No. 23-6384

IN THE SUPREME COURT OF THE UNITED STATES

MONTERIAL WESLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in finding that "extraordinary and compelling reasons" did not support reducing petitioner's preexisting sentence under 18 U.S.C. 3582(c)(1)(A), where his motion relied on alleged errors at his trial and sentencing.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Wesley, No. 07-cr-20168 (Mar. 10, 2022)

Wesley v. United States, No. 12-cv-2704 (May 22, 2013)

United States Court of Appeals (10th Cir.):

United States v. Wesley, No. 22-3066 (Feb. 28, 2023)

United States v. Wesley, No. 13-3149 (Sept. 23, 2013)

United States v. Wesley, No. 09-3307 (May 23, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 60 F.4th 1277. The order of the district court (Pet. App. 50a-66a) is not published in the Federal Supplement but is available at 2022 WL 715094.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2023. A petition for rehearing was denied on August 28, 2023 (Pet. App. 23a-24a). On November 9, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including December 27, 2023. The petition for a writ of

certiorari was filed on December 26, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea and jury trial in the United States District Court for the District of Kansas, petitioner was convicted on one count of conspiring to manufacture, possess with the intent to distribute, and distribute 50 grams or more of cocaine base, and to possess with intent to distribute and distribute five kilograms or more of cocaine, in violation of 18 U.S.C. 2, 21 U.S.C. 841(a)(1), (b)(1)(A)(ii), (b)(1)(A)(iii), and 846; three counts of using a communication device to facilitate a drug trafficking crime, in violation of 21 U.S.C. 843(b); and two counts of attempting to possess cocaine with the intent to distribute, in violation of 18 U.S.C. 2, 21 U.S.C. 841(a)(1), (b)(1)(A)(ii), and 846. Judgment 1-2. The district court sentenced petitioner to 360 months of imprisonment. Judgment 3. The court of appeals affirmed, 423 Fed. Appx. 838, and this Court denied a petition for a writ of certiorari, 565 U.S. 993.

The district court denied petitioner's subsequent motion under 28 U.S.C. 2255 to vacate his sentence, and denied a certificate of appealability, 2013 WL 2285102; the court of appeals likewise denied a certificate of appealability, 532 Fed. Appx. 822. Petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 1993 (Feb. 10, 2021). The district court dismissed in part and denied in part the motion,

Pet. App. 50a-66a, and the court of appeals affirmed, Pet. App. 1a-22a.

1. a. The Sentencing Reform Act of 1984 (Sentencing Reform Act), Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 et seq.), "overhaul[ed] federal sentencing practices." Tapia v. United States, 564 U.S. 319, 325 (2011). To make prison terms more determinate, Congress "established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue policy statements." Dillon v. United States, 560 U.S. 817, 820 (2010); see 28 U.S.C. 991, 994(a).

Congress also abolished the practice of federal parole, specifying that a "court may not modify a term of imprisonment once it has been imposed" except in certain enumerated circumstances. 18 U.S.C. 3582(c); see Tapia, 564 U.S. at 325. One of those circumstances is set forth in 18 U.S.C. 3582(c)(1)(A). As originally enacted in the Sentencing Reform Act, Section 3582(c)(1)(A) stated:

> the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 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.

Sentencing Reform Act § 212(a)(2), 98 Stat. 1998-1999. Congress made clear that "[r]ehabilitation of the defendant alone shall not

be considered an extraordinary and compelling reason." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

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(a)(2)(C); see Sentencing Reform Act § 217(a), 98 Stat. 2019. Congress instructed "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, [to] describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

The Commission did not promulgate an applicable policy statement until 2006, when it issued Sentencing Guidelines § 1B1.13. See Sentencing Guidelines App. C, Amend. 683 (Nov. 1, 2006). As amended in 2016, the commentary to Section 1B1.13 described four categories of reasons that should be considered extraordinary and compelling: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons." Sentencing Guidelines § 1B1.13, comment. (n.1(A)-(D)) (2016); see Sentencing Guidelines App. C Supp., Amend. 799 (Nov. 1, 2016) (emphasis omitted). The fourth category -- "Other Reasons" -- encompassed any reason determined by the

Bureau of Prisons (BOP) director to be "extraordinary and compelling" "other than, or in combination with," the reasons described in the other three categories. Sentencing Guidelines § 1B1.13, comment. (n.1(D)) (2016).

b. In the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, Tit. VI, § 603(b), 132 Stat. 5239, Congress amended Section 3582(c)(1)(A) to allow defendants, as well as the BOP itself, to file motions for a reduced sentence. As amended, Section 3582(c)(1)(A) now states:

> 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 * * * , 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.

18 U.S.C. 3582(c)(1)(A) (emphasis added).

After the First Step Act's enactment, the Sixth Circuit determined that the 2016 version of Sentencing Guideline § 1B1.13, including its description of what should be considered "extraordinary and compelling" reasons, was not applicable to Section 3582(c)(1)(A) motions filed by defendants. See United States v. Jones, 980 F.3d 1098, 1109-1110 (2020).

2. In July 2006, law enforcement began investigating petitioner's drug trafficking activities in the Leavenworth, Kansas area. Presentence Investigation Report (PSR) ¶ 34. Petitioner and co-defendant Shevel Foy purchased over 100 kilograms of cocaine from co-defendant Thomas Humphrey in five to ten kilogram increments. PSR ¶ 35. Petitioner and Foy then distributed the cocaine through a network of distributors in Leavenworth and two cities in Missouri. PSR ¶ 34. A confidential source identified petitioner as "one of the main cocaine suppliers" in Leavenworth. PSR ¶ 79.

Intercepted calls from petitioner's cell phone revealed numerous drug-related conversations with co-defendants and other individuals, including approximately 172 calls between petitioner and Foy between August and November 2007. PSR ¶ 48. Petitioner stored money at another co-defendant's residence and on multiple occasions directed her to bring him large sums of cash coinciding with drug transactions he had arranged over the phone. PSR ¶ 49. In November 2007, agents arrested petitioner and recovered a loaded pistol from his vehicle. PSR ¶ 60.

A federal grand jury in the District of Kansas returned a 12-count indictment charging petitioner with various offenses relating to his trafficking of cocaine and cocaine base. D. Ct. Doc. 50 (Feb. 1, 2008). After the jury was empaneled, but before any evidence was presented, petitioner pleaded guilty to four counts of the indictment: one count of conspiring to manufacture,

possess with intent to distribute, and distribute 50 grams or more of cocaine base, and to possess with the intent to distribute and distribute five kilograms or more of cocaine, in violation of 18 U.S.C. 2, 21 U.S.C. 841(a)(1), (b)(1)(A)(ii), (b)(1)(A)(iii), and 846; and three counts of using a communication device to facilitate a drug trafficking crime, in violation of 21 U.S.C. 843(b). 423 Fed. Appx. at 839; Judgment 1-2. Petitioner proceeded to trial on the remaining counts and was found guilty on one count of attempting to possess five or more kilograms of cocaine with the intent to distribute, in violation of 18 U.S.C. 2, 21 U.S.C. 841(a)(1), (b)(1)(A)(ii), and 846; and one count of attempting to possess 500 or more grams of cocaine with the intent to distribute, in violation of 18 U.S.C. 2, 21 U.S.C. 841(a)(1), (b)(1)(B)(ii), and 846. Judgment 1-2.

The district court sentenced petitioner to 360 months of imprisonment. Judgment 3. The court of appeals affirmed, 423 Fed. Appx. 838, and this Court denied a petition for a writ of certiorari, 565 U.S. 993.

3. In 2012, petitioner moved under 28 U.S.C. 2255 to vacate his sentence, alleging ineffective assistance of trial and appellate counsel. D. Ct. Doc. 1500 (Oct. 31, 2012). The district court denied the motion and denied petitioner a certificate of appealability. D. Ct. Doc. 1575 (May 22, 2013). The court of appeals likewise denied petitioner's application for a certificate of appealability. 532 Fed. Appx. at 822-823.

4. Nearly ten years later, in December 2021, petitioner moved for a sentence reduction under Section 3582(c)(1)(A). D. Ct. Doc. 1993. Petitioner claimed that the prosecutor in his case had solicited false testimony about drug quantities at his trial and that her misconduct was an "extraordinary and compelling" reason warranting a sentence modification. Id. at 9-33. Petitioner also asserted that his sentence was excessively long and disproportionate compared to his co-defendants who pleaded guilty or cooperated with the government. Id. at 33-38.

The district court dismissed petitioner's motion in part and denied it in part. Pet. App. 50a-66a. The court first observed that petitioner's prosecutorial-misconduct claim, "which * * * allege[d] that he is entitled to release because his sentence was based on the unconstitutional acts of the prosecutor in this case" and "unquestionably attack[ed] the validity of his conviction," was one that "must be asserted in the context of a § 2255 petition." Id. at 55a. The court rejected petitioner's contention that he could raise such a claim under 18 U.S.C. 3582(c), explaining that "the more specific federal habeas corpus statute is the 'exclusive' remedy in situations where it 'so clearly applies.'" Id. at 60a (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)). The court accordingly dismissed that aspect of petitioner's motion for lack of jurisdiction, id. at 55a, and declined to issue a certificate of appealability, id. at 62a-63a.

The district court also rejected petitioner's claim that his sentence was excessively long and disproportionate compared to others, observing that "the disparity between [petitioner's] sentence and other individuals who entered guilty pleas or cooperated with the government does not constitute an extraordinary and compelling reason for a sentence reduction." Pet. App. 63a. The court explained that such a challenge was "one to the sentencing guidelines themselves and the prosecutor's broad discretion in the plea negotiation context" and that petitioner had failed to identify any circumstances "unique to him" warranting relief. Id. at 65a.

5. The court of appeals granted a certificate of appealability and affirmed. Pet. App. 1a-22a. It agreed with the district court that petitioner's assertion of prosecutorial misconduct in a Section 3582 motion was an improper effort to "circumvent the procedural and substantive requirements of § 2255." Id. at 7a. The court of appeals rejected petitioner's assertion that "'extraordinary and compelling reasons' is limitless, subject only to the district court's discretion." Id. at 9a (citation omitted). It instead identified several reasons why Section 2255 "is presumptively the vehicle by which federal prisoners must raise challenges to their convictions or sentences." Id. at 12a.

First, the court of appeals observed that Section 3582 directs courts to ensure that any sentence modification is consistent with

"policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c), and the court doubted that Congress would have granted the Sentencing Commission "the authority to decide whether federal postconviction challenges must proceed through § 2255 or not." Pet. App. 13a. Second, the court observed that Section 3582(c) requires a prisoner to ask BOP to seek Section 3582 relief on his behalf before making the request himself, a screening mechanism that makes sense if the requests must be based on behavioral or medical issues on which BOP has "special expertise," but not if the requests may be based on trial errors. Id. at 13a-14a (citation omitted). Third, the court reasoned that that a district court's discretion to deny relief under Section 3582(c) would have "incongruous" results as applied to claims like petitioner's, because a court could discretionarily deny relief even where a prisoner "proves an error or defect of constitutional magnitude." Id. at 14a. Fourth, the court noted that Section 3582(c) requires the consideration of the applicable sentencing factors in 18 U.S.C. 3553(a), which have no obvious application where the defendant claims he was wrongfully convicted and sentenced. Id. at 14a-15a. And fifth, the court observed that Section 3582(c) permits early release but preserves the criminal judgment against the prisoner, and that a more explicit instruction from Congress would be necessary to justify the assumption that discretionary sentence modification was the intended remedy for claims of wrongful conviction and sentencing. Id. at 16a.

In recognizing that a Section 2255 postconviction motion, rather than a discretionary sentence-modification motion, would have been the appropriate avenue for petitioner's claim of prosecutorial misconduct, the court of appeals noted that its decision was consistent with "the majority of circuits to have issued a published decision on this issue." Pet. App. 16a-17a.

6. The court of appeals denied a petition for rehearing en banc. Pet. App. 23a-24a.

Judge Tymkovich, the author of the panel opinion, concurred in the denial of rehearing en banc. Pet. App. 25a-26a. He emphasized that the panel opinion "explains in detail why [Section 3582(c)(1)(A)(i)] does not apply to [petitioner's] claims of prosecutorial misconduct," and creates "no conflict" with circuit precedent or the views of the Sentencing Commission. Id. at 25a.

Judge Rossman dissented from the denial of rehearing en banc. Pet. App. 27a-49a. In her view, the panel's reasoning was at odds with the statute, circuit precedent, and the recently stated view of the Sentencing Commission. Id. at 29a.

ARGUMENT

Petitioner contends (Pet. 11-12, 14) that errors in his trial and sentencing can serve as an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). That contention lacks merit. And although courts of appeals have reached different conclusions on the issue, petitioner overstates the extent of the disagreement, and the Sentencing Commission

recently issued an amended policy statement that undermines the practical significance of prior circuit disagreement. This Court has repeatedly and recently denied petitions for writs of certiorari that presented similar issues.[1] It should follow the same course here.

1. The court of appeals correctly rejected petitioner's contention that errors in his trial or sentencing can constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). Pet. App. 10a-22a.

a. The overarching principle of federal sentencing law is that a "federal court generally 'may not modify a term of imprisonment once it has been imposed.'" Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. 3582(c)). Section 3582(c)(1)(A) provides a limited "except[ion]" to that rule. 18 U.S.C. 3582(c). To disturb the finality of a federal sentence under that provision, the district court typically must identify "extraordinary and compelling reasons" for doing so. 18 U.S.C. 3582(c)(1)(A)(i); see 18 U.S.C. 3582(c)(1)(A)(ii) (providing specific statutory criteria for reducing the sentence of certain elderly prisoners who have already served lengthy terms).

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[1] See, e.g., Ferguson v. United States, No. 22-1216 (Feb. 26, 2024); West v. United States, No. 23-5698 (Feb. 26, 2024); McCall v. United States, 143 S. Ct. 2506 (2023) (No. 22-7210); Gibbs v. United States, 143 S. Ct. 1796 (2023) (No. 22-5894); King v. United States, 143 S. Ct. 1784 (2023) (No. 22-5878); Fraction v. United States, 143 S. Ct. 1784 (2023) (No. 22-5859).

The extraordinary and compelling reason that petitioner asserts here is an allegation of "prosecutorial misconduct." Pet. 12. Petitioner alleges that the prosecutor encouraged witnesses to lie about drug quantities at his trial, thereby "undermin[ing] the constitutional integrity" of the proceedings. D. Ct. Doc. 1993, at 20.

The assertion of such an error is neither an "extraordinary" nor a "compelling" reason for a sentence reduction under Section 3582(c)(1)(A). Consistent with the "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute,'" Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (citation omitted), the word "extraordinary" should be understood "to mean 'most unusual,' 'far from common,' and 'having little or no precedent,'" United States v. McCall, 56 F.4th 1048, 1055 (6th Cir. 2022) (en banc) (quoting Webster's Third New International Dictionary of the English Language 807 (1971) (Webster's)), cert. denied, 143 S. Ct. 2506 (2023). There is "nothing 'extraordinary'" about a challenge to the trial or sentencing proceedings, because such challenges "are the ordinary business of the legal system, and their consequences should be addressed by direct appeal or collateral review under 28 U.S.C. § 2255." United States v. King, 40 F.4th 594, 595 (7th Cir. 2022), cert. denied, 143 S. Ct. 1784 (2023); see Gonzalez v. Crosby, 545 U.S. 524, 536 (2005) (observing

that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of a federal statute).

Such an assertion of error likewise cannot constitute a "compelling" reason for a Section 3582(c)(1)(A) sentence reduction. When Congress enacted the Sentencing Reform Act of 1984, "[c]ompelling" meant "forcing, impelling, driving." McCall, 56 F.4th at 1055 (quoting Webster's 463). Thus, for a reason to be "compelling" under Section 3582(c)(1)(A), it must provide a "powerful and convincing" reason to disturb the finality of a federal sentence. United States v. Jenkins, 50 F.4th 1185, 1197 (D.C. Cir. 2022) (citation omitted). "But given the availability of direct appeal and collateral review under section 2255 of title 28," there is no powerful and convincing reason to allow prisoners to challenge the legal validity of a conviction or sentence under Section 3582(c)(1)(A). Id. at 1200.

Section 2255 is the "remedial vehicle" that Congress "specifically designed for federal prisoners' collateral attacks on their sentences." Jones v. Hendrix, 599 U.S. 465, 473 (2023). Treating an asserted legal error in the original proceedings as an "extraordinary and compelling" reason for a sentence reduction would permit defendants to "avoid the restrictions of the post-conviction relief statute by resorting to a request for compassionate release instead." United States v. Crandall, 25 F.4th 582, 586 (8th Cir.), cert. denied, 142 S. Ct. 2781 (2022).

And it "would wholly frustrate explicit congressional intent to hold that [defendants] could evade" those restrictions "by the simple expedient of putting a different label on their pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

Accordingly, an asserted legal error in the original trial or sentencing cannot serve as an "extraordinary and compelling reason[]" for a sentence reduction either in isolation or as an addition to a package of such "reasons." 18 U.S.C. 3582(c)(1)(A)(i). Whether considered alone or in combination with other asserted factors, such an asserted error is a "legally impermissible" consideration for purposes of determining whether an extraordinary and compelling reason exists. Jenkins, 50 F.4th at 1202 (citation omitted).

b. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 23) that the court of appeals improperly narrowed Section 3582(c)(1)(A)'s reach beyond the "express limitations" that Congress included: the requirements that any reduction be consistent with applicable Sentencing Commission policy statements, that the district court consider any applicable Section 3553(a) factors, and that rehabilitation alone shall not be considered an extraordinary and compelling reason. That contention disregards the express textual requirement that the reason for a reduction be both "extraordinary and compelling." 18 U.S.C. 3582(c)(1)(A)(i). And as explained above, the asserted

legal invalidity of a conviction or sentence is "neither extraordinary nor compelling." Jenkins, 50 F.4th at 1200.

Petitioner argues (Pet. 27-28) that granting a Section 3582(c)(1)(A) sentence reduction based on a trial or sentencing error would not in fact intrude on the domain of Section 2255, on the theory that he "did not present a standalone claim alleging that his sentence was imposed in violation of the Constitution or federal law" and "[g]ranting [him] a sentence reduction would not require any finding that his sentence is invalid." But petitioner asserts that the prosecutor committed misconduct that resulted in "an unconstitutional proceeding." D. Ct. Doc. 1993, at 20. A court could not accept that assertion without "necessarily" concluding that his conviction and sentence were infected by precisely the sort of legal invalidity that would provide the basis for collateral relief under Section 2255. Jenkins, 50 F.4th at 1204. As the court of appeals observed, "[w]hen a federal prisoner asserts a claim that, if true, would mean 'that the sentence was imposed in violation of the Constitution or laws of the United States,'" he "is bringing a claim governed by § 2255," and petitioner "cannot avoid this rule by insisting [that] he requests relief purely as an exercise of discretion rather than entitlement." Pet. App. 20a (citation omitted).

Petitioner also suggests that the decision below creates an "unworkable standard" for district courts because it is unclear what types of claims are prohibited in a motion for a sentence

reduction under Section 3582(c). Pet. 30 (emphasis omitted). But as the court of appeals explained, "[w]hen a federal prisoner asserts a claim that, if true, would mean" that his conviction or sentence was invalid, "the prisoner is bringing a claim governed by § 2255," and such a motion, "however captioned or argued, must be treated as a § 2255 motion." Pet. App. 20a-21a. And because district courts "have for decades been screening postconviction motions for claims that are, in substance, § 2255 claims, even though ostensibly brought under some other authority," there is "no reason to believe district courts will have more difficulty isolating § 2255 claims brought in the guise of compassionate release compared to § 2255 claims brought in some other guise." Id. at 26a (Tymkovich, J., concurring in the denial of rehearing en banc).

2. Petitioner contends (Pet. 14-21) that the courts of appeals are divided on whether a claim like his can constitute an extraordinary and compelling reason for a sentence reduction under Section 3582(c)(1)(A). But petitioner overstates the level of disagreement in the courts of appeals, and the recent amendment to Sentencing Guidelines § 1B1.13 undercuts the prospective significance of any such disagreement.

a. Petitioner acknowledges (Pet. 17-21) that most of the courts of appeals that have considered the question have determined that a claim like his cannot constitute an extraordinary and compelling reason for a sentence reduction under Section

3582(c)(1)(A). See Pet. App. 16a-17a; United States v. Ferguson, 55 F.4th 262, 269-272 (4th Cir. 2022), cert. denied, No. 22-1216 (Feb. 26, 2024); United States v. Escajeda, 58 F.4th 184, 188 (5th Cir. 2023); United States v. West, 70 F.4th 341, 346-347 (6th Cir. 2023), cert. denied, No. 23-5698 (Feb. 26, 2024); Crandall, 25 F.4th at 586 (8th Cir.); Jenkins, 50 F.4th at 1200-1204 (D.C. Cir.).

Petitioner errs in asserting (Pet. 15-16), however, that two other circuits have taken a different approach. Although the First Circuit has taken the view that an asserted legal error can form part of an individualized assessment of whether extraordinary and compelling reasons exist in a particular defendant's case, see United States v. Trenkler, 47 F.4th 42, 48-49 (2022), petitioner incorrectly categorizes (Pet. 15-16) the Ninth Circuit as having adopted that view. In the decision that petitioner cites (Pet. 15-16), the Ninth Circuit stated that prospective statutory amendments enacted by Congress can form part of an individualized determination of whether extraordinary and compelling reasons exist for reducing a preexisting sentence. United States v. Chen, 48 F.4th 1092, 1093 (2022). But the court did not address whether the type of reason asserted here -- a trial or sentencing error that causes the legal invalidity of the conviction or sentence -- can constitute an extraordinary and compelling reason. Cf. United States v. Roper, 72 F.4th 1097, 1102 (9th Cir. 2023) (noting the issue, but deciding the case without resolving it because the

defendant "does not claim that his original sentence violated the Constitution or federal law").

b. In any event, the Sentencing Commission's recent amendment to Sentencing Guidelines § 1B1.13, which took effect November 1, 2023, supersedes any disagreement in the circuits. That amendment revised Section 1B1.13 to "extend[] the applicability of the policy statement to defendant-filed motions." 88 Fed. Reg. 28,256 (May 3, 2023). The amendment also revised Section 1B1.13 to "expand[] the list of specified extraordinary and compelling reasons that can warrant sentence reductions." Ibid. Even as expanded, however, that list does not include the type of reason asserted here. See id. at 22,254-22,255.

Under Section 3582(c)(1)(A), any sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(A). Because the Commission has now issued an amended policy statement applicable to defendant-filed motions, and because that amended policy statement does not permit reliance on the asserted legal invalidity of a conviction or sentence in the determination of whether extraordinary and compelling reasons for a sentence reduction exist, any disagreement among the circuits on the question presented lacks prospective significance. Even in those circuits that petitioner views as having adopted his position on the question presented under then-current law, district courts will now be limited by the amended policy statement's description of

what may be considered extraordinary and compelling reasons and therefore may not rely on the type of reason petitioner asserts here. See United States v. Ruvalcaba, 26 F.4th 14, 23-24 (1st Cir. 2022) (acknowledging that "[i]f and when the Sentencing Commission issues updated guidance applicable to prisoner-initiated motions," district courts "will be required to ensure that their determinations of extraordinary and compelling reasons are consistent with that guidance"); Chen, 48 F.4th at 1098 (acknowledging that district courts "are bound by" applicable policy statements).

The amended policy statement specifies that "a change in the law * * * may be considered in determining whether the defendant presents an extraordinary and compelling reason" under certain circumstances. 88 Fed. Reg. at 28,255. But while that provision purports to allow a district court to consider a statutory amendment enacted by Congress, a legal error of the sort asserted here would not qualify as "a change in the law" within its scope. See Pet. App. 25a (Tymkovich, J., concurring in the denial of rehearing en banc) (explaining that the "amended policy statement * * * contains not a word about errors in a conviction or sentence as a basis for compassionate release"). Petitioner's assertion of prosecutorial misconduct does not rely on any alteration of the governing legal approach. And because petitioner's claim of an error in his original proceedings, proffered as a potential ground for reducing his sentence, is not "similar in gravity," Sentencing

Guidelines § 1B1.13(b)(5), to the preceding sentence-focused reduction grounds to which it must be compared -- namely, medical concerns, age, family circumstances, and abuse while imprisoned -- see Sentencing Guidelines § 1B1.13(b)(1)-(4), it likewise does not supply a basis for such a reduction.

In any event, the court of appeals decided this case in February 2023, nine months before the Commission's amendments to § 1B1.13 went into effect in November 2023. Although the opinions concerning the denial of rehearing en banc briefly discuss the pending amendment, Pet. App. 25a (Tymkovich, J., concurring in the denial); id. at 43a, 47a-48a (Rossman, J., dissenting from the denial), there is no sound reason for the Court to consider the question presented in a case that predates the amended policy statement and any relevant consideration of the implications of that policy statement by the circuit courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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