SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CARLOS CONCEPCION,)

Petitioner,)

v.) No. 20-1650

UNITED STATES,)

Respondent.)

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Washington, D.C.
Wednesday, January 19, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:31 a.m.

APPEARANCES:

CHARLES L. McCLOUD, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.
MATTHEW GUARNIERI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-1650, Concepcion versus United States.

Mr. McCloud.

ORAL ARGUMENT OF CHARLES L. McCLOUD

ON BEHALF OF THE PETITIONER

MR. McCLOUD: Mr. Chief Justice, and may it please the Court:

The First Circuit held below that district courts are barred from considering intervening law and facts when deciding whether to impose a reduced sentence under the First Step Act. That holding conflicts with the law's text, and it flouts background principles of sentencing and judicial decision-making.

The First Circuit's rule would also require courts to ignore information that is critical to the reasoned exercise of their sentencing discretion. Under the First Circuit's approach, the fact that a defendant was suspected in the murder of a prison guard would be an impermissible consideration when deciding whether to reduce that defendant's

sentence.

The government does not defend the First Circuit's rule. The judgment should therefore be vacated because the district court in this case plainly did not recognize its authority to consider intervening developments.

The question for this Court is, what rule should apply on remand? The first option is that courts must consider relevant intervening law and facts, just as they do in other sentencing proceedings. This is a modest requirement. Under a "must consider" rule, the court has to pay respectful attention to arguments about intervening developments made by the parties. But the court, of course, does not have to be persuaded by those arguments, and it does not have to reduce the defendant's sentence.

Our backup option, which the government endorses, is that courts may consider intervening law and facts.

We think that a "must consider" rule will lead to more consistent results in district courts and be more consistently reviewable on appeal. But either alternative

before the Court today is preferable to the First Circuit's rule, and the bottom line for both is the same. The First Step Act does not require courts to ignore relevant information.

I welcome the Court's questions.

JUSTICE THOMAS: Mr. McCloud, if you are going to make the "must" or "mandatory" argument, on what language do -- do you rely?

MR. McCLOUD: Justice Thomas, we have two textual bases for the "must consider" argument. The first is Congress's use of the phrase "impose a reduced sentence." We think that that's a clear textual indication that what Congress wanted courts to do is to apply the Section 3553(a) factors, the factors that courts consider when they impose a sentence more generally.

And many of those factors incorporate consideration of intervening legal and factual developments because they go to things like the history and characteristics of the defendant and the severity of the defense -- of the offense.

The alternative textual basis we would say for the "must consider" rule is that

Section 404 clearly sets up a statutory scheme where district courts are supposed to exercise their discretion. And in the sentencing context, courts, of course, must be reasonable in exercising their discretion, and the way that Congress has established for courts to be reasonable is to apply the 3553(a) factors.

JUSTICE THOMAS: Don't -- do you think that your discretionary or "may" permissive argument is a better -- stronger argument than the "mandatory" argument?

MR. McCLOUD: Your Honor, I think that they're -- they're both strong arguments. I guess the one advantage I would say that the "must consider" argument has is that we think it would be more predictable for district courts because the parties will know that the court is going to pay attention to arguments about intervening developments. And I think the same is probably true for appellate courts. They will have the hook of the 3553(a) factors when they review the case.

But just to be clear, Your Honor, we would be perfectly happy with an opinion that said courts may consider these developments.

That's certainly better than the First Circuit's rule.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: I don't really understand, either through your presentation or the government's, what this "may" argument is. I understand the idea that you must consider the different things, and at the end of the day, you can come out and say, well, I'm not going to change anything. Judge -- judges now do that all the time.

And I understand the argument that you can't look at the things and change it, but what is it -- what is the "may"? You've already got the "may" in the "must" part. You have to consider it, but you don't have to do anything.

It -- it sounds to me like we're delegating to -- or Congress or somebody's delegating to individual district judges the authority to determine what the law is. It's like a police officer -- you know, you can't park here or you pay -- you have to pay, you know, $20. You know, it's one thing to say, yeah, the officer can say, you know, I'm not

going to give you a ticket, I see you're coming down the street or whatever it is. Doesn't have to, you know, enforce whatever discretion he has. But the officer can't say I think people ought to be able to park here, so I'm never going to give anybody a ticket for that.

What is -- what is this "may" argument?

MR. McCLOUD: Well, Mr. Chief Justice, I think it stems from the fact that Congress clearly has set up a discretionary scheme in this statute. Courts have discretion to decide whether to impose a reduced sentence or not. And so, when they're making that decision, we don't see anything in the text of the statute or in sentencing practice more generally that would suggest that courts are required to put certain information off limits.

CHIEF JUSTICE ROBERTS: Well, right, but what you're saying is Congress passed this discretionary rule, but the people in this "may" category are saying I'm not going to exercise my discretion, I am never going to give a -- a reduction to the sentence.

Is that all right? That's -- that's

-- I don't think that would be something that we would accept in any other area of the law where people have discretion.

You would say, yes, in this particular case, you don't have to give a discretion -- an adjustment. You have discretion not to do that. But the idea for somebody to decide I -- I am not going to exercise discretion, I'm just not going to look at it, I don't understand what -- where that authority comes from.

MR. McCLOUD: So, Mr. Chief Justice, I would agree with you that district courts do not have that authority. I think that courts could not erect categorical rules that they would never look at intervening developments or that they would never reduce a sentence under the First Step Act. I think it has to be an individualized defendant-by-defendant determination that may --

JUSTICE GORSUCH: But -- but, counsel, where does that come from? I mean, if it's "may" and it is divorced and free-floating from 3553 and anything goes, I don't know on what basis this or any court would find an abuse of discretion under that standard that you're

proposing.

MR. McCLOUD: Justice Gorsuch, I agree with you it would be difficult to find an abuse of discretion under that standard. The courts that apply --

JUSTICE GORSUCH: But -- but isn't the Chief Justice's intuition absolutely right, that if a court simply said we would never -- I will never do these things, I know Congress said I may, but I'm not going to do it, I -- you know, I'd prefer not to, we -- we would find that to be an abuse of discretion, I -- I'm pretty confident.

Likewise, if -- if the district court said I know that my original sentence had an egregious guidelines error that -- previously undiscovered, but absolutely egregious, results in a grave injustice, but I prefer not to, really?

MR. McCLOUD: So, Justice Gorsuch, I agree with you and with the Chief Justice that in the first scenario, where the district court has erected a categorical rule that they will not reduce a sentence or look at intervening developments, that would be arbitrary and that

would be an abuse of discretion.

I think it is a much closer question in a case where, in a "may consider" world, the court looks at all of the evidence and says I just don't want to take a consideration of this information.

JUSTICE GORSUCH: Even in a guidelines -- an egregious guidelines error case, you're going to say that that too -- that's just -- that's fine, we can just pass that one over?

MR. McCLOUD: Justice Gorsuch, our position is that if "may consider" means "may," then, yes, the district court has that discretion. That's one of the reasons why we think that the "must consider" rule is the better rule.

JUSTICE ALITO: Well, under your --

JUSTICE KAVANAUGH: You know -- go ahead.

JUSTICE ALITO: Is there any difference between your argument and a statute that says that the district court simply must conduct a new sentencing? Is -- that's what you want, isn't it? You want a new sentencing with the law as -- as changed by the First Step

Act, right?

MR. McCLOUD: Justice Alito, we do think there are significant differences between this proceeding and a plenary resentencing. For example, in this proceeding, rules of waiver and forfeiture and law of the case would apply.

And so, from our perspective, the scope of the proceeding is defined by the -- the new arguments and new information that are presented to the court by the parties. The court doesn't have to work from the ground up.

We also would take the perspective that the court looks at the changes from the Fair Sentencing Act as the starting point. We just don't think that that's the end point for the analysis.

JUSTICE GORSUCH: Well, why --

JUSTICE BREYER: Why -- why are you -- why are you just pretending, not really pretending, but that sentencing starts from scratch? Where does the judge's come from, the discretion, to impose a sentence? It comes from statutes which say zero to 20 years, and they say nothing more within that.

And this is the same. It says "may." Same thing. Okay. Now you've left out the giant actor in this. It's called the Sentencing Commission, and that applies because 3553. And so why doesn't -- all the answers to these questions are, of course, the questioners are right. You could abuse your discretion, District Judge, and so can the Sentencing Commission abuse its discretion.

So far, I don't think it has, but maybe. The -- the -- and so this is just the same. If you want to treat this word "may," which was written against the background of there being several actors -- district court, Sentencing Commission, courts of appeals -- if we're going to treat this the same way, which I think the "may" would give us the -- the -- what Congress wanted, then there we are. The case is only worth a paragraph. It's "may." That's what the statute says.

(Laughter.)

JUSTICE BREYER: How do you do it? The same way you do everything else in sentencing where you have discretion. And, by the way, if you look at what the Sentencing

Commission has done -- unfortunately, there aren't any members except, I think, for one -- but the -- the -- the -- the -- its office has written about 20 pages on this, and they say here's what you do, Judge, at the moment. What you do is you look to 3553. I think that's what the Office of Education says. So this isn't so tough.

Now you're going to agree with me because it ends up with "may," but maybe you won't because you want "must," but I don't know where you get the "must" from.

JUSTICE KAVANAUGH: What --

JUSTICE KAGAN: Well, I don't know where you get the "may" from.

JUSTICE BREYER: It's the statute.

JUSTICE KAVANAUGH: How about the --

JUSTICE BREYER: It's the statute says "may."

JUSTICE KAGAN: The statute --

CHIEF JUSTICE ROBERTS: I know where you get the "can't" from --

JUSTICE KAVANAUGH: How about "may not" --

JUSTICE KAGAN: -- but "may" is not

the "may" that Justice Breyer thinks is in the statute.

JUSTICE BREYER: Really?

JUSTICE KAGAN: The statute says "may impose a reduced sentence."

JUSTICE BREYER: Yes.

JUSTICE KAGAN: "May impose a reduced sentence" or you could not impose a reduced sentence, but the statute says nothing about what you have to consider in deciding whether to impose a reduced sentence. It says you may or you may not impose a reduced sentence. It says nothing about the consideration you have to undertake and the factors that you have to address.

So I would think that a normal way to think about that question is, what do we usually do in resentencing procedures -- in resentencing proceedings? So what's the answer to that question? What do we usually do in resentencing proceedings?

MR. McCLOUD: Your Honor, the answer is that courts usually apply the 3553(a) factors and they usually look to intervening legal and factual developments.

JUSTICE KAGAN: And feel obliged to do that, right? They don't think it's like, oh, it's something I can do if I'm feeling up to it and not do if I'm sort of feeling stressed.

MR. McCLOUD: That's -- that's right, Your Honor. And I do think that that's, again, one advantage of the "must consider" rule, is that --

JUSTICE ALITO: I don't know. Is that completely -- well, I -- I -- I didn't want to cut off your answer. I'm sorry. Did --

MR. McCLOUD: Well, I was just going to say --

JUSTICE ALITO: You were answering Justice Kagan, so go ahead.

MR. McCLOUD: -- one advantage of the "must consider" rule is that it does not lead to a situation where courts are able to ignore information that everyone would agree is relevant.

To go back to the example that I gave in my introduction, it's inconceivable to me that Congress would have wanted a court to make a decision about sentencing without accounting for the fact that the defendant is suspected in

the murder of the prison guard. That's --

JUSTICE ALITO: Well, that was really -- that's an intriguing observation, because do you think that that would be -- there would be a constitutional problem with that?

MR. McCLOUD: No, I don't think so, Justice Alito.

JUSTICE ALITO: Now somebody's been sentenced to, let's say, 10 years for an offense but behaves really badly in -- while in prison, and so Congress says, under those circumstances, you can bring that person back before the sentencing judge and impose a new sentence so that the person is sentenced to a longer term?

MR. McCLOUD: Justice Alito, I do think there would be constitutional questions if the court were able to impose a longer term. That is not an option under the First Step Act because the sentence has to be reduced.

JUSTICE ALITO: Oh. Well, but you said in your -- in your introductory remarks it would be unthinkable for the court not to be able to take into account bad behavior in prison in -- in resentencing somebody under

this, but it -- it is unthinkable because it's unconstitutional.

MR. McCLOUD: Yes, Justice Alito, I agree with you that if there were a situation where a court was increasing the sentence that was given to the defendant based solely on conduct in prison, that could raise constitutional questions.

Those questions are not presented in this case because, as I said before, it is not possible to increase a defendant's sentence. You can only decline to give them a reduced sentence.

JUSTICE KAVANAUGH: Mr. McCloud --

JUSTICE ALITO: So --

JUSTICE KAVANAUGH: Oh, sorry. Go ahead.

JUSTICE ALITO: Yeah. Just one -- one last thing. So I come back to my original question. I think it was my first question. If what Congress wanted to say was, in these cases covered by the First Step Act, you just resentence the defendant, why didn't they just say that? Why did they use this formulation?

MR. McCLOUD: Justice Alito, I think

it's because Congress did not want a plenary resentencing. As I said before, we think that rules like waiver and forfeiture and law of the case would still apply.

So Congress was not wiping the slate clean. It was giving district courts the option to make an exception to finality and to give the defendant a new sentence that's lower relative to their prior sentence.

JUSTICE KAVANAUGH: Mr. McCloud --

JUSTICE BREYER: So here's the example. Look, 3553(a) applies to most sentencing because almost all sentencing statutes don't list factors. They simply say the district court may sentence between zero and 20 years, and they don't even say that. They say the sentence is zero to 20 years.

So we go to the Sentencing Commission to try to regularize it, but the district court has lots of discretion reviewed by a court of appeals.

And my real question -- I shouldn't have sounded so definite and so -- so forth, and I'm sorry about that -- but -- but -- but, look, what I don't see is why we wouldn't treat

this the same way. And -- and, of course, sometimes they could abuse their discretion. Sometimes they couldn't. So why -- there must be a reason that you can answer me on that because nobody's really been arguing that.

And so I come to this and say I -- I don't understand why. There must be a reason because nobody's arguing it.

MR. McCLOUD: Well, Justice Breyer, I agree that you should treat it the same. This is not a mechanical adjustment of the sentence. Let's take Mr. Concepcion's --

JUSTICE BREYER: So you just suddenly started to argue this because you wanted to agree with me, but I -- but nobody in the briefs or nobody said, look, this isn't such a tough case. The First Circuit writes an opinion that seems to me to make it tougher than necessary.

But is there any answer to what I've -- you -- you see where I'm coming from?

MR. McCLOUD: I -- I think I take your question -- Your Honor's question to be how have courts come to this different conclusion. And the textual hook that the First Circuit

relied on is the reference in Section 404(b) to imposing a reduced sentence as if Sections 2 and 3 of the Fair Sentencing Act were in effect at the time of the covered offense.

And, in our view, the First Circuit misread that language as a limitation on district courts' authority. It is not a limitation.

JUSTICE GORSUCH: But --

MR. McCLOUD: It actually --

JUSTICE GORSUCH: -- let me -- oh, I'm sorry, go ahead.

JUSTICE KAVANAUGH: We start with the principle of finality, right? You -- you -- you mentioned that, Mr. McCloud. And then the First Step Act is an exception to that principle of finality and refers to adjusting sentences, as you say, as if Sections 2 and 3 of the Fair Sentencing Act, right, and what concerns me, we have a "must" and we have a "may."

We're not discussing "may not," but I want to at least make sure that's on the table and why that you think that's wrong, on "may not consider."

And the -- the issue, as I understand it, is can the defendant coming in trying to get the benefit of the change in the crack guideline also get the benefit of a change in the career offender guideline based on subsequent developments, even though the Commission in Amendment 798 is not retroactive? That's kind of the big ticket issue as I see it here.

And my concern about saying, oh, yeah, you can come in and get the benefit of the change in the career offender guideline is that what about the defendants who are in prison for armed robbery or what have you? They can't use 2255 or 3582 to come in and get the benefit of the change in the career offender guideline.

So the people who are coming in for the crack/powder issue are being treated differently than those people in getting an extra benefit compared to those people by being able to take advantage of the change in the career offender guideline, even though it's not retroactive.

That concerns me about the disparity. That also makes me think the "as if" language

has some -- some bite here or at least it should.

And I wanted to give you a chance to respond to all that.

MR. McCLOUD: So, Justice Kavanaugh, let me start with the "as if" language, and then I'll turn to the question about disparity.

We agree that the "as if" language plays an important role in the statute, but it's a very limited role. The "as if" language is critical for getting around 1 -- U.S.C. 109, the federal savings statute, and making Sections 2 and 3 of the Fair Sentencing Act retroactive. And that's clear from the reference in the clause to the time of the covered offense. As this Court explained in Dorsey, that is the point at which criminal penalties affix to a defendant.

So all Congress was trying to do in the "as if" clause was to make clear that when a court imposes a new sentence, it doesn't have to be bound by the statutory penalties that were previously in effect for that defendant. So it is not a limitation.

There are, in fact, limitations in the

First Step Act, contained in Section 404(c). So I think, to the extent that there's an attempt to read the "as if" clause as a limitation, that really is inconsistent with canons like expressio unius --

JUSTICE KAVANAUGH: Right. But, if Congress wanted these defendants to be able to take advantage of changes in the career offender guideline, I have two thoughts. One, why didn't they say that? And, two, why is that not available to the thousands of other defendants who are out there who are not in the crack/powder situation but could really benefit from the change in the career offender situation, but they're not allowed to? They can't get it under 2255 or 3582, so they're stuck. What about those two things?

MR. McCLOUD: So, Justice Kavanaugh, as to why Congress didn't single out the career offender issue, I think that it's because Congress recognized there were a lot of issues with these defendant sentences. The crack/powder ratio really permeated every aspect of their sentencing, and so what Congress did was to create an individualized

process where district courts could go through and correct those sorts of problems if it was warranted to do so in a particular case.

On the question about disparity, I recognize there may be some difference in treatment between the covered offenders in this case and, for example, a powder offender, but I don't think that disparity is an unwarranted disparity, and that's because Congress has acted here in a very significant way to give a substantial benefit to the crack offender.

So I -- I think, in a real sense, the powder defendant that you're talking about is not similarly situated to the crack defendant, who's covered by this law.

I would also note that the powder defendant is probably out of jail at this point because the sentences that were given to the crack offenders were so substantially longer than sentences for any other kind of drug.

JUSTICE KAVANAUGH: Last one on this. It wasn't just powder but all the other defendants who were in for robbery or whatever and could take advantage of the change in the career offender guideline, I guess that's it,

but it's a pretty huge difference, the crack advantage that you get coming back, the change in that guideline gives you some advantage. It gives you from 262 to 327, drops to 188 to 235. But, when you throw in the career offender change, you get to 57 to 71. That's enormous, but that's because of the career offender change, not because of the crack powder. Correct me if I'm wrong on that.

MR. McCLOUD: No, that's -- that's correct, Justice Kavanaugh. Two things on that point.

The first is we have to remember this is still a discretionary system, and so, if the district court finds that reducing Mr. Concepcion's sentence based on the changes in his career offender status is unwarranted, it can do that.

The other point I would make on disparity is that our rule actually addresses that disparity concern by requiring courts to look at 3553(a)(6), which explicitly calls for courts to consider the potential for unwarranted disparity.

JUSTICE GORSUCH: Counsel, along the

same lines, I -- I understand what -- I'm -- I'm hearing basically a lenity argument, right? Don't -- don't assume that we should not give the benefit to some people just because others don't -- don't -- don't get it. And I understand that argument.

But the government has a slightly different policy argument in this field too that I -- I want your -- hear you on, and that is that this is going to be enormously burdensome for district courts. It may be more regular. It may be more administrable. I understand those arguments, so no need to repeat those.

But this is just going to be burdensome for having to pull out old PSRs out of storage and recreate probation reports and the like. So I -- I -- what -- what are your thoughts about that?

MR. McCLOUD: Justice Gorsuch, let me talk about the burden in general, and then I'll go to this specific case.

So we don't think there is much substantial additional burden in the typical First Step Act case where arguments about

intervening developments are made. The parties submit briefs on those issues. It's a very limited record, and so it's not a large volume of additional work for the district court.

And however the Court comes out on the question presented today, these motions are still procedurally available to defendants, and so courts will have to do some amount of work at the end of the day to resolve the motions.

In this particular case, we think the analysis is actually not as complicated as the district court suggested because we don't think that the statutes that are at issue are divisible, and so there's no need to consult Shepard documents. But, if the district court disagrees, I think what I would say is that is just part and parcel of the job of a district court judge, to resolve complicated sentencing issues. And this one is no different.

JUSTICE SOTOMAYOR: Counsel, it seems to me that generally, as a general matter, district courts have a wide range of discretion to impose an appropriate sentence, even based on disagreements with the guidelines, correct?

MR. McCLOUD: That's correct.

JUSTICE SOTOMAYOR: And so my experience -- and perhaps you can correct me if I'm wrong -- that when Congress wants to limit that discretion, that Congress usually explicitly does so, correct?

MR. McCLOUD: That's correct, Justice Sotomayor. An example is 3742(g), which limits district courts' ability to consider current guidelines on resentencing.

JUSTICE SOTOMAYOR: And so it seems to me that your argument, if I'm correct, is that there's no language in this statute that limits the district court from considering factual or legal changes, correct?

MR. McCLOUD: That's right, Justice Sotomayor. As I was discussing with Justice Breyer and Justice Kavanaugh, the only language that could -- could conceivably serve that purpose would be the "as if" clause in Section 404(b), and I think that that's an incorrect interpretation of that clause for all the reasons I was explaining.

JUSTICE SOTOMAYOR: And it's incorrect and it -- it feels illogical to me. Even the government is arguing that district courts can

consider factual changes but not legal changes, correct?

MR. McCLOUD: Your Honor, I understand the government's position to be that there are some legal changes that courts could take account of. There are some courts -- the Ninth Circuit in the Kelley case is an example -- that have held that courts can consider factual changes but not legal changes.

I think that's an illogical --

JUSTICE SOTOMAYOR: The -- the -- I agree, it doesn't -- it doesn't make any sense. Neither does it make any sense that when a -- when a statute says a district court may reduce a sentence, that a district court isn't going to naturally ask itself, is this a person that's deserving of a change?

And someone with a very long disciplinary record in prison or someone, as Justice Alito mentioned, who has killed somebody, that a district court wouldn't say to itself, well, I can't raise his sentence, but I certainly don't think that I should reduce it.

And once I accept that that kind of changed circumstance from the original

sentencing might influence my decision, that changes in law and there's a lot of other variety of arguments that could be made that would enter into my consideration, correct?

MR. McCLOUD: That's right, Justice Sotomayor. And I would note that changes in law can be just as relevant as changes in fact. Changes in law go to the nature and characteristics of the defendant.

I would also point out that changes in law will not be uniformly defendant-friendly. So the rule that we're advocating is really an equal opportunity rule that would allow both defendants and the government to point to changes in law that they think are relevant and that bear on whether this individual should get a reduced sentence or not.

JUSTICE SOTOMAYOR: I think --

CHIEF JUSTICE ROBERTS: Counsel, I --

JUSTICE SOTOMAYOR: -- by that, you're meaning if -- if a guideline ranges have dramatically increased the sentence, a district court might look at that and say, you know, I might not have thought this crime was so serious back then, but today I understand, for

whatever reasons, because of the increased guidelines, things that I didn't appreciate and I don't think a change is warranted today, correct?

MR. McCLOUD: That's right, Your Honor. You could also think of the example of the reverse of this case, where a defendant was not sentenced as a career offender initially, perhaps because of some ambiguity in the law. And if that ambiguity is clarified, we think it would be valid for the district court to say you got a lucky break the first time around because I didn't recognize you really were a career offender.

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: I think you're making it a little too easy on yourself when you focus on the "as if," as if it were just those two words. The whole point of the statute, the background, the structure, the purpose, was limited. It was to change the disparities that were corrected in the Fair Sentencing Act.

I don't see anything in this statute

that says because of that fortuity, that you benefit or may benefit from that, all bets are off and we're back to the beginning and I could look at anything I want. That seems to me to be a pretty -- you're putting an awful lot of weight on the "as if" when I think the structure of the statute really doesn't show any objective other than to correct a particularly egregious problem.

MR. McCLOUD: May I respond, Your Honor?

CHIEF JUSTICE ROBERTS: Sure.

MR. McCLOUD: The reason that we think that Congress would have wanted that result or at least would have allowed that result is because we don't see any language of limitation in the statute that would depart from the normal rule that courts consider relevant information during sentencing.

Sentencing is a very difficult process. Many district judges say it's the most difficult thing they do. And in that process, more truthful information about a defendant is always to the better.

CHIEF JUSTICE ROBERTS: Justice

Thomas, anything further?

Justice Breyer?

Justice Alito?

JUSTICE ALITO: Well, Justice Sotomayor correctly said that district judges generally have a lot of discretion in deciding what sentence to impose at least while they have it insofar as it's allowed under the Sentencing Reform Act and our Court's decisions, but isn't it true that the backdrop here is that there has been a sentence and there would be no ground for reconsidering the sentence were it not for this one provision?

So, when you have a background rule of prohibition and then you say you may do this thing, isn't it un- -- isn't it generally understood that the -- the thing that you may do is just the thing that's set out? It doesn't say, well, that means you can go back and redo the whole thing over again.

MR. McCLOUD: Well, Justice Alito, the thing that is set out is imposing a new sentence that's lower than the previous sentence.

JUSTICE ALITO: Imposing a new

sentence is -- well, we're back to the -- to the structure and to the "as if." But do you deny the fact that the background rule here is that you generally would not be resentenced, regardless of intervening changes of the law, in the law, regardless of whether your conduct in the intervening years might justify a different sentence?

MR. McCLOUD: I don't dispute that at all, Justice Alito. And we respect the value of finality in our criminal system. But Congress has done something momentous here with the First Step Act; that is to disrupt finality and to give defendants the opportunity to get a new reduced sentence.

And in that process, as I was saying to the Chief Justice, we think that more information about the defendant is always going to benefit the district court and the system as a whole.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: No. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: You know, I guess, in

thinking about the challenge that Justice Alito has posed to you, I would think it's -- it's relevant to ask whether there are analogous kinds of resentencings. In other words, are there resentencings that have been prompted for one -- because of one particular thing but that enable or require a judge to take into account the world more broadly?

And so I -- I don't know the answer to this question. Are there analogues here?

MR. McCLOUD: Justice Kagan, I think the most analogous proceeding is a resentencing on a limited remand. That's where the court of appeals identifies one problem with the sentence and says correct that problem.

The way that court of appeals have treated those sentencings is that they do not bar courts from considering changes in fact or changes in law, and, in fact, courts can reconsider even issues that were already decided if they can get around the law of the case or waiver or forfeiture.

JUSTICE KAGAN: The -- the way you just answered the question suggested the "may" answer rather than the "must" answer. Is that

right? On -- on those sorts of -- of resentencings, is -- is there -- is there a view that really we have to cover the field now, or is there a view of we can cover the field?

MR. McCLOUD: So, Your Honor, I think it is actually a -- a "must" answer because, under this Court's decision in Pepper, the Court said that factual developments are relevant. Courts don't have discretion to ignore relevant developments.

With respect to legal developments, it's been an established principle in this Court's case law going back to the Schooner Peggy that a court does not have discretion to ignore changes in the law simply because they happen after an initial sentence.

And so, in those limited remands, if this Court, for example, were to issue a new opinion that bears on some issue in the case, the Court could not ignore that. It would have to apply that law.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: I -- I would like to

follow up on that just briefly. I apologize to my colleagues for extending the proceedings.

But Pepper, I thought, said that after a successful appeal on resentencing in the district court, the court may consider evidence of rehabilitation during that period.

What do we do with that?

MR. McCLOUD: Your Honor, I think that what Pepper stands for is the proposition that post-sentencing information can be relevant. So, if the post-sentencing information is relevant, I would think that established principles of decision-making suggest the court has to consider it. It doesn't have to affect the overall decision on the sentence, but it at least has to be considered.

JUSTICE GORSUCH: So you do read Pepper as -- as a "must consider"?

MR. McCLOUD: I do read Pepper as "must consider," Your Honor.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: I -- I do have a couple questions.

First, in response to Justice

Sotomayor's questions, she's quite right about the discretion that district judges have, and disagreement with the guidelines, I think you agreed, was a permissible basis for a district judge to rely on when sentencing.

So, if the -- on resentencing here, whatever the proceeding is, if the district court judge says I actually don't think someone should get the benefit of the career offender guideline, and, therefore, I'm not going to take that into account, the change, is that an abuse of discretion?

MR. McCLOUD: No, that would not be an abuse of discretion. The only abuse of discretion along those lines I can think of is the one I was discussing with the Chief Justice earlier where a court has a categorical rule that they won't reduce sentence.

JUSTICE KAVANAUGH: Second and relatedly, you know, my experience is in the D.C. courthouse with district judges who spanned the spectrum of sentencing philosophies, and you're going to get some who do the career offender thing and really lower the sentence. You're going to get others who

really don't. You know, it's going to -- it's going to split, and that's going to be true probably in every courthouse.

And is that -- you know, should we be concerned about that? I guess your answer is, no, that's just the way sentencing works, which I -- I agree with. I've spent enough time reviewing it. But -- but that seems a -- a mild concern here.

MR. McCLOUD: That is my answer, Justice Kavanaugh. Our sentencing system is imperfect and it relies on imperfect human beings to make these decisions about other imperfect human beings standing before them. And so there will be some variation in -- in the decisions that get made. I think that's true under any possible rule in this case, though.

JUSTICE KAVANAUGH: I think that's probably right.

So, last question, does the district judge in the new proceeding have to calculate the new guidelines range based on today and, if they err in that, is that reversible error on appeal?

MR. McCLOUD: Under a "must consider" rule, the district court would have to consider the new applicable guidelines, and an error in that calculation would be reversible.

JUSTICE KAVANAUGH: How about on a "may consider"?

MR. McCLOUD: I think not on a "may consider." Well, a legal error in the guidelines would be reversible. So, if the district court went to the trouble of calculating the guidelines and got it wrong --

JUSTICE KAVANAUGH: Yeah.

MR. McCLOUD: -- that would be reversible.

JUSTICE KAVANAUGH: But they don't have to do it?

MR. McCLOUD: But they don't have to do it.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Thank you, counsel.

MR. McCLOUD: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Guarnieri.

ORAL ARGUMENT OF MATTHEW GUARNIERI
ON BEHALF OF THE RESPONDENT

MR. GUARNIERI: Mr. Chief Justice, and may it please the Court:

Section 404 of the First Step Act authorizes a limited sentence reduction proceeding, not a plenary resentencing.

By its plain terms, Section 404 only requires a district court to take account of one new development, namely, the changes to crack cocaine sentencing made by Sections 2 and 3 of the Fair Sentencing Act.

Section 404 does not entitle a defendant to insist that the court consider other unrelated factual and legal developments since the original sentencing, including the more than 75 non-retroactive amendments to the Sentencing Guidelines that the Commission has adopted since 2010.

Reading Section 404 to create such an entitlement would result in a significant and unjustified windfall for a select subset of crack cocaine offenders who were sentenced before the effective date of the Fair Sentencing Act.

Petitioner's principal argument, as you've heard this morning, in favor of such an entitlement rests on the term "impose" in Section 404, which Petitioner would read to incorporate a requirement to redo the Section 3553(a) analysis that a court does in imposing an initial sentence.

That argument is inconsistent with the text of Section 404 as a whole, in particular, with the text of Section 404(c), as well as with the undisputedly limited scope and nature of sentence reduction proceedings.

As the statutory text reflects, the lodestar of any proceeding under Section 404 is the defendant's existing lawful sentence.

At every single proceeding under Section 404, the district court has already fully considered the Section 3553(a) factors at the original sentencing, and the only question before the court is whether to reduce that current sentence.

In that context, we think that Congress chose to require district courts to consider only the changes made by Sections 2 and 3 of the Fair Sentencing Act, and it

sensibly left the consideration of other developments to the Court's discretion.

I welcome the Court's questions.

JUSTICE THOMAS: Counsel, you seem fairly certain that there is no -- that Petitioner's argument is foreclosed by the language of the statute.

Could you spend a minute on precisely what words you're relying on for this -- for your limitations?

MR. GUARNIERI: Sure. So we do think that there are important limitations in the text of Section 404(b) itself. In particular, Section 404(b) requires the district court to engage in this counterfactual inquiry and to determine the statutory and guidelines range that would have applied to the offender at the time of the original sentencing had Sections 2 and 3 of the Fair Sentencing Act been in effect at that time.

Now, in light of the fact that the statute specifies that the Court must engage in that counterfactual inquiry, we think there's just no plausible textual basis to read into the statute a requirement to consider other

unrelated changes.

JUSTICE THOMAS: So you think this language by -- there's sort of a negative implication that nothing -- because it mentions this provision, no other considerations can be taken into account?

MR. GUARNIERI: Well, I -- Justice Thomas, I wouldn't say that no other considerations can be taken into account. I -- I would say that the statute does not require the district court to take into account anything else. And that discretionary reading is backstopped by Section 404(c), which says expressly that a sentence reduction is never required in any of these proceedings.

So the -- the watchword here is discretion. This is a entirely discretionary sentence reduction. There -- there is a mandatory decision-making process in the sense that the district court, for a covered eligible offender, must engage in this counterfactual inquiry, but once the court has done so and figured out this counterfactual penalty range, the choice of a point within that range is left to the court's discretion.

JUSTICE THOMAS: But I don't see the difference. Petitioner seemed quite willing to accept that also. So I don't see what the daylight is between you and -- I see the daylight between the -- the "mandatory" argument. But, if Petitioner's argument is willing to accept the discretionary approach, as you seem to be willing to accept, what's the daylight between you and Petitioner with respect to that approach?

MR. GUARNIERI: Well, I'm not sure there is any daylight, Justice Thomas. In seeking this Court's review, Petitioner argued in favor of a mandatory approach in which district courts would be required to consider these unrelated developments.

In his merits brief in this Court, Petitioner has adopted as his notional fallback position the government's long-standing approach to Section 404 under which the consideration of other factors is discretionary or other -- other factual and legal developments is discretionary.

So I think, at least with respect to Petitioner's fallback argument, there really is

-- is not daylight between the parties at this point. But --

JUSTICE KAVANAUGH: You're not -- keep going. Keep going.

MR. GUARNIERI: Well, I -- I -- there is a significant difference between that approach and the mandatory approach that Petitioner has principally advocated for. And under Petitioner's mandatory approach, in a case like this one, the district court would be required to redo the 3553(a) analysis from scratch. The court would be required to recalculate the offender's advisory guidelines range in light of numerous amendments that the Commission itself declined to make retroactive to a defendant in Petitioner's circumstances.

And we just don't think there's a basis to read into the statute that kind of burdensome requirement.

JUSTICE GORSUCH: Counsel, I -- I -- I understand that everybody seems happy to lose and take the "may," but it's interesting that the government has chosen not to defend the "must not" position that the Ninth Circuit, among others, articulated pretty thoughtfully.

And you -- you -- you've mentioned it, alluded to it in your opening remarks, the "as if" language suggests that you're just doing a counterfactual hypothetical changing one thing and one thing only, and that's the -- the -- Sections 2 and 3 of the Fair Sentencing Act.

I can understand -- I -- I -- I'm kind of where the Chief Justice was at the beginning of this argument. I can understand that argument. And then I can also understand the -- the "may impose" suggests -- if you're going to impose a sentence, you do it like we have always done it, and that's 3553.

I have a very hard time getting my head around that there's some universe in which you may impose a lower sentence, but it's unconstrained by 3553 or anything the Sentencing Commission has said. That's a world, I guess, after Rita and Gall I just don't recognize.

So can you help me first with why the government abandoned the position in the Ninth Circuit, which I could understand, and, two, help me understand that -- that which I'm struggling to understand?

MR. GUARNIERI: I -- sure, Justice Gorsuch. A couple of points. One, as detailed in our brief in opposition, I'm not sure it's clear that any court, including the Ninth Circuit, has embraced the kind of --

JUSTICE GORSUCH: Well, assume they did, okay?

MR. GUARNIERI: Sure. Sure. You -- principally -- I mean, we start actually from a quite similar position to one that Mr. McCloud alluded to in the top half of his argument, which is it would really be extraordinary in this context for Congress to have forbidden district courts from taking into account post-sentencing criminality by -- by the Section 404 movement.

So, if you had a case in which the defendant had committed a serious -- had, for example, continued to deal drugs --

JUSTICE GORSUCH: I -- I don't --

MR. GUARNIERI: -- while in prison --

JUSTICE GORSUCH: -- understand that argument because -- because, surely, a district court can consider criminality post-sentencing as a basis for exercising its discretion not to

reduce the sentence. That would be one of the 3553(a) factors, right? Your -- your character, your -- your -- and -- and your activities. That's -- that's part of what a judge would do.

And, surely, Congress didn't say you can increase the sentence on the basis of such conduct because a trial would be required. If you're going to increase punishment, you'd need a jury to do that. So there's obvious reasons why that's not the case.

So that doesn't work for me, so let's try again.

MR. GUARNIERI: Well, I take the point, Justice Gorsuch, but if you were to really adopt what I'll -- I'll characterize as a hard-line view in which all that the district court is required to take into account in these proceedings --

JUSTICE GORSUCH: I'm asking you to first address the question of why is the government not pursuing the "as if" position, which I attribute at least to the Ninth Circuit and which does strike me as a plausible reading. That's my first question, all right?

MR. GUARNIERI: Sure.

JUSTICE GORSUCH: Let's start there.

MR. GUARNIERI: Justice Gorsuch, perhaps I'm not understanding what it is that -- that you are conceptualizing as -- as that approach, but, as I understand it --

JUSTICE GORSUCH: That you must not consider anything other than the Fair Sentencing Act change, and it's a counterfactual hypothetical.

MR. GUARNIERI: Sure.

JUSTICE GORSUCH: The government's saying that's off the table, we're not pursuing that argument, and I'm just asking why?

MR. GUARNIERI: Well, again, we don't think that that is a plausible reading of the text here, in significant part because, if you were to adopt that reading, the implication would be that the sentencing court cannot consider post-sentencing misconduct by the defendant --

JUSTICE GORSUCH: And that -- that is a rational policy too. As -- as Justice Alito explained, on a presumption of finality in our criminal justice system, we're not going to

reopen the books for any reason.

MR. GUARNIERI: Well, it --

JUSTICE GORSUCH: For any reason.

MR. GUARNIERI: Sure. It --

JUSTICE GORSUCH: Except -- except --

MR. GUARNIERI: -- it would be very strange to impute to Congress the -- the -- a directive to district courts to consider whether to impose a reduced sentence in light of the changes made by the Fair Sentencing Act but to ignore the fact that the defendant, during the intervening period, has continued to engage in serious criminal conduct, including potentially drug dealing --

JUSTICE BARRETT: But why would --

CHIEF JUSTICE ROBERTS: I don't --

MR. GUARNIERI: -- while in prison.

JUSTICE BARRETT: -- that be strange?

MR. GUARNIERI: And if you accept that -- if you accept that the district court was -- that Congress was unlikely to have required district courts to blind themselves in that way, then I think it follows naturally that district courts could also take a -- at least entertain argument --

JUSTICE BARRETT: But, counsel, I don't understand why that would be strange. Justice Kavanaugh pointed out that there are horizontal equity arguments because others can't take advantage of, say, the changes in the career offender guidelines. Why is that so outlandish?

MR. GUARNIERI: Well, I -- I take the point, and -- and, indeed, we make those kinds of horizontal equity arguments in many cases. We think that is a strong reason to reject Petitioner's mandatory approach.

But my point is just a more modest one, which is that I don't -- you know, we certainly think that, for example, district courts -- it's a perfectly permissible exercise of a district court's discretion to decline to take into account post-Sentencing Guidelines amendments that the Commission made not retroactive, but it would be strange to take off the table any consideration of post-sentencing misconduct by the defendant --

CHIEF JUSTICE ROBERTS: I -- I just --

MR. GUARNIERI: -- including, as in this case, the seven disciplinary infractions

that Petitioner committed while incarcerated.

CHIEF JUSTICE ROBERTS: Well, I have the same reaction as Justice Barrett. I don't know if -- think it would be a reasonable -- I think it would be the most rational thing. Congress is saying there is a particular problem that we think is really outrageous, that we think ought to be fixed, and it's this, you know, crack/powder disparity, and we want you to go fixed it.

Well, you know, do -- are you worried about this problem? You know, are you worried about this one? Say no, no, I -- you know, district judges are busy. So are people in Congress. I don't want to deal with the whole universe of things that a judge might want to look at. I've got one problem and I'm going to deal with that. And then to say back when it gets to the district judge, well, we're going to do a whole bunch of other things.

I don't know that Congress would have wanted that. And you could pick particularly egregious examples. There are particularly egregious examples with respect to other people who are not seeking relief under the Fair

Sentencing Act, and they don't get a restart. I can see Congress saying we're only dealing with one thing and that's it.

MR. GUARNIERI: Well, Mr. Chief Justice --

CHIEF JUSTICE ROBERTS: And that's certainly what the record looks like. I don't see anything in the record saying that it's a good opportunity for us to fix all these other errors that might be out there.

MR. GUARNIERI: Sure. Mr. Chief Justice, let me -- let me take -- let me make a couple of additional points against that position.

First, it would be contrary to this Court's decision in Pepper, which recognized that -- and Pepper, to be clear, was a case involving a plenary resentencing after a sentence was vacated on direct appeal. But the Court in Pepper was discussing general principles and made clear that, ordinarily, a district court is entitled to take into account or has the discretion to take into account post-sentencing conduct in fashioning a sentence in --

CHIEF JUSTICE ROBERTS: Well, but --
MR. GUARNIERI: -- those circumstances.
CHIEF JUSTICE ROBERTS: -- I mean, that just kind of begs the whole question here. Here, we have something which is not a plenary review. It's a focused review on the Fair Sentencing Act issue.
MR. GUARNIERI: Well, what --
CHIEF JUSTICE ROBERTS: So I would put Pepper to one side.
MR. GUARNIERI: That -- that's entirely true.
I -- the second point I would make, again, we -- we draw a great deal of our argument from the expressly discretionary language of the statute that is 404(b)'s use of the term "may" and 404(c)'s clear rule that nothing in the statute requires a sentence reduction in any particular case. So -- so you have that discretionary language.
The third point I would make, Section 404 motions, and this is in 404(b), can be brought by the director of the Bureau of Prisons. There's really no obvious reason why

Congress would have authorized the Bureau of Prisons to move under Section 404 for a sentence reduction, unless it is to bring to the district court's attention post-sentencing conduct --

JUSTICE KAVANAUGH: The -- if --

MR. GUARNIERI: -- because that's really institutionally the only thing that BOP would be positioned to speak to.

So, again, that's -- I mean, it's not -- it's not prohibitive --

JUSTICE BREYER: Why?

MR. GUARNIERI: -- but it's another sort of textual hint that Congress didn't mean to take off the table any consideration of post-offense conduct.

JUSTICE BREYER: Fine. Okay. Why have you said nothing about the Commission? Is the Department disowning the Commission, or am I making a big mistake?

(Laughter.)

JUSTICE BREYER: And please tell me or try to tell me if I'm making a big mistake.

MR. GUARNIERI: I --

JUSTICE BREYER: I thought, when the

guidelines were originally drawn up and for a long time, what the Fair Sentencing Act is about and what the First Step is about are mandatory minimums, okay, five grams and 50 grams of crack.

There also are approximately 48 numbers in between those. And, indeed, someone can be convicted of four grams of crack, all right? So what the Commission did was write some guidelines that were keyed to what was then the 100-to-1 ratio.

When Congress changed it, Congress -- the Commission rewrote those guidelines, again, with a key. So, if we limit this just to the mandatory minimums, what are we going to find? We're going to find that where you're talking about 4, 3, 2, and 1, for example, and where the Commission both rechanged it and made them retroactive to a considerable degree, we will have a big discrepancy because we will only be looking at the change from 100 to 1 to 28 to 1. And so that -- Congress is most unlikely to have wanted that.

So I would think that sometimes at least a district court should look at other

things, such as what the Commission did with four grams or six grams or 10 grams. So I would think that was pretty relevant.

Now there may be other things which they shouldn't look at, which have been mentioned. You know the Department is a member of the Commission or at least they have a person there, and they can say: Let's write our guidelines which are followed by approximately 60 to 80 percent of the judges, though they're absolutely discretionary, to say let's not.

What the -- what the Education Office has so far said is it said: What you should do, courts should consider the guidelines and policy statements along with other 3553(a) factors during the resentencing. That's what their staff said.

So why is -- where I'm puzzled is, why is nobody thinking that any of that is relevant?

MR. GUARNIERI: Well, Justice Breyer, let me just make a couple of quick points about the Commission's role in these proceedings.

First, the United States does not

oppose consideration of the revised drug quantity table in the Section 404 proceedings. So, in that sense, the district courts are -- are permitted to and, indeed, are taking account of the Commission's handiwork here.

The principal locus of a lot of the litigation about these proceedings is the career offender enhancement, which I think, as Justice Kavanaugh's questions demonstrated earlier, has nothing at all to do with the crack-to-powder disparity that Congress was addressing in the Fair Sentencing Act and in the First Step Act.

The second point I'd like to make about the Commission's role here, Section 404 proceedings unfold under the aegis of 18 U.S.C. 3582(c)(1)(A). 3582(c) is the provision that generally forbids district courts from modifying terms of imprisonment once they have been imposed, and then the statute has a couple of exceptions to that broad rule.

(c)(1)(A) is the exception for compassionate release. (c)(2) is the exception for retroactive guidelines amendments. And (c)(1)(B), the provision implicated here, is

for modifications permitted by statute or by Rule 35.

Now, for (c)(1)(A) and (c)(2), Congress has expressly incorporated a requirement to consider the 3553(a) factors to the extent applicable. In (c)(1)(A) and (c)(2), both of those provisions direct the sentencing court to consider applicable Commission policy statements. (c)(1)(B), the provision at issue here, contains none of that express language.

So there is nothing in 3582(c)(1)(B) that requires a district court to consider any applicable Commission policy statement or to otherwise redo the 3553(a) analysis.

JUSTICE KAVANAUGH: Could I ask --

MR. GUARNIERI: And, of course, there's nothing in Section 404 either. So we -- I mean, there's just -- there's no clear statutory directive requiring that.

Now, again, we think that a district court may do so in its discretion --

JUSTICE KAVANAUGH: That's what I -- can I interrupt there?

MR. GUARNIERI: Certainly.

JUSTICE KAVANAUGH: Just to be clear about your position, you're saying that the district court, with respect to changes in the law, is not required to consider the changes in the law but may, is that correct?

MR. GUARNIERI: That's generally correct, Justice Kavanaugh.

JUSTICE KAVANAUGH: That -- I mean, that's got to be a yes or no, I think.

MR. GUARNIERI: Well, I just -- I want to make sure that I'm crystal-clear about the way that we think this works. The district court under 404(b) has to figure out the counterfactual penalty range that would have applied at the time of the initial sentencing if the Fair Sentencing Act had been in effect.

The result of that inquiry may well be that the defendant is still subject to mandatory minimum sentences. And a district court -- when we say the district court can consider other changes in the law, what we mean is the district court is entitled to say: Well, in light of some other changes that reflect, you know, different views, different social views about the severity of the offense,

whatnot, I'm going to select a point within that range, but the district court can't go below any applicable mandatory minimums.

JUSTICE KAVANAUGH: And this is a very important question to me. Okay. In figuring out the new range, you figure out the new range that here is 188 to 235, is that the correct new range, or is the correct new range 57 to 71, which, as the numbers reveal, is a huge difference? Which of those two is the correct new range here, or does the district court have discretion which of those two to say he or she is following?

MR. GUARNIERI: The correct new one is the first one. The -- the -- the "as if" clause --

JUSTICE KAVANAUGH: Okay.

MR. GUARNIERI: -- we understand to require the district court to -- to correctly calculate that range --

JUSTICE KAVANAUGH: That's --

MR. GUARNIERI: -- as it would have applied at the original sentencing.

JUSTICE KAVANAUGH: Got it. So that -- and then the district court in your view has

discretion, though -- just correct me if I'm wrong -- to say but I know there's this career offender thing out there that's changed too. And that would be 57 to 71. And that influences me a lot, so I'm going to really drop the sentence quite a bit.

Your position is that's okay?

MR. GUARNIERI: That's correct.

JUSTICE KAVANAUGH: Okay.

MR. GUARNIERI: Now, in this Court, we -- in this case, we also --

JUSTICE GORSUCH: And -- I want to follow up on that. In what world does it make sense that some district courts will be -- take cognizance of -- of changes in the law like that and others will not, and the results will be, as -- as Justice Kavanaugh points out, dramatically different for different individuals?

I thought the point of imposing a sentence was you looked the defendant in the eyes on the day he stands before you and take the measure of that person as a whole. And to be willfully blind to math wouldn't normally be part of the equation. That would normally be

an abuse of discretion.

MR. GUARNIERI: Well, as I alluded to in my opening, at every single one of these 404(b) proceedings, the district court has already done precisely what -- what Your Honor is suggesting. The district court has conducted the full -- the full 3553(a) analysis that applies at the initial sentencing. And the court is not imposing a new sentence.

JUSTICE GORSUCH: No, we're positing, though --

MR. GUARNIERI: It is considering whether to reduce it.

JUSTICE GORSUCH: -- two district courts, one of whom who says looking at the person before me and deciding how many years this person must spend in federal prison, I take cognizance of the fact that sentencing guidelines have changed and here is the Commission's current recommendation.

And the other one says: I choose not to do so, for no reason, for no reason. Now, if he had a bad behavior in prison, that might be a reason, okay, not -- not to -- not to impose a lower sentence. I get that.

But just to say "I choose not to" traditionally has never been a good enough reason under this Court's precedents to ignore the changes in Commission guidance, intervening law, intervening facts, in looking at an individual in the eye at the time he stands before the court.

But your submission, I understand it, is different. And I'm just -- I just don't know another area in which we give lower courts that kind of latitude. Are you aware of any?

MR. GUARNIERI: Well, I think the most obvious example would be a Rule 35 sentence reduction proceeding, which gives --

JUSTICE KAVANAUGH: What about the original sentencing too? Can't the -- at the -- sorry to interrupt.

MR. GUARNIERI: That -- that's perfectly --

JUSTICE KAVANAUGH: At the original sentencing, the district court can say: You know what? I don't agree with this guideline. I'm not following it. That, in fact, a significant percentage of district judges do that now.

MR. GUARNIERI: That's absolutely true.

JUSTICE GORSUCH: Well, if we're going to get into a discussion here, I'd say that they -- they -- they at least have to take cognizance of it and explain themselves, and it can't be "I prefer not to."

And so that's my question to you, just to -- just -- and I appreciate the friendly amendment, I'll take it as that, to my question -- it isn't about whether I disagree with the guidelines. Rita and Gall, of course, leave room for that, but it has to be a reasoned explanation.

Here, you're positing something different and that I'm unfamiliar with, so help me out.

MR. GUARNIERI: That's all right. Well, as I began to say, this is no different in kind from Rule 35 proceedings under which there is no mandate to redo the 3553(a) analysis. It's -- it's not substantially different than a sentence reduction proceeding under (c)(2), as this Court considered in Dillon. There, again, the district court is

not required to redo all of the analysis that it did of the initial 3553(a) factors.

And -- and, more broadly, I mean, it makes sense that Congress would have left this to the district courts' discretion because, in many cases, these are the same district court judges who imposed the original sentence. They are the ones best positioned to know the factors that they found particularly important in their original 3553(a) calculus, the things that they -- that are likely to influence them in making a judgment now, 10 or more years after the fact, of whether a reduction is warranted in light of the water under the bridge in those intervening years.

And so Congress left it to their discretion.

JUSTICE KAVANAUGH: One more friendly --

JUSTICE BREYER: I thought Congress solved this. I thought they solved it because the arguments that you are making I've heard for decades, okay, in lots of contexts.

And the way I thought they solved it was they created a Sentencing Commission, and

now, as discretionary, they said to the lower -- the district judge: Judge, you don't have to apply these rules, and if you don't, give us your reason.

And then you can appeal, I thought, your sentence to the courts of appeals, who will decide whether your decision on these matters is reasonable.

Now, I -- I mean, that's been going on since 1986, and I don't think it's worked perfectly, but I don't think it's been a disaster. And all I can't understand is why this isn't the same kind of problem so that we don't have to answer this now. We -- all we have to say is treat it the same as you treat lots of other things in sentencing. And if the Commission wants to write a guideline to unify things, it can. And if district courts want to decide different ways -- and believe me, if a district court decides something important and doesn't give any reason except, oh, that's what I like, which I don't think I've seen, but I feel there are courts of appeals that would sort of take offense at that and they might say at least explain.

But, I -- I mean, I spelled this out because I don't really see why this is a different problem in Congress.

MR. GUARNIERI: Well, I think that's absolutely correct, Justice Breyer. And, you know, there is -- an important backstop here is the availability of review on appeal for abuse of discretion.

You know, this -- the rule we are defending here has been the rule, the operative rule, in numerous courts of appeals for the past several years. We haven't seen a spate of reversals, and to the extent we have, they're cases in which the court --

JUSTICE ALITO: Let me make --

MR. GUARNIERI: -- doesn't --

JUSTICE ALITO: -- sure I understand --

MR. GUARNIERI: -- put any for additional explanation.

JUSTICE ALITO: -- let me make sure I understand your -- your argument. Suppose we're dealing with a guide -- a new guideline issued by the Sentencing Commission that the Sentencing Commission says is not retroactive, okay?

Could a district judge say, although the Sentencing Commission has said this is not retroactive, I think it reflects a policy that is appropriate and I am going to apply it? Could another district judge say the Sentencing Commission has said this is not retroactive, and I don't think that there should be a retroactive change as to this defendant's sentence.

Are those both permissible in your view?

MR. GUARNIERI: Yes, they are. And as I hope I clarified in my answer to Justice Kavanaugh earlier, we do think there is a predicate step where the district court has to correctly calculate what the guidelines range would have been at the time of the original offense, but having done that, it is left to the court's discretion whether to take into account these other non-retroactive guidelines.

JUSTICE ALITO: And -- and would the --

MR. GUARNIERI: And, at the end of the day, these are all advisory.

JUSTICE ALITO: -- would the -- would

the -- the judge who takes the second view, that they said it was not retroactive, I don't think there should be a retroactive change, would the judge be required to say anything more than that?

MR. GUARNIERI: No.

JUSTICE ALITO: And the same issue as to new factual developments. One judge says, I think we should take these into account because I'm resentencing this person, I want to make sure it's appropriate for this human being who's standing before me.

Another judge says, no, this person was sentenced before. I think that the -- the person should get the sentence that this person merited on the day when that person was sentenced. That would be permissible as well?

MR. GUARNIERI: Yes.

JUSTICE ALITO: So why -- and so I -- I come back to a question Justice Gorsuch provided to you. Why in the world is that -- would Congress want that?

I -- you know district judges have some discretion, but the Sentencing Reform Act was intended to eliminate the enormous

disparities that existed before then, and our decisions have reduced the strength of that -- that -- to which the Sentencing Reform Act achieves it.

But your argument introduces an enormous amount of discretion. It's hard to understand why Congress would have wanted that, and if they did, why would they have -- how can you find that in -- in this language?

MR. GUARNIERI: Well, we think these are just two -- these are flip sides of the same coin. Congress did not require district courts to take account of unrelated legal and factual developments beyond the Fair Sentencing Act itself, but so too it didn't prohibit courts from doing so.

The -- the statute is essentially agnostic on that issue, and so we think that leaves to the district courts some discretion to do that.

JUSTICE KAGAN: You suggested that there was a backstop of appellate review. But how is appellate review supposed to operate as against such a system? What -- what are they reviewing for? What's -- what counts as an

abuse of discretion?

MR. GUARNIERI: Well, it's -- I mean, abuse of discretion is a familiar appellate standard of appellate review. It's been the standard of review for sentencing decisions --

JUSTICE KAGAN: Yes, I know --

MR. GUARNIERI: -- since this Court's decision in Gall --

JUSTICE KAGAN: -- but you're sort of positing a world in which anybody gets to do anything. So what -- what -- what counts as going -- what counts as an abuse?

MR. GUARNIERI: Well, I -- the district court could decline to -- for impermissible reasons, such as animus, I think, would be an impermissible reason. You -- you could imagine the district court fails to conduct the "as if" inquiry correctly. That would be an abuse of discretion. If the district court is trying to recalculate the guidelines range that would have applied at the original sentencing and makes a mistake, that -- that could be the case --

JUSTICE KAGAN: No, no, no.

MR. GUARNIERI: -- there are curbs

here --

JUSTICE KAGAN: But beyond the "as if" inquiry. In the world of discretion that you're positing and that people, you know, from different, maybe, points are saying, huh, why does that middle position make sense, is there any -- you know, are there -- are there any bounds to that discretion that you're positing?

MR. GUARNIERI: Well, look, I think, frankly, the result here is going to be substantial discretion for the district courts. Again, these are proceedings that are limited in scope. This is a sentence reduction proceeding. There's already a lawful sentence that was itself the product of the 3553(a) factors. We're talking here about whether to reduce that sentence in light of a -- essentially congressional largesse. Congress has created this limited and -- and, frankly, quite extraordinary opportunity for defendants who were lawfully sentenced at the time to benefit retroactively from Congress's reconsideration of the crack-to-powder ratio. And in that very narrow context, we're saying that district courts have discretion about

whether or to what extent they want to take into account developments --

JUSTICE SOTOMAYOR: Counsel --

MR. GUARNIERI: -- other than the Fair Sentencing Act.

JUSTICE SOTOMAYOR: -- counsel, much of the questions that I'm hearing or discomfort that some of my colleagues are expressing with the -- the discretion that district courts have. Regrettably, that's what led to the Sentencing Guidelines and to the original mandatory nature.

Once we overturned that and returned discretion, the fact that judges have different views about factors and how to weigh them is inherent in the sentencing process.

Do you agree with that?

MR. GUARNIERI: I do, Justice Sotomayor. And this is not categorically different from that. I mean, just as a judge might give different weight to the 3553(a) factors, so too, in this context, a judge might choose to give different weight to post-sentencing conduct --

JUSTICE SOTOMAYOR: I -- I mean, there

are some judges, and I've known them, who always believe the maximum guideline sentence was the appropriate sentence for any serious crime, and they define "serious" more broadly than most others.

Similarly, some people might view a clean disciplinary record as being zero infractions, and other judges may say, if there's one infraction, that's enough for me to say no.

That is always inherent in sentencing, and we can rail against it, but I think your point is -- and you can correct me -- is, if Congress wanted to take that discretion away, it would have -- it would have, as it has done on many other occasions, have said that explicitly, correct?

MR. GUARNIERI: That -- that's absolutely correct. And -- and then, on the other side, we don't think there's any sound basis to constrain the district courts' discretions in these proceedings by weighting down the proceedings with a requirement to redo the 3553(a) factors or to take account of any intervening legal or factual developments that

the -- the defendant claims --

JUSTICE SOTOMAYOR: Or -- or --

MR. GUARNIERI: -- is relevant.

JUSTICE SOTOMAYOR: -- frankly, to weigh it down by saying the only thing the district court can do is look at the original factors, because that then introduces -- have they actually calculated it right becomes more important, correct?

MR. GUARNIERI: That's right.

CHIEF JUSTICE ROBERTS: Justice Thomas, anything further?

Justice Breyer? Okay.

Justice Alito?

JUSTICE ALITO: Your argument is that the -- a district court can disregard the 3553 factors, isn't -- if it chooses to, right? It has discretion to do that?

MR. GUARNIERI: It has discretion not to reconsider those factors, although, in many cases, we do urge the courts to use them. They're a sensible and familiar framework, but -- but it --

JUSTICE ALITO: Yeah. So maybe the -- the -- the scope of the discretion that you

seem to suggest in responding to Justice Sotomayor with respect to the post-sentencing guideline, post-Booker world was a bit exaggerated there. There still is discretion, but it's still limit to -- limited to a substantial degree. Isn't that true?

MR. GUARNIERI: At -- at an original sentencing, sure, we -- we don't think at -- in -- in these sentence reduction proceedings that 3553(a) operates the same way. And -- and -- and that's consistent with 3553(a) itself.

The prime directive in 3553(a) is to impose a sentence that is sufficient but not greater than necessary. And at a sentence reduction proceeding, the district court can only go down. It can't go up, even if its judgment is that a greater sentence is necessary to effectuate the purposes of federal sentencing.

So this is just a different proceeding. It's more limited in scope, and we don't think 3553(a) automatically applies here.

JUSTICE ALITO: What should I do if I think that you are -- the government is effectively trying to drive down the -- the

middle -- on -- on the dividing line of a two-lane highway, and, really, the only choice is to go in one direction or the other direction.

So you had to choose between either -- either Petitioner's position or the position that you just have to have the -- you have to have a resentencing while ruling -- while taking -- correcting only the specific error mentioned in the -- in this provision? Which would you choose?

MR. GUARNIERI: We -- we would prefer to live in a world in which the district court would have to take into account post-sentencing developments, and that's principally because, in many, many of these cases, we do rely on arguments about post-sentencing misconduct by the defendant, and we would not want to take those off the table.

JUSTICE ALITO: And -- and where would you find that in the statutory language?

MR. GUARNIERI: Well, I -- for all the reasons set forth in our brief, we don't think that's the correct understanding of the statute. But I -- I took Your Honor's question

to be --

JUSTICE ALITO: Right.

MR. GUARNIERI: -- if those arguments are rejected, which -- which is the lesser evil from our perspective, and -- and that -- that would be our answer.

CHIEF JUSTICE ROBERTS: Justice Sotomayor, anything further?

JUSTICE SOTOMAYOR: No. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: I'd like to ask a similar question of you that I asked to Mr. McCloud. I mean, I find the text here not very useful either way, so that makes me think that we should try to figure out what the most analogous situations are and how courts operate in those situations. I think, for the reasons Justice Alito gave, I don't think sentencing generally is analogous. I -- I think you have to look to some, you know, resentencings that occur for particular reasons.

So, in that, tell me what you think the analogues are in resentencings and what the rules are, you know, how much discretion, of what kind, or, you know, what are the -- what

-- what are the rules that operate in what you think of as the best analogues?

MR. GUARNIERI: Sure. So I think the best analogue here is a -- a sentence reduction proceeding in light of a retroactive guidelines amendment which unfolds under 3582(c)(2). And that's the best analogue because that is the other circumstance in which a district court has discretion to reduce the sentence in light of retroactive legal changes.

Now there, obviously, it's a change that the Commission has made retroactive. Here, it's Congress has created this limited retroactivity provision. But 3582(c)(2) is probably the best -- the closest sibling to these proceedings.

And in that context, it -- the district court, it is not a de novo resentencing. The court is not redoing the 3553(a) factors from scratch. It is a proceeding that is limited in scope for all the reasons this Court discussed in Dillon.

And the Court can permissibly decline to take into account other unrelated changes. And -- and, indeed, the guidelines require the

district court not to take into account other unrelated changes to the guidelines themselves.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: A couple quick questions, I hope.

First, Justice Gorsuch was talking about the defendant appearing at the new proceeding in -- if I followed his questions. I want to make sure. Does that always happen, or is this sometimes done on the paper?

MR. GUARNIERI: That rarely happens, and, indeed, I believe the courts of appeals --

JUSTICE KAVANAUGH: What -- what rarely happens? Appearing?

MR. GUARNIERI: The -- the -- yes. It -- it is -- the -- these proceedings are principally done on the papers. And the courts of appeals have been unanimous so far in concluding that the defendant has no right to an in-person hearing for a Section 404 motion.

JUSTICE KAVANAUGH: Okay. Second: Factual changes, in other words, things you've done in prison while you're there. I thought

the good time credit system was designed to deal with that. Am I wrong about that?

MR. GUARNIERI: The good time credit system, as -- as modified by the First Step Act itself, certainly is -- is one means that Congress has created to give defendants the benefit of good conduct in prison.

JUSTICE KAVANAUGH: Okay. Third, you've said discretion is your number one choice here, your only argument really.

That means appellate review should be very deferential, correct?

MR. GUARNIERI: Yes.

JUSTICE KAVANAUGH: Okay. And, last, I think your strongest argument in terms of the big picture is this is the way it's been going in the district courts and courts of appeals in a lot of regions around the country.

And I just want to get the government's perspective on, have there been problems in these proceedings from the government's perspective or not?

MR. GUARNIERI: No, Justice Kavanaugh. The rule we're advocating here, as -- as detailed in our brief in opposition in this

case, has been the majority rule in the courts of appeals, and it's been perfectly administrable in the district courts, and we haven't seen any kind of practical problems with -- with this approach.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Thank -- thank you, counsel.

MR. GUARNIERI: Thank you.

CHIEF JUSTICE ROBERTS: Mr. McCloud, I guess I'll call it rebuttal.

REBUTTAL ARGUMENT OF CHARLES L. McCLOUD
ON BEHALF OF THE PETITIONER

MR. McCLOUD: Thank you, Mr. Chief Justice.

Justice Kavanaugh, you asked about good time credits. We agree those are important, and the First Step Act made changes to the way that those are calculated, but they don't take into account some important developments, for example, Mr. Concepcion's religious conversion in prison. A number of prisoners bring that sort of evidence to their First Step Act proceedings, and it's not always

accounted for in the good time credits.

Justice Kagan, you asked the question of Mr. Guarnieri about the analogous proceeding. He gave a different answer. He referenced 3582(c)(2). I think, at the end of the day, it doesn't matter which proceeding you think is most analogous.

In fact, I think 3582(c)(2) helps us because the reason this Court in Dillon did not allow the defendant to make an argument based on current law is because there was explicit text in the policy statement that was at issue there that said you can't raise those sorts of arguments.

The First Step Act doesn't have that sort of limitation, and so we don't see any reason for courts not to be able to consider current law and current facts in First Step Act proceedings.

Mr. Chief Justice, you asked a question about why we shouldn't just fix the one problem and leave it at that, and -- and the problem with that approach is that this is not a mechanical adjustment. So, in Mr. Concepcion's case, if you make the change from

the Fair Sentencing Act, you still have a range of four years of possible sentences that could be given.

And looking at Mr. Concepcion as he exists today and taking account of the good and the bad and relevant legal developments is critical in deciding where in that range he should fall.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:47 p.m., the case was submitted.)