

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS CONCEPCION,)
)
 Petitioner,)
)
 v.) No. 20-1650
)
 UNITED STATES,)
)
 Respondent.)

Pages: 1 through 87
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CARLOS CONCEPCION,)

Petitioner,)

v.) No. 20-1650

UNITED STATES,)

Respondent.)

- - - - -

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.

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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

1 sentence.

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

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

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

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

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

5 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

3 JUSTICE THOMAS: Thank you.

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

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

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

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

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

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

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

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

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

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

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

20 JUSTICE GORSUCH: But -- but, counsel,
21 where does that come from? I mean, if it's
22 "may" and it is divorced and free-floating from
23 3553 and anything goes, I don't know on what
24 basis this or any court would find an abuse of
25 discretion under that standard that you're

1 proposing.

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

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

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

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

1 would be an abuse of discretion.

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

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

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

17 JUSTICE ALITO: Well, under your --

18 JUSTICE KAVANAUGH: You know -- go
19 ahead.

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

1 Act, right?

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

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

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

18 JUSTICE GORSUCH: Well, why --

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

1 And this is the same. It says "may."
2 Same thing. Okay. Now you've left out the
3 giant actor in this. It's called the
4 Sentencing Commission, and that applies because
5 3553. And so why doesn't -- all the answers to
6 these questions are, of course, the questioners
7 are right. You could abuse your discretion,
8 District Judge, and so can the Sentencing
9 Commission abuse its discretion.

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

21 (Laughter.)

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

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

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

13 JUSTICE KAVANAUGH: What --

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

16 JUSTICE BREYER: It's the statute.

17 JUSTICE KAVANAUGH: How about the --

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

20 JUSTICE KAGAN: The statute --

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

23 JUSTICE KAVANAUGH: How about "may
24 not" --

25 JUSTICE KAGAN: -- but "may" is not

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

3 JUSTICE BREYER: Really?

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

6 JUSTICE BREYER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 JUSTICE KAVANAUGH: Mr. McCloud --

15 JUSTICE ALITO: So --

16 JUSTICE KAVANAUGH: Oh, sorry. Go
17 ahead.

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

25 MR. McCLOUD: Justice Alito, I think

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

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

10 JUSTICE KAVANAUGH: Mr. McCloud --

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

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

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

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

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

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

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

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

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

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

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

9 JUSTICE GORSUCH: But --

10 MR. McCLOUD: It actually --

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

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

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

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

10 And my concern about saying, oh, yeah,
11 you can come in and get the benefit of the
12 change in the career offender guideline is that
13 what about the defendants who are in prison for
14 armed robbery or what have you? They can't use
15 2255 or 3582 to come in and get the benefit of
16 the change in the career offender guideline.

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

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

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

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

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

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

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

25 There are, in fact, limitations in the

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GORSUCH: Counsel, along the

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

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

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

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

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

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

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

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

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

25 MR. McCLOUD: That's correct.

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

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

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

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

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

1 consider factual changes but not legal changes,
2 correct?

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

10 I think that's an illogical --

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

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

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

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

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

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

18 JUSTICE SOTOMAYOR: I think --

19 CHIEF JUSTICE ROBERTS: Counsel, I --

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

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

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

15 JUSTICE SOTOMAYOR: Thank you,
16 counsel.

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

25 I don't see anything in this statute

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

10 MR. McCLOUD: May I respond, Your
11 Honor?

12 CHIEF JUSTICE ROBERTS: Sure.

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

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

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas, anything further?

2 Justice Breyer?

3 Justice Alito?

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

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

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

25 JUSTICE ALITO: Imposing a new

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

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

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

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: No. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: You know, I guess, in

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: I -- I would like to

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

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

7 What do we do with that?

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

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

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

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

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

25 First, in response to Justice

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

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

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

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

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

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

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

19 JUSTICE KAVANAUGH: I think that's
20 probably right.

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

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

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

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

12 JUSTICE KAVANAUGH: Yeah.

13 MR. McCLOUD: -- that would be
14 reversible.

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

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

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 Thank you, counsel.

23 MR. McCLOUD: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Guarnieri.

25

1 ORAL ARGUMENT OF MATTHEW GUARNIERI
2 ON BEHALF OF THE RESPONDENT

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

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

8 By its plain terms, Section 404 only
9 requires a district court to take account of
10 one new development, namely, the changes to
11 crack cocaine sentencing made by Sections 2 and
12 3 of the Fair Sentencing Act.

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

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

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

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

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

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

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

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

3 I welcome the Court's questions.

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

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

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

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

1 unrelated changes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 JUSTICE GORSUCH: Well, assume they
7 did, okay?

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

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

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

21 MR. GUARNIERI: -- while in prison --

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

1 reduce the sentence. That would be one of the
2 3553(a) factors, right? Your -- your
3 character, your -- your -- and -- and your
4 activities. That's -- that's part of what a
5 judge would do.

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

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

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

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

1 MR. GUARNIERI: Sure.

2 JUSTICE GORSUCH: Let's start there.

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

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

11 MR. GUARNIERI: Sure.

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

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

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

1 reopen the books for any reason.

2 MR. GUARNIERI: Well, it --

3 JUSTICE GORSUCH: For any reason.

4 MR. GUARNIERI: Sure. It --

5 JUSTICE GORSUCH: Except -- except --

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

15 JUSTICE BARRETT: But why would --

16 CHIEF JUSTICE ROBERTS: I don't --

17 MR. GUARNIERI: -- while in prison.

18 JUSTICE BARRETT: -- that be strange?

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

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

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

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

23 CHIEF JUSTICE ROBERTS: I -- I just --

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

1 that Petitioner committed while incarcerated.

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

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

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, but --

2 MR. GUARNIERI: -- those
3 circumstances.

4 CHIEF JUSTICE ROBERTS: -- I mean,
5 that just kind of begs the whole question here.
6 Here, we have something which is not a plenary
7 review. It's a focused review on the Fair
8 Sentencing Act issue.

9 MR. GUARNIERI: Well, what --

10 CHIEF JUSTICE ROBERTS: So I would put
11 Pepper to one side.

12 MR. GUARNIERI: That -- that's
13 entirely true.

14 I -- the second point I would make,
15 again, we -- we draw a great deal of our
16 argument from the expressly discretionary
17 language of the statute that is 404(b)'s use of
18 the term "may" and 404(c)'s clear rule that
19 nothing in the statute requires a sentence
20 reduction in any particular case. So -- so you
21 have that discretionary language.

22 The third point I would make,
23 Section 404 motions, and this is in 404(b), can
24 be brought by the director of the Bureau of
25 Prisons. There's really no obvious reason why

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

6 JUSTICE KAVANAUGH: The -- if --

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

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

12 JUSTICE BREYER: Why?

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

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

21 (Laughter.)

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

24 MR. GUARNIERI: I --

25 JUSTICE BREYER: I thought, when the

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

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

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

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

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

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

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

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

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

25 First, the United States does not

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

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

14 The second point I'd like to make
15 about the Commission's role here, Section 404
16 proceedings unfold under the aegis of 18 U.S.C.
17 3582(c)(1)(A). 3582(c) is the provision that
18 generally forbids district courts from
19 modifying terms of imprisonment once they have
20 been imposed, and then the statute has a couple
21 of exceptions to that broad rule.

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

1 for modifications permitted by statute or by
2 Rule 35.

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

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

16 JUSTICE KAVANAUGH: Could I ask --

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

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

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

25 MR. GUARNIERI: Certainly.

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

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

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

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

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

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

4 JUSTICE KAVANAUGH: And this is a very
5 important question to me. Okay. In figuring
6 out the new range, you figure out the new range
7 that here is 188 to 235, is that the correct
8 new range, or is the correct new range 57 to
9 71, which, as the numbers reveal, is a huge
10 difference? Which of those two is the correct
11 new range here, or does the district court have
12 discretion which of those two to say he or she
13 is following?

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

17 JUSTICE KAVANAUGH: Okay.

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

21 JUSTICE KAVANAUGH: That's --

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

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

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

7 Your position is that's okay?

8 MR. GUARNIERI: That's correct.

9 JUSTICE KAVANAUGH: Okay.

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

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

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

1 an abuse of discretion.

2 MR. GUARNIERI: Well, as I alluded to
3 in my opening, at every single one of these
4 404(b) proceedings, the district court has
5 already done precisely what -- what Your Honor
6 is suggesting. The district court has
7 conducted the full -- the full 3553(a) analysis
8 that applies at the initial sentencing. And
9 the court is not imposing a new sentence.

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

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

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

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

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

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

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

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

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

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

1 MR. GUARNIERI: That's absolutely
2 true.

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

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

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

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

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

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

16 And so Congress left it to their
17 discretion.

18 JUSTICE KAVANAUGH: One more
19 friendly --

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

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

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

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

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

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

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

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

15 JUSTICE ALITO: Let me make --

16 MR. GUARNIERI: -- doesn't --

17 JUSTICE ALITO: -- sure I understand --

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

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

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

10 Are those both permissible in your
11 view?

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

21 JUSTICE ALITO: And -- and would
22 the --

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

25 JUSTICE ALITO: -- would the -- would

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

6 MR. GUARNIERI: No.

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

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

18 MR. GUARNIERI: Yes.

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

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

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

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

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

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

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

1 abuse of discretion?

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

6 JUSTICE KAGAN: Yes, I know --

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

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

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

24 JUSTICE KAGAN: No, no, no.

25 MR. GUARNIERI: -- there are curbs

1 here --

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

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

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

3 JUSTICE SOTOMAYOR: Counsel --

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

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

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

17 Do you agree with that?

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

25 JUSTICE SOTOMAYOR: I -- I mean, there

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

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

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

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

1 the -- the defendant claims --

2 JUSTICE SOTOMAYOR: Or -- or --

3 MR. GUARNIERI: -- is relevant.

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

10 MR. GUARNIERI: That's right.

11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas, anything further?

13 Justice Breyer? Okay.

14 Justice Alito?

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

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

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

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

7 MR. GUARNIERI: At -- at an original
8 sentencing, sure, we -- we don't think at -- in
9 -- in these sentence reduction proceedings that
10 3553(a) operates the same way. And -- and --
11 and that's consistent with 3553(a) itself.

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

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

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

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

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

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

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

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

1 to be --

2 JUSTICE ALITO: Right.

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor, anything further?

9 JUSTICE SOTOMAYOR: No. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

17 And in that context, it -- the
18 district court, it is not a de novo
19 resentencing. The court is not redoing the
20 3553(a) factors from scratch. It is a
21 proceeding that is limited in scope for all the
22 reasons this Court discussed in Dillon.

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

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

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: A couple quick
7 questions, I hope.

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

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

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

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

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

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

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

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

11 That means appellate review should be
12 very deferential, correct?

13 MR. GUARNIERI: Yes.

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

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

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

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

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 Thank -- thank you, counsel.

10 MR. GUARNIERI: Thank you.

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

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

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

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

1 accounted for in the good time credits.

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

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

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

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

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

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

9 Thank you.

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

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

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