming that stance, despite the Commission's policy statement to the contrary. And decisions from the Eleventh Circuit are now splitting with those. Both *Ware* and *Harper* note that the

Eleventh Circuit had not previously ruled on the validity of change-in-the-law arguments, *see Ware*, 2024 WL 1007427, at *6; *Harper*, 2024 WL 1053547, at *4; but these decisions and others preceding them show that the Eleventh Circuit, following the new policy statement, is now falling in line with the First, Second, Fourth, Ninth, and Tenth Circuits. *See United States v. Allen*, No. 09-CR-320, 2024 WL 631609, at *4-5 (N.D. Ga. Feb. 12, 2024). Moreover, the lower court decisions show an additional, complicated dimension to the Circuit split, as the lower courts are also now dividing on whether the Commission's new policy statement is valid.

The various new cases also further illustrate the illogic of the Government's assertion in its opposition that the Commission's new policy statement "undermines the practical significance of prior circuit disagreement" on the Question Presented. *Wilson v. United States*, No. 23-555, Mem. for the United States in Opp'n 3. The Government now has repeatedly asserted, and with success, that the Commission's policy statement is invalid, in order to keep in place prior Circuit precedents contrary to the legal position Wilson seeks to vindicate. In reality, what follows from the Government's position in the new lower court cases is that the Commission's policy statement should have no effect at all – practical or otherwise – because it is (the Government thinks) illegal.

Accordingly, then, the Government's stance currently in the lower courts helps ensure that the preexisting Circuit split continues on the Question Presented. It also has another pernicious effect: it means the Bureau of Prisons ("BOP") will not be filing motions for compassionate release for prisoners

worthy of sentence reduction under § 1B1.13(b)(6). Notwithstanding § 3582(c)(1)(A)'s original authorization (and Congress's assumed preference) for the BOP (rather than prisoners directly) filing such motions, *see* Pet. 3, the BOP seemingly will not do so where changes in the law are a material determinant, in deference to the Government's legal position that changes in the law are an illicit factor. Resolution of the Circuit split is urgently needed, for in the meantime prisoners potentially are robbed of the BOP seeking reduction in their sentences in an entire category of cases blessed by the Commission.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Anthony F. Shelley
Counsel of Record
Alexandra E. Beaulieu
Rebecca Tweedie
Miller & Chevalier Chartered
900 Sixteenth St. NW
Black Lives Matter Plaza
Washington, DC 20006
Telephone: (202) 626-5800
Facsimile: (202) 626-5801
ashelley@milchev.com
abeaulieu@milchev.com
rtweedie@milchev.com

March 14, 2024