No. 24-556

In the Supreme Court of the United States

JOE FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner had not identified "extraordinary and compelling reasons" that supported reducing his sentence under 18 U.S.C. 3582(c)(1)(A)(i), where his motion relied on his asserted "potential innocence" and differences between his sentence and those of his coconspirators.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. *Fernandez*, No. 10-cr-863 (Oct. 22, 2014)

United States v. *Fernandez*, No. 17-cv-4806 (Nov. 13, 2017)

United States v. *Fernandez*, No. 10-cr-863 (Nov. 3, 2021)

United States Court of Appeals (2d Cir.):

United States v. *Fernandez*, No. 14-4158 (May 2, 2016)

United States v. *Fernandez*, No. 15-487 (May 2, 2016)

United States v. *Fernandez*, No. 15-643 (May 2, 2016)

United States v. *Fernandez*, No. 18-6 (Dec. 4, 2018)

United States v. *Fernandez*, No. 20-1130 (June 22, 2020)

U.S. Supreme Court:

Fernandez v. *United States*, No. 17-5760 (Oct. 10, 2017)

Fernandez v. *United States*, No. 19-5631 (Oct. 7, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 104 F.4th 420. The order of the district court (Pet. App. 28a-39a) is unreported but is available at 2022 WL 17039059. Prior decisions of the court of appeals in petitioner's case are available at 648 Fed. Appx. 56 and 757 Fed. Appx. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2024. A petition for rehearing was denied on August 15, 2024 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on November 13, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit murder for hire resulting in death, in violation of 18 U.S.C. 1958; and using a firearm in furtherance of a crime of violence resulting in death, in violation of 18 U.S.C. 924(j). Judgment 1. The district court sentenced him to two consecutive terms of life imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. 648 Fed. Appx. 56. This Court denied a petition for a writ of certiorari. 583 U.S. 925.

In 2017, petitioner filed a motion to vacate his convictions and sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 217 (June 23, 2017). The district court denied the motion. 17-cv-4806 D. Ct. Doc. 6 (Nov. 13, 2017). The court of appeals affirmed. 757 Fed. Appx. 52. This Court denied a petition for a writ of certiorari. 140 S. Ct. 337.

In 2020, the court of appeals authorized petitioner to file a second Section 2255 motion to raise a claim that his Section 924(j) conviction should be vacated in light of *United States* v. *Davis*, 588 U.S. 445 (2019). 20-1130 C.A. Order (June 22, 2020). The district court granted the motion and vacated petitioner's life sentence for the Section 924(j) offense, leaving undisturbed his life sentence for the murder-for-hire conspiracy. D. Ct. Doc. 245 (Nov. 3, 2021).

In 2021, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 248 (Nov. 30, 2021); D. Ct. Doc. 257 (Feb. 14, 2022). The district court granted the motion and reduced petitioner's life sentence to a time-served sentence of roughly 11 years. Pet. App. 28a-39a. The court of appeals reversed. *Id.* at 1a-25a.

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." *Id.* § 1B1.13, comment. (n.1(A)-(D)); see *id.* App. C Supp., Amend. 799. 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. *Id.* § 1B1.13, comment. (n.1(D)).

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).

After the First Step Act's enactment, the Second 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. *Brooker*, 976 F.3d 228, 235-236 (2d Cir. 2020).

2. In 2000, Arturo Cuellar and Idelfonso Vivero Flores, members of a Mexican drug cartel, traveled to New York City to collect a $6.5 million debt for 274 kilograms of cocaine that their cartel had delivered to Jeffrey Minaya, the leader of a New York drug ring. Pet. App. 4a. Instead of paying Cuellar and Flores, Minaya hired Patrick Darge to kill them. *Ibid.* Darge enlisted petitioner (his cousin) as his "backup shooter" and Luis Rivera as their getaway driver. *Ibid.*; see *id.* at 29a.

On the morning of February 22, 2000, petitioner and Darge waited for Cuellar and Flores in the lobby of an apartment building in the Bronx. Pet. App. 4a. Alberto Reyes, another participant in the scheme, let Cuellar and Flores into the building, called an elevator, signaled to petitioner and Darge, and left. *Ibid.* Darge shot Cuellar in the back of the head, but his gun jammed

before he could shoot Flores, and he fled to the getaway car. *Ibid.* Petitioner remained in the lobby and fired 14 shots, nine of which hit either Cuellar or Flores. *Ibid.* After confirming that both victims were dead, petitioner fled to the getaway car and he, Darge, and Rivera left the scene. *Ibid.* Darge paid petitioner $40,000 for his role in the murder. *Ibid.*

In October 2011—eleven years later—police came searching for petitioner at an address in Woodbury, New York, and encountered his wife. Pet. App. 5a. Petitioner surrendered to police a few days later. *Ibid.*

3. A grand jury in the Southern District of New York charged petitioner with one count of conspiring to commit murder for hire resulting in death, in violation of 18 U.S.C. 1958, and one count of using a firearm in furtherance of a crime of violence resulting in death, in violation of 18 U.S.C. 924(j). Superseding Indictment 1-2. The predicate crime of violence for the Section 924(j) offense was the murder-for-hire conspiracy. *Id.* at 2; Pet. App. 5a. Darge, Reyes, and Minaya were also charged with crimes related to the murders and pleaded guilty, while Rivera was charged with, and pleaded guilty to, a drug conspiracy that was separate from the murder-for-hire scheme. Pet. App. 5a-6a n.1.

Petitioner opted to proceed to trial. Pet. App. 5a-6a. The evidence at trial included bullets and shell casings from the crime scene; photographs of the scene and relevant individuals; the testimony of four law enforcement officers, one of whom was a ballistics expert; the testimony of a doctor from the Office of the Chief Medical Examiner; and the testimony of six cooperating witnesses. *Id.* at 6a. The government's key cooperating witness was Darge, who testified to petitioner's participation in the shooting. *Ibid.* On cross-examination,

Darge admitted that, as a cooperating witness in another case, he had lied to the government, agents, and a judge for his own benefit. *Ibid.* Those lies related to his involvement in two prior murders (including one at issue in this case), his history of credit card fraud, the extent to which he dealt drugs, his brother's involvement in his drug-dealing business, and his brother's history of "shooting people." *Ibid.*

The jury found petitioner guilty on both counts. Pet. App. 6a; Judgment 1. In two post-trial motions and at sentencing, petitioner "argued to the district court * * * that the evidence was insufficient to sustain his conviction because Darge's testimony was unreliable." Pet. App. 7a. The court rejected that argument each time. *Ibid.* (citation omitted).

The district court sentenced petitioner to a mandatory life sentence on the murder-for-hire count, and a consecutive (non-mandatory) life sentence on the Section 924(j) count, to be followed by five years of supervised release. Judgment 2-3; Pet. App. 7a. Separately, the district court sentenced Darge to 30 years of imprisonment, Reyes to 25 years of imprisonment, Minaya to 15 years of imprisonment, and Rivera to two years of imprisonment, on the charges to which they had pleaded guilty. Pet. App. 7a; see *id.* at 5a n.1.

4. The court of appeals affirmed. 648 Fed. Appx. 56. The court rejected petitioner's argument that the evidence was insufficient to convict him because Darge's testimony was uncorroborated. *Id.* at 60. This Court denied a petition for a writ of certiorari. 583 U.S. 925.

5. In 2017, petitioner filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. 2255, pressing claims other than his asserted innocence. D. Ct. Doc. 217. The district court denied the motion. 17-cv-

4806 D. Ct. Doc. 6. The court of appeals affirmed. 757 Fed. Appx. 52. This Court denied a petition for a writ of certiorari. 140 S. Ct. 337.

In 2020, the court of appeals authorized petitioner to file a second Section 2255 motion to raise a claim that his Section 924(j) conviction should be vacated in light of *United States* v. *Davis*, 588 U.S. 445 (2019), which held that the definition of crime of violence in 18 U.S.C. 924(c)(3)(B) is unconstitutionally vague. 20-1130 C.A. Order. The district court granted the motion and vacated petitioner's life sentence for the Section 924(j) offense, leaving undisturbed his mandatory life sentence for the murder-for-hire conspiracy. D. Ct. Doc. 245.

6. In 2021, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). D. Ct. Doc. 248; D. Ct. Doc. 257. The district court granted the motion and reduced petitioner's life sentence to a time-served sentence of roughly 11 years. Pet. App. 28a-39a.

The district court accepted petitioner's claim that "extraordinary and compelling reasons" warranted a sentence reduction. See 18 U.S.C. 3582(c)(1)(A)(i). The court based its decision largely on its view that there was "reason to question the verdict." Pet. App. 36a (capitalization omitted). The court acknowledged that "there is factual support for the jury's verdict and the verdict has been affirmed," but stated that "a certain disquiet remains." *Id.* at 36a. The court wondered whether Darge had "sacrifice[d]" petitioner "to save his brother" and it speculated that "[a] more effective cross-examination" of Darge "might have changed the verdict." *Ibid.* The court also pointed, *inter alia*, to the fact that the Darge and his brother had fled to the Dominican Republic immediately after the murders, whereas petitioner had remained in the United States, and to potential

discrepancies in the evidence as to how many shots Darge and petitioner each fired. *Ibid.* The court further suggested that the government's decision to charge Rivera (the getaway driver) with a drug offense rather than the murder-for-hire conspiracy might have indicated that it lacked confidence in Darge's testimony. *Id.* at 37a. The court stated that "[t]he sum of all this causes me to be unsure that [petitioner] was Darge's back-up, or that he was a member of the conspiracy to kill Cuellar and Flores, or that he shot either or both of the two." *Ibid.*

In addition, the district court took the view that petitioner's statutorily required term of imprisonment was disparately lengthy compared to the sentences imposed on his coconspirators. Pet. App. 37a. Although petitioner received the only term of imprisonment allowed for the offense for which he was convicted, the court stated that "the enactment of the First Step Act enables me to consider this disparity as part of the extraordinary and compelling circumstances that justify a lower sentence for [petitioner]." *Id.* at 38a. In the court's view, a time-served sentence of about 11 years would reduce the disparity between petitioner and his coconspirators and would be sufficient but not greater than necessary to achieve the sentencing objectives set forth in Section 3553(a). *Ibid.*

7. The court of appeals reversed. Pet. App. 1a-25a.

With respect to the sentencing-disparity rationale, the court determined that "[u]nder the circumstances of this case," the difference between petitioner's sentence and those of his coconspirators was not an extraordinary and compelling reason to reduce his sentence. Pet. App. 14a. The court explained that unlike his co-conspirators, petitioner did not plead guilty or

cooperate with the government, and "[i]t is not 'extraordinary' (indeed, it should be expected) that a defendant who proceeds to trial and is convicted receives a longer sentence than his co-defendants who plead guilty to different crimes, accept responsibility, and assist the government by cooperating." *Id.* at 14a-15a.

The court of appeals declined, however, to "foreclose the possibility that significant sentencing disparities, even between a defendant who went to trial and * * * co-defendant[s] who pleaded guilty and cooperated, might" in some cases warrant a finding of extraordinary and compelling reasons to grant a sentencing reduction. Pet. App. 16a n.4. It explained that "[t]he case at bar simply does not involve any such circumstances." *Ibid.*

With respect to the possible-innocence rationale, the court of appeals explained that petitioner's claim was not properly channeled through a motion for a Section 3582(c)(1)(A) sentence reduction. Pet. App. 17a-25a. The court explained that the statute governing post-conviction review for federal prisoners, 28 U.S.C. 2255, is more specific in scope than Section 3582(c)(1)(A) and includes explicit restrictions on the timing of petitions and the permissibility of serial motions that are not present in 18 U.S.C. 3582(c)(1)(A). Pet. App. 18a.

The court of appeals observed that if Congress had intended for prisoners to circumvent the strictures of Section 2255 by challenging the validity of a conviction through a Section 3582(c)(1)(A) sentence-reduction motion, it would have said so expressly. Pet. App. 18a-19a. The court explained that because challenges to the validity of a conviction must be brought under Section 2255, they cannot qualify as extraordinary and compelling reasons under Section 3582(c)(1)(A). *Id.* at 19a. And the court observed that it was joining a "near-

unanimous consensus" among the courts of appeals on the issue. *Id.* at 21a; see *id.* at 21a-22a (citing cases).

ARGUMENT

Petitioner contends (Pet. 11-23) that an asserted basis "to question the jury's verdict," and the difference between his statutorily required sentence following trial and his coconspirators' sentences for different crimes following guilty pleas, can serve as "'extraordinary and compelling'" reasons for a sentence reduction under Section 3582(c)(1)(A). Pet. 4. That contention lacks merit and does not warrant this Court's review. Petitioner overstates the extent of relevant disagreement in the circuits, and the Sentencing Commission recently issued an amended policy statement that undermines the practical significance of any preexisting disagreement. This Court has recently and repeatedly 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 his asserted "potential innocence" and sentencing disparities between petitioner and his coconspirators can constitute "'extraordinary and compelling'" reasons for a sentence reduction under Section 3582(c)(1)(A). Pet. App. 11a (citation omitted); see *id.* at 11a-25a.

a. The overarching principle of federal sentencing law is that a "federal court generally 'may not modify a

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[1] See, *e.g.*, *Wesley* v. *United States*, 144 S. Ct. 2649 (2024) (No. 23-6384); *Ferguson* v. *United States*, 144 S. Ct. 1007 (2024) (No. 22-1216); *West* v. *United States*, 144 S. Ct. 1010 (2024) (No. 23-5698); *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).

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). Petitioner here claims (Pet. 16-17) that his "potential innocence," either alone or in combination with the lower sentences received by his coconspirators, constitute such "extraordinary and compelling" reasons. Pet. 16. But those are neither an "extraordinary" nor "compelling" reasons 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*, 585 U.S. 274, 284 (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, *e.g.*, Pet. App. 16a (citing authority for the proposition that lower sentences for cooperating defendants are common and explicitly contemplated by statute and the Sentencing Guidelines).

Such challenges likewise cannot constitute a "compelling" reason for a Section 3582(c)(1)(A) sentence reduction. When Congress enacted the pertinent language in Sentencing Reform Act of 1984, "[c]ompelling" meant "forcing, impelling, driving." *McCall*, 56 F.4th at 1055 (quoting *Webster's* 463); see *Oxford Dictionary of the English Language* 355 (2010) (similar current definition). 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 validity of a conviction or sentence under Section 3582(c)(1)(A). *Id.* at 1200.

To the contrary, Section 2255 is the "remedial vehicle" Congress "specifically designed for federal prisoners' collateral attacks on their sentences." *Jones* v. *Hendrix*, 599 U.S. 465, 473 (2023). Treating purported doubts about the validity of a conviction or sentence 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, the types of claims petitioner raises here cannot serve as "extraordinary and compelling reasons" for a sentence reduction either in isolation or as part of a package of such "reasons." 18 U.S.C. 3582(c)(1)(A)(i). Whether considered alone or in combination with other asserted factors, asserted doubts about the validity of a conviction or the propriety of a sentence are "legally impermissible" considerations 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 appears to contend that Section 3582(c)(1)(A) in fact grants district courts unlimited, or near-unlimited, discretion to decide what constitutes an extraordinary and compelling reason to reduce a sentence, with the only limitation being that the decision cannot be based on rehabilitation alone. Pet. i, 16-18 (citing 28 U.S.C. 994(t)). 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). As explained above, the asserted invalidity of a conviction or sentence is "neither." *Jenkins*, 50 F.4th at 1200.

Petitioner is incorrect in asserting (Pet. 13-15) that the decision below conflicts with this Court's decision in *Concepcion* v. *United States*, 597 U.S. 481 (2022). In *Concepcion*, the Court considered the scope of a district court's discretion under Section 404 of the First Step Act, which provides an explicit statutory mechanism for a court to revisit the sentence of a defendant convicted

of a crack-cocaine offense "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." First Step Act § 404(a), 132 Stat. 5222; see § 404(b), 132 Stat. 5222; *Concepcion*, 597 U.S. at 495. The Court explained that, in adjudicating a motion under Section 404 of the First Step Act, a district court "may consider other intervening changes" of law or fact, beyond the changes made by those sections of the Fair Sentencing Act. *Concepcion*, 597 U.S. at 486. But while Section 404 of the First Step Act directly authorizes sentence reductions for a specifically defined subset of previously sentenced drug offenders, Section 3582(c)(1)(A)(i) contains a threshold requirement that a district court identify "extraordinary and compelling reasons" warranting a sentence reduction. 18 U.S.C. 3582(c)(1)(A)(i); see *Concepcion*, 597 U.S. at 495.

Petitioner also argues (Pet. 21-22) that the district court's decision to grant a Section 3582(c)(1)(A) sentence reduction in his case is not an attack on the validity of his conviction or sentence, and thus would not be an end-run around Section 2255, because the district court recognized that the jury's verdict was valid and lawful. See Pet. App. 37a. That case-specific argument does not provide a sound basis for certiorari, see Sup. Ct. R. 10, and is, moreover, conceptually mistaken. Petitioner notes (Pet. 22) that his claim that his conviction and sentence were "unjust" would not be a viable claim under Section 2255. But as the court of appeals explained, "[t]he fact that [petitioner's claim] would not have *succeeded* in that posture does not permit [petitioner] to channel that claim into a section 3582 motion instead." Pet. App. 24a. "To the contrary," the court stated, "this is precisely what the habeas regime prevents." *Ibid.*

Allowing a prisoner to seek a sentence reduction under Section 3582(c)(1)(A) on the theory that the prisoner could *not* prevail under Section 2255 would be a substantial end-run around the limitations on collateral review. Petitioner's motion for a sentence reduction, in essence, just repackages two unavailing arguments for challenging his sentence and underlying conviction under Section 2255. Petitioner could not prevail on a claim that he *might* have been innocent when the jury, based on sufficient evidence, found otherwise. Nor could he prevail on a claim of unlawful sentence disparity in his statutorily required sentence. He cannot now combine and recharacterize those two nonviable claims into a viable basis for a sentence reduction. The absence of a viable argument under Section 2255 is neither "extraordinary" nor "compelling," and Section 3582(c)(1)(A) is not a catchall for attempting to vindicate otherwise nonactionable challenges to the original judgment.[2]

2. Petitioner asserts (Pet. 16-21) 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

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[2] To the extent that petitioner suggests (Pet. 16-17) that the court of appeals categorically held that sentencing disparities could not be considered as part of the "extraordinary and compelling" analysis, that suggestion is misplaced. The court in fact reasoned that "[u]nder the circumstances of this case," the sentencing disparity was neither extraordinary nor compelling because petitioner's coconspirators pleaded guilty to other crimes and cooperated with the government, whereas petitioner went to trial and did not cooperate. Pet. App. 14a-15a. The court thus left open the possibility that sentencing disparities could warrant a finding of extraordinary and compelling reasons to grant a sentence reduction, but it determined that "[t]he case at bar simply does not involve any such circumstances." *Id.* at 16a n.4.

petitioner overstates the disagreement in the courts of appeals, and a recent amendment to Sentencing Guidelines § 1B1.13 undercuts the prospective significance of any disagreement.

a. As the court of appeals here observed (Pet. App. 21a-22a), most of the courts of appeals that have considered the question have determined that a claim like petitioner's cannot constitute an extraordinary and compelling reason for a sentence reduction under Section 3582(c)(1)(A). See *id.* at 17a-25a; *United States* v. *Ferguson*, 55 F.4th 262, 270-272 (4th Cir. 2022), cert. denied, 144 S. Ct. 1007 (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, 144 S. Ct. 1010 (2024); *United States* v. *Von Vader*, 58 F.4th 369, 371 (7th Cir.), cert. denied, 144 S. Ct. 399 (2023); *Crandall*, 25 F.4th at 586 (8th Cir.); *United States* v. *Wesley*, 60 F.4th 1277, 1283-1286 (10th Cir. 2023), cert. denied, 144 S. Ct. 2649 (2024); *Jenkins*, 50 F.4th at 1200-1204 (D.C. Cir.); see also Pet. 20 (acknowledging Fifth and Tenth Circuit decisions).

Petitioner errs in asserting (Pet. 18-21) that two other circuits have adopted a different approach. Although the First Circuit has taken the view that an asserted trial 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. 19-20) the Ninth Circuit as having adopted that view as well. In the decision petitioner cites, *United States* v. *Roper*, 72 F.4th 1097, 1102 (2023) (cited at Pet. 19-20), the Ninth Circuit stated that nonretroactive changes in sentencing law that postdate the defendant's sentencing and create disparities with

similarly situated defendants can form part of an individualized determination of whether extraordinary and compelling reasons exist for reducing a preexisting sentence. *Ibid.* But petitioner does not allege any post-sentencing change in the law in this case.

Indeed, in *Roper*, the Ninth Circuit declined to resolve the issue petitioner raises here, emphasizing that the defendant did "not claim that his original sentence violated the Constitution or federal law" or "seek 'to correct sentencing errors.'" 72 F.4th at 1102 (citation omitted). Petitioner—who clearly is attacking his original judgment on grounds that were available but rejected at the time the conviction and sentence were entered—thus cannot show that the result in his case would be different in the Ninth Circuit.

b. At all events, the Sentencing Commission's recent amendment to Sentencing Guidelines § 1B1.13, which took effect on November 1, 2023, after petitioner filed the motion at issue here, supersedes any disagreement in the circuits. The 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 reasons asserted here. See Sentencing Guidelines § 1B1.13(b).

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 invalidity of a conviction or sentence in the determination of whether extraordinary and compelling reasons for a sentence reduction exist, any disagreement in 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 reasons 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"); *United States* v. *Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022) (acknowledging that district courts "are bound by" applicable policy statements).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2025