NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RODNEY L. LOVE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether non-retroactive changes in federal law can serve as "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

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PRAYER

Petitioner Rodney Love respectfully petitions for a writ of certiorari issue to review to review the judgment of the U. S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion denying relief is unpublished but available at Pet. App. 2. The district court's opinion and order is available at Pet. App. 5.

JURISDICTION

The court of appeals entered its judgment on August 9, 2023. This petition is filed within 90 days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 3582 of Title 18 of the U.S. Code provides, 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; or
> >
> > (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that

the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

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

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

INTRODUCTION

In 2018, Congress gave federal prisoners the opportunity to seek compassionate release from their sentences for "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A). Congress also amended two especially harsh sentencing provisions, making those changes applicable to pending cases without providing for retroactive application. The interplay between those provisions has divided the circuits. Some courts of appeals have held that on a case-by-case basis, the new sentencing provisions may be considered in resolving a motion for compassionate release. Other courts of appeals have interpreted the non-retroactive character of the sentencing changes as precluding district courts from considering them in motions for compassionate release. In this case, Sixth Circuit, following its *en banc* holding in *United States v. McCall*, 56 F.4th 1048 (6th Cir. 2022) (en banc), held that a non-retroactive change in federal sentencing law cannot be part of the "extraordinary and compelling reasons" justifying a sentence reduction. In the Sixth Circuit's view, no matter how great the variance between the prisoner's sentence and current federal provisions, and regardless of Congress's decision not to enact a categorical bar against relying on changes in law in a compassionate-release motion, courts cannot consider that factor. The Sixth Circuit thus precluded petitioner from asking the district court to exercise discretion to reduce his sentence based in part on the sentence's gross disproportion to current federal law.

The conflict in the circuits has widespread importance to the administration of federal criminal justice, and the circuit split has evidently been cemented by the Sentencing Commission's decision to adopt a policy statement contrary to *McCall*. U.S.S.G. § 1B1.13(b)(6). This Court should grant certiorari and reverse.

STATEMENT

A. Statutory framework

Criminal sentences are generally final once imposed. *See Dillon v. United States*, 560 U.S. 817, 824 (2010); 18 U.S.C. § 3582(b). One exception to this rule of finality is set forth in what is colloquially known as the "compassionate release" statute, 18 U.S.C. § 3582(c)(1)(A), enacted as part of the Sentencing Reform Act of 1984. *See* Pub. L. No. 98- 473, tit. 2, ch. 2, 98 Stat. 1837, 1987 (1984).

As relevant here, that Act provides that a district court may reduce a prisoner's sentence "after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent that they are appliable, if it finds that" (i) "extraordinary and compelling reasons warrant such a reduction" or (ii) the defendant has reached a certain age, has served a certain amount of time, and has been deemed not to be "a danger to the safety of any other person or the community" by the Director of the Bureau of Prisons. 18 U.S.C. § 3582(c)(1)(A). Congress provided that any sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* As originally enacted, only the Director of the Bureau of Prisons could file a motion under this provision. *See* 18 U.S.C. § 3582(c)(1)(A) (1988).

The Act did not define what "extraordinary and compelling reasons" warrant a sentence reduction. Instead, it instructed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). Congress's sole limitation on this instruction was the following: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

In 2007, the Sentencing Commission issued a policy statement saying that "extraordinary and compelling reasons" include medical conditions, age, family circumstances, and "[o]ther

[r]easons [as] determined by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13, cmt. (n.1).

Despite the policy statement, the compassionate-release process was rarely used by the Bureau of Prisons. As the Department of Justice stated in a 2013 report on the process's functioning between 2006 and 2011: "[T]he existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."[1]

In 2016, the Commission responded to this report, as well as "Bureau of Prisons data documenting lengthy review of compassionate release applications and low approval rates." U.S.S.G., App'x C, Amendment 799. It "held a public hearing on compassionate release and received testimony from witnesses and experts about the need to broaden the criteria for eligibility," among other issues. *Id.* Following that hearing, the Commission broadened the list of factors that qualify as "extraordinary and compelling reasons" warranting compassionate release under Section 3852. *Id.* It specifically noted that these amendments were designed to "encourage[] the Director of the Bureau of Prisons to file a motion for compassionate release" more frequently. *Id.*

In 2018, Congress intervened. It enacted the First Step Act, see Pub. L. No. 115-391, 132 Stat. 5194, one purpose of which was to "increas[e] the use and transparency of compassionate release," id. at 5239, § 603(b) (capitalization omitted); see also 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin) ("The bill expands compassionate release under

[1] Office of the Inspector General, U.S. Dep't of Justice, The Federal Bureau of Prisons' Compassionate Release Program (Apr. 2013), https://oig.justice.gov/reports/2013/e1306.pdf.

the Second Chance Act and expedites compassionate release applications."). This change removed the bottleneck inherent in the original version of Section 3582, under which only the Director of the Bureau of Prisons could seek the compassionate release of a prisoner. Under the First Step Act, prisoners can file their own motions, as long as certain administrative prerequisites have been met and the court finds that the reduction is warranted by "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A).

The First Step Act also addressed two particularly severe provisions of federal sentencing law for drug and firearms offenses. First, federal law had long provided for consecutive sentencing for multiple violations of 18 U.S.C. § 924(c)—which prohibits using, carrying, or possessing a firearm in connection with certain federal felonies—even if the Section 924(c) convictions were entered in a single proceeding. *See Deal v. United States*, 508 U.S. 129 (1993). Because a recidivist Section 924(c) conviction carries a mandatory sentence of 25 years' imprisonment and must be served consecutively to any other sentence, multiple Section 924(c) convictions in a single prosecution could readily escalate to produce a life or near-life sentence. These "stacked" Section 924(c) sentences often greatly exceed the Sentencing Guidelines' recommendation for the offense conduct. The First Step Act altered that regime by providing that the recidivist 6 provisions for a "second or subsequent" Section 924(c) offense applied only "after a prior conviction under [Section 924(c)] has become final." *See* First Step Act, 132 Stat. 5221-5222, § 403(a).

Second, the First Step Act narrowed the type of prior offenses that trigger increased penalties for federal drug offenses and expanded the scope of covered offenses; it also reduced the length of some of the enhanced penalties. See First Step Act, 132 Stat. 5220, § 401.[2]

Congress made each of those changes applicable to pending cases:

> **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, 132 Stat. 5221, 5222, §§ 401(c), 403(b). Because Congress made no provision for applying these changes to final sentences, federal law provides that the prior penalties for such offenders remain unchanged. *See Dorsey v. United States*, 567 U.S. 260 (2012) (clarifying that under 1 U.S.C. § 109, prior penalties remain in force absent an express statement or fair implication that more lenient changes apply to pre-Act offenders).

B. Love's case

Rodney Love was arrested three times while possessing a firearm and a distribution-quantity of Dilaudid. In 2002, he was indicted on two counts of possession with intent to distribute Dilaudid within 1,000 feet of a school, 21 U.S.C. § 841(a)(1) and 860; one count of possession with intent to distribute Dilaudid, 21 U.S.C. § 841(a)(1); three counts of possession of a firearm in furtherance of drug trafficking, 18 U.S.C. § 924(c); and three counts of being a felon in possession of a firearm, 18 U.S.C. § 922(g). The government subsequently filed a notice under 21 U.S.C. § 851 informing Love that, if convicted of a school-zone drug trafficking count, he would be subject to a statutory mandatory minimum sentence of life.

[2] The Sentencing Commission described these changes in The First Step Act of 2018, One Year of Implementation 6-8 (Aug. 2020), https://www.ussc.gov/sites/default/files/pdf/research -and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

A jury convicted Love on all counts. Due to the § 851 enhancement, Love received mandatory concurrent life sentences for two drug counts. Due to the § 924(c) stacking rule, he received a consecutive mandatory minimum of 55 years. In 2017, President Obama commuted his sentence to 322 months.

In January 2020, Love filed a motion for compassionate release under § 3582(c)(1), arguing that his 322-month sentence remains primarily the product of overly harsh laws that Congress has now amended. The district court denied relief, citing *United States v. McCall*, 56 F.4th 1048, 1065-66 (6th Cir. 2022) (en banc), in which the Sixth Circuit held that "[n]onretroactive legal developments, considered alone or together with other factors, cannot amount to an 'extraordinary and compelling reason' for a sentence reduction." On appeal, the Sixth Circuit denied relief because *McCall* precluded it.

REASONS FOR GRANTING THE PETITION

The circuits are deeply divided on a question of exceptional importance to federal criminal justice: whether defendants serving decades more prison time than they would serve today because of fundamental changes in sentencing law can rely on those legal changes in motions for compassionate release. The court of appeals' categorical bar on such consideration parts ways with the decisions of other courts of appeals and creates unjustified geographical disparities. The impact is severe for hundreds, if not thousands, of prisoners serving lengthy sentences. This case is an ideal vehicle for resolving the split. Review is all the more warranted because the court of appeals is wrong, and the Sentencing Commission has issued a policy statement contrary to the Sixth Circuit's holding. Congress's decision to make its more lenient recidivist-sentencing provisions prospectively applicable on a categorical basis says nothing about whether these disproportionate sentences can be an "extraordinary and compelling

reason[]" for a reduced sentence on a case-by-case basis. This Court should grant review and reverse.

A. The Courts of Appeals Are Intractably Divided on the Question Presented.

In a deeply-divided but unequivocal decision, the Sixth Circuit has held that "[n]onretroactive legal developments, considered alone or together with other facts, cannot amount to an 'extraordinary and compelling reason' for a sentence reduction" under 18 U.S.C. § 3582(c)(1). *United States v. McCall*, 54 F.4th 1048, 1065-66 (6th Cir. 2022) (en banc). That holding is consistent with the published holdings of four other circuits. *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022); *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021).

Yet four Circuits disagree with *McCall*, holding that a nonretroactive change in the law can contribute to an "extraordinary and compelling reason" for relief. *See United States v. Chen*, 48 F.4th 1092, 1097 (9th Cir. 2022); *United States v. Ruvalcaba*, 26 F.4th 14, 25-26 (1st Cir. 2022); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 285-87 (4th Cir. 2020).

Thus, in four circuits, a prisoner can get relief from a draconian sentence that the law no longer mandates. But in five other circuits, a prison cannot get that life-changing relief. Not only is this circuit split entrenched, but it creates a stark disparity in the treatment of prisoners based on geography.

B. The Sentencing Commission's Amendment to Its Policy Statement Only Ensures the Confusion Will Persist.

Effective November 1, 2023, the Sentencing Commission has amended its policy statement such that it says "extraordinary and compelling reasons" for relief exist in the following circumstance:

> UNUSUALLY LONG SENTENCES.—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.

U.S.S.G. § 1B1.13(b)(6).[3]

This proposed amendment only makes it more important for this Court to resolve the dispute over the *McCall* question. Courts in the *McCall* camp, which have interpreted § 3582(c)(1)(A) as *not* allowing for relief based even in part on "a change in the law," *id.*, will need to decide if the Commission, by adding this change-in-the-law basis for relief, has issued a provision that is invalid because "at odds" with the statute, § 3582(c)(1)(A). *United States v. LaBonte*, 520 U.S. 751, 757 (1997). Even the courts disagreeing with *McCall* will have to answer that same question when a prisoner who has served less than 10 years seeks relief based on a change in the law and presents a gross disparity in sentencing. Thus, prisoners in all circuits now need definitive guidance from this Court as to the meaning of "extraordinary and compelling reasons" in 18 U.S.C. § 3582(c)(1)(A).

[3] Mr. Love would appear to qualify under these criteria. He has served more than 21 years in prison, and he was subject to a grossly disparate sentence prior to the amendment of § 851 and § 924(c).

C. The Decision Below is Incorrect.

Review is particularly warranted here because the Sixth Circuit's categorial ruling is incorrect.

Section 3582(c)(1)(A) lists only one reason that cannot, standing alone, constitute an "extraordinary and compelling" reason for a sentence reduction: the fact of rehabilitation. 28 U.S.C. § 994(t); *see* U.S.S.G. § 1B1.13 (same). Nothing in the statutory text supports the conclusion that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A) to defendants who would be subject to much shorter sentences under non-retroactive changes in the law, such as those implemented by the First Step Act. Indeed, the principle that "[t]he expression of one thing implies the exclusion of others (*expression unius est exclusion alterius*)" supports the conclusion that the "express exception" of rehabilitation in the statute "implies there are no other" exceptions. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (internal citation and quotation marks omitted). Reading in *an additional* exception to the district court's discretion would contradict that statutory text.

CONCLUSION

For the foregoing reasons, petitioner Rodney Love respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

November 1, 2023

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