NO._____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL DEWAYNE HEGWOOD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2010, petitioner Michael Dewayne Hegwood was sentenced as a career offender to 200 months in prison for a drug trafficking offense. Under the First Step Act, the district court in 2019 resentenced petitioner as a career offender to 153 months in prison, but stated that the Act did not authorize it to apply recent circuit precedent showing that Mr. Hegwood was not a career offender in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). On appeal, the Fifth Circuit affirmed holding that the First Step Act only authorized the district court to "modify" the sentence notwithstanding the Act's language authorizing the district court to "impose" a reduced sentence rather than to "modify" a sentence previously imposed.

The questions presented are:

I. Does the First Step Act authorize a court to "impose" a reduced sentence in accordance with such statutes as 18 U.S.C. §§ 3553(a) and 3582(a), or does it only authorize a court to "modify" a sentence under 18 U.S.C. § 3582(c)?

II. Does the First Step Act authorize a court to "impose" a reduced sentence using current binding case law that applies to the Act's change in the sentencing calculations, or does it require a court to "modify" the sentence by applying only the Act's change in the sentencing calculations while ignoring binding case law that applies to the change?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

None.

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MISCELLANEOUS

PRAYER

Petitioner Michael Dewayne Hegwood respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on August 8, 2019.

OPINIONS BELOW

On August 8, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Hegwood's judgment of conviction and sentence. *See United States v. Hegwood*, No. 19-40117, __ F.3d __, 2019 WL 3729590 (5th Cir. Aug. 8, 2019). The Fifth Circuit's opinion is reproduced as an Appendix to this petition. The district court did not enter a written opinion.

JURISDICTION

On August 8, 2019, the United States Court of Appeals for the Fifth Circuit entered its opinion and judgment in this case. This petition is filed within 90 days after that date and thus is timely. *See* Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED[1]

First Step Act of 2018, PL 115-391, 132 Stat 5194, § 404(a)-(c) (Dec. 21, 2018):

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

* * * * *

Fair Sentencing Act of 2010, PL 111-220, 124 Stat 2372, §§ 2-3 (Aug. 3, 2010):

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.--Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

<< 21 USCA § 841 >>

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and

<< 21 USCA § 841 >>

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

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1 Bold typeface and footnotes omitted from all provisions.

(b) IMPORT AND EXPORT ACT.--Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

<< 21 USCA § 960 >>

(1) in paragraph (1)(C), by striking "50 grams" and inserting "280 grams"; and

<< 21 USCA § 960 >>

(2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

<< 21 USCA § 844 >>

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

* * * * *

18 U.S.C.A. § 3553(a)-(b):

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

* * * * *

18 U.S.C. § 3582(a)-(c):

(a) Factors to be considered in imposing a term of imprisonment.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

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

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

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

* * * * *

Tex. Health & Safety Code § 481.112(a):

Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.

* * * * *

USSG § 4B1.1(a)-(b):

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	Offense Level*
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

. . .

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

* * * * *

USSG § 4B1.2(b):

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

STATEMENT OF THE CASE

On November 12, 2008, petitioner Michael Dewayne Hegwood entered a plea of guilty to possession with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(iii). The prosecutor proffered a factual basis for the plea establishing that, on May 15, 2007, Mr. Hegwood, sold approximately eight grams of cocaine base to a cooperating witness.

Using the 2008 edition of the Sentencing Guidelines, the presentence report ("PSR") calculated Mr. Hegwood's total offense level as shown in the following table:

Calculation	**Levels**	**USSG §**	**Description**
Base offense level	24	2D1.1(c)(8)	21 U.S.C. § 841(b)(1)(B)(iii)
Adjustment	-3	3E1.1(a) & (b)	Acceptance of responsibility
Adjusted offense level	21		
Chapter 4 Enhancements	34	4B1.1	Career offender
Adjustment	-3	3E1.1(a) & (b)	Acceptance of responsibility
Total offense level	31		

The PSR applied the career-offender Guideline, USSG § 4B1.1, based on 2 prior felony convictions for a controlled substance offense: .(1) a 1998 conviction for possession of a controlled substance (*i.e.*, cocaine) with intent to deliver it for which the sentence was 6 years of probation, which was revoked a year later for 2 years in prison; and (2) a 2002 conviction for delivery of a controlled substance (i.e., cocaine) for which the sentence was 1 year in state jail. A total offense level of 31, when combined with Mr. Hegwood's

criminal history category of VI, resulted in a Guideline imprisonment range of 188 to 235 months.

On January 11, 2010, the court sentenced Mr. Hegwood to serve 200 months in the custody of the Bureau of Prisons, which included 27 months of credit for a recent state sentence. The court also imposed a 5-year term of supervised release, but it remitted the $100 special assessment and did not impose a fine.[2]

On January 15, 2019, Mr. Hegwood filed a motion in which he noted that the First Step Act, which became law on December 21, 2018, allowed the court to reduce his sentence under the Fair Sentencing Act of 2010 and that the statutory range for his crime would change to 0 to 20 years. His motion also pointed out that this change in the statutory range would lower the offense level under the career offender guideline to 32 and the Guideline range to 151 to 188 months, which was below his original 200-month prison sentence. The motion additionally pointed out that he did not qualify for the career offender enhancement in light of the Fifth Circuit's opinion in *United States v. Tanksley*, 848 F.3d 347, 352, *supplemented*, 855 F.3d 284 (5th Cir. 2017). Without the application of that enhancement, his motion noted, his Guideline range was 77 to 96 months.

On February 6, 2019, the United States Probation Office issued a "First Step Act Addendum to the Presentence Report." (hereinafter referred to as the "PSR addendum").

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[2] Thereafter, Mr. Hegwood's timely appeal was dismissed pursuant to *Anders v. California*, 386 U.S. 738 (1967). *See United States v. Hegwood*, 398 Fed. Appx. 949, 949-50 (5th Cir. 2010) (unpublished).

The PSR addendum noted that a statutory mandatory minimum penalty was no longer applicable and that the statutory range of imprisonment was from 0 to 20 years. It also noted that the 9.32 grams of cocaine base charged in the indictment would result in a base offense level of 16, but that the career offender Guideline would result in an offense level of 32 and a Guideline range of 151 to 188 months. The PSR finally recounted Mr. Hegwood's post-sentencing conduct and noted that the Court should consider the sentencing factors in 18 U.S.C. § 3553(a).

Mr. Hegwood filed a written response to the PSR addendum in which he again pointed out that *Tanksley* had held that a district court errs by treating a conviction under Tex. Health & Safety Code § 481.112 as a "controlled substance offense" and that the Fifth Circuit had repeatedly held after *Tanksley* that it was reversible plain error to do so. He thus contended that, "[i]n light of this authority, Mr. Hegwood is no longer properly classified as a career offender under USSG § 4B1.1."

Mr. Hegwood's response also pointed out that various statutes and case law required a district court to consider the factors under 18 U.S.C. § 3553(a) and the Sentencing Guidelines when "imposing," as opposed to modifying, a sentence and that the First Step Act provided that a district court should "impose" a reduced sentence as if certain provisions of the First Step Act were in effect at the time that the offense was committed. He thus contended that the district court should consider the change in binding Fifth Circuit precedent regarding "a controlled substance offense" and § 481.112.

At a hearing on February 11, 2019, Mr. Hegwood reurged his previously filed

written objections and arguments as to why the district court should apply *Tanksley* and should find the Guideline range to be 77 to 96 months. The court declined to do so, stating that it was "going to resentence [Mr. Hegwood] on the congressional change and that alone." The court then sentenced Mr. Hegwood based on the fact that the original sentence was "96 percent of the original [G]uideline range" and did the same with the new Guideline range of 151 to 188 months. The court imposed a prison sentence of 153 months (noting that it was giving him the same 27 months of credit on the prison sentence as it originally had) and a 4-year term of supervised release.

On February 12, 2019, Mr. Hegwood timely filed notice of appeal. On appeal, he argued, among other things, that Congress knows how the use the word "impose," rather than "modify," when it enacts sentencing legislation and that Congress's choice of "impose" in the First Step Act and Supreme Court precedent establish that a district court is authorized to consider the Sentencing Guidelines in effect at resentencing under the Act and to impose a sentence under such statutes as 18 U.S.C. §§ 3553(a) and 3582(a).

On August 17, 2018, the Fifth Circuit affirmed Mr. Hegwood's conviction and sentence, holding that "it is clear that the First Step Act grants a district judge limited authority to consider reducing a sentence previously imposed" because the prior "Sentencing Guidelines are adjusted 'as if' the lower drug offense sentences were in effect at the time of the commission of the offense." *United States v. Hegwood*, No. 19-40117, __ F.3d __, 2019 WL 3729590, at *4 (5th Cir. Aug. 8, 2019).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The district court also had authority to resentence petitioner pursuant to the First Step Act of 2018, PL 115-391, 132 Stat 5194, § 404(b) (Dec. 21, 2018).

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari To Decide an Important Question of Federal Statutory Construction on Which the Lower Courts Are Divided and Which Has Not Been, but Should Be, Settled by this Court.

I. Introduction.

The First Step Act provides that "[a] court that ***imposed*** a sentence for a covered offense ***may***, on motion of the defendant, . . . ***impose*** a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed."[3] Pursuant to the First Step Act, the district court reduced Mr. Hegwood's statutory range of punishment from 5 to 40 years to 0 to 20 years, which automatically lowered his career offender Guideline range from 188 to 235 months to 151 to 188 months. Mr. Hegwood requested that the court apply a recent Fifth Circuit decision that applied *Mathis v. United States*, 136 S. Ct. 2243 (2016), to a Texas statute and established that Mr. Hegwood's prior drug convictions could not serve as predicate offenses under the career offender Guideline.[4] In other words, Mr. Hegwood asked the court to apply recent precedent to the specific change in the sentencing calculations (*i.e.*, the career offender calculation)

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[3] First Step Act of 2018, PL 115-391, 132 Stat 5194, § 404(b) (Dec. 21, 2018) (emphasis added) (hereinafter cited as "First Step Act").

[4] The Fifth Circuit held in *United States v. Tanksley*, 848 F.3d 347, 352, *supplemented*, 855 F.3d 284, 352 (5th Cir. 2017), that a conviction under Tex. Health & Safety Code § 481.112(a) is indivisible and cannot be used as a predicate "controlled substance offense" conviction for purposes of the career offender Guideline. Mr. Hegwood thus is not a career offender because his convictions under § 481.112(a) cannot serve as predicate convictions for a "controlled substance offense."

wrought by the First Step Act and not to some unrelated sentencing calculation.[5] However, the district court stated that it was "going to resentence [Mr. Hegwood] on the congressional change and that alone."

The Fifth Circuit affirmed, holding that the First Step Act only authorized the district court to modify the sentence pursuant to 18 U.S.C. § 3582(c). The result is that Mr. Hegwood and numerous other federal inmates will languish in prison for a number of years when they should have been released long ago under a plain reading of the statute and a proper application of the principles of statutory interpretation.[6]

As discussed below, this Court should grant certiorari to decide the important federal question of statutory construction, on which the lower courts are divided, concerning meaning of § 404(b) of the First Step Act and to correct the Fifth Circuit's misapplication of this Court's precedent on statutory interpretation.

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5 Nor was Mr. Hegwood asking the court to apply some new rule that did not exist before his First Step Act sentencing, as this Court's opinion in *Mathis* did not establish a new rule of law, but instead was a "straightforward application" of 25 years of precedent. *Mathis*, 136 S. Ct. at 2257.

6 The Sentencing "Commission's estimate [is] that 2,660 offenders are eligible for relief under section 404. As the Commission has explained, this estimate includes people like Mr. [Hegwood] whose base offense level under the career offender guideline has been lowered as a result of the Fair Sentencing Act." *United States v. Allen*, 384 F. Supp. 3d 238, 242 (D. Conn. 2019) (citing U.S. Sentencing Commission, Sentence and Prison Estimate Summary: S.756, The First Step Act of 2018 at 1-2 (Dec. 21, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf)

II. This Court Should Grant Certiorari.

The First Step Act provides that a district "court that ***imposed*** a sentence for a covered offense may, on motion of the defendant, . . . ***impose*** a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act § 404(b) (emphasis added). Federal statutes make clear that a district court is required to consider the Sentencing Guidelines, including the applicable criminal history category, and the factors set out in 18 U.S.C. § 3553(a) when "imposing" a sentence. For example, 18 U.S.C. § 3582 directs that a "court, in determining whether to ***impose*** a term of imprisonment and, if a term of imprisonment is ***to be imposed***, in determining the length of the term, ***shall consider*** the factors set forth in section 3553(a)." 18 U.S.C. § 3582(a) (emphasis added). And, 18 U.S.C. § 3553(a) directs that a district court, "in determining the particular sentence to be ***imposed shall consider*** . . . the kinds of sentence and sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the [G]uidelines . . . issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code." 18 U.S.C. § 3553(a)(4) (emphasis added, but original paragraph structure, lettering, and numbering omitted).

Moreover, Congress knows how to use the verb "impose," rather than "modify," when it enacts legislation on sentencing. For example, 18 U.S.C. § 3582(c) provides that "the court may ***modify an imposed term of imprisonment*** to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." 18 U.S.C.

§ 3582(c)(1)(B) (emphasis added). Indeed, in § 3582(b)(1)(B), Congress even knew to pair "an imposed term of imprisonment" with the word "modify" to clearly express its understanding that a previously imposed sentence was merely being modified. The fact that Congress chose to give the district court the authority to "impose" a sentence under the First Step Act and chose not to use the word "modify" demonstrates that it intended a district court to undertake the steps and consider the factors required of it when it imposes a sentence under such statutes as 18 U.S.C. §§ 3553(a) and 3582(a). *See, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (employing the maxim of statutory construction that the "expression of one thing implies the exclusion of others").

Congress's selection of the word "impose" instead of the word "modify," therefore, was no accident: "'[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense.'" *Microsoft Corp. v. i4i Ltd. Partnership*, 564 U.S. 91, 103 (2011) (brackets in original) (quoting *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911)). "Moreover, because Congress is presumed to know the law," *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995), it must be presumed that Congress was well aware of this Court's decision in *Dillon v. United States*, 560 U.S. 817 (2010), and the restrictive interpretation that the Court gave regarding the power to "modify" a sentence, *see id. at* 819, when it chose to authorize a district court to "impose" a sentence under the Fair Sentencing Act.

It also is significant that the Act uses the word "impose" twice, once when referring to the original sentencing proceeding and again when referring to the resentencing proceeding authorized by the Act: "A court that ***imposed*** a sentence for a covered offense may, on motion . . ., ***impose*** a reduced sentence." First Step Act § 404(b) (emphasis added). This Court has made clear that, when the same word appears in the same statute more than once, it cannot not be given multiple meanings. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005). "To give these same words a different meaning for each category would be to invent a statute rather than to interpret one." *Id.* The rules of statutory construction require, therefore, that "imposing" a sentence under the First Step Act means the same thing as "imposing" a sentence initially. The Fifth Circuit's statutory construction of the First Step Act, therefore, should rested on the meaning of "impose," *see, e.g.*, *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994), as well as the settled principle of statutory construction repeatedly articulated by this Court.

Furthermore, what Congress chose to include within and exclude from § 404 of the First Step Act shows that it intended a district court to "impose" a sentence pursuant to such statutes as §§ 3553(a) and 3582(a). The First Step Act is a freestanding statutory remedy that: (1) permits the court to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect"; (2) places no limit on the Court's discretion or what the court may consider; (3) mentions no bar to making other Guideline determinations; and (4) does not direct or rely on the Sentencing Commission to take any action at all or refer to the Commission's policy statements. *See* First Step Act § 404(a)-

(c). In other words, in the First Step Act, Congress chose to adopt only §§ 2 and 3 of the Fair Sentencing Act, eschewing the adoption of other sections of the Fair Sentencing Act that asked the Commission to amend the Sentencing Guidelines or gave it the emergency power to do so. *See, e.g.*, Fair Sentencing Act §§ 5-8.

This demonstrates that Congress intended the freestanding statutory remedy under the First Step Act to be different from a sentence modification under a retroactive Guideline amendment. Unlike the irst Step Act, a retroactive Guideline amendment is cabined by USSG § 1B1.10, which dictates that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." USSG § 1B1.10(a)(3). Having previously enacted the Fair Sentencing Act and commanded the Sentencing Commission to develop amended Guidelines, Congress obviously knew what it was doing when it did not do that in the First Step Act and instead, using a well-known statutory term, authorized the district court to "impose" sentence. *See, e.g., Microsoft Corp.*, 564 U.S. at 103.

However, in the present case, the Fifth Circuit concluded that a district court could only modify the sentence under 18 U.S.C. § 3582(c)(2) based on the fact that Congress authorized a district court that previously "imposed" a sentence to "impose" a reduced sentence as if §§ 2 and 3 of the Fair Sentencing Act were in effect at the time of the offense. *See Hegwood*, 2019 WL 3729590, at *4. The problem with the Fifth Circuit's interpretation is that it reads Congress's second use of the word "impose" out of the statute and substitutes the word "modify" in its place. But, "[i]f Congress had wanted to confine the reach of the

[statute] in the way that [the Fifth Circuit] suggests, it would have been easy to do so." *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). It easily could have written § 404(b) of the First Step Act using the same language as in § 3582(c) to read that a "court may ***modify an imposed term of imprisonment***," *see* 18 U.S.C. § 3582(c)(1)(B), and "reduce[] [the] sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." *Compare* First Step Act § 404(b). Congress chose not to do so, however, and a court must give effect to the language as written. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

In addition, even though it is unnecessary to go outside of the express language of the statute to interpret the First Step Act, consideration of the purposes of the First Step Act supports giving the word "impose" its ordinary and its well-accepted legal meaning:

> Enacted in 2018, the First Step Act was the result of a bipartisan legislative effort to moderately overhaul the criminal justice system. It ushered in small changes to the "tough-on-crime" prison and sentencing laws of the 1980s and 1990s that led to an explosion in federal prison populations and costs. *See* Nicholas Fandos, Senate Passes Bipartisan Criminal Justice Bill, N.Y. Times, Dec. 18, 2018. ("The Senate overwhelmingly approved on Tuesday the most substantial changes in a generation to the tough-on crime prison and sentencing laws that ballooned the federal prison population and created a criminal justice system that many viewed as costly and unfair.").
>
> The Act modified prior sentencing law and expanded vocational training, early-release programs, and other programing designed to reduce recidivism. *Id.* Congress aimed to "enhance public safety by improving the effectiveness and efficiency of the Federal prison system with offender risk and needs assessment, individual risk reduction incentives and rewards, and risk and recidivism reduction." H.R. Rep. No. 115-699, at 22 (2018); *cf.* Dewan & Binder, supra ("Evidence has mounted that the country's sprawling system of punishment was counterproductive, resulting in high recidivism rates. Studies showed that even brief stays in jail disrupts people's lives and

> [often] make them more likely to commit crime. And many states realized that without substantive change they would be spending an ever-greater portion of their budgets on prisons.").
>
> Growing prison populations and the high costs of incarceration—averaging more than $ 30,000 per year for each prisoner in federal custody—were a motivating consideration for the Act. *See* Ames Grawert et al., Ending Mass Incarceration: A Presidential Agenda, Brennan Center for Justice 1, 2 (2019); H.R. Rep. No 115-699, at 22 (2018) (explaining that Congress saw a need to reform the federal prison system "through the implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to control corrections spending, manage the prison population, and reduce recidivism."). . .

United States v. Simons, 375 F. Supp. 3d 379, 384-86 (E.D.N.Y. 2019). Reading the First Step Act as written to authorize federal district judges to grant relief from the Draconian prison sentences of the 1980s and 1990s and enhance the effectiveness and efficiency of the federal prison system, therefore, comports with the purposes of the Act.

Nevertheless, the Fifth Circuit is not alone in its interpretation of § 404(b) of the First Step Act, and the lower courts are divided on the issue. A number of district courts have decided that § 404(b) grants them only the limited power to modify a previously imposed sentence under 18 U.S.C. § 3582(c). *See, e.g.*, *United States v. Mason*, 2019 WL 2396568, at *5 (E.D. Wash. June 6, 2019) (holding that the First Step Act authorizes a sentence modification under § 3582(c)); *United States v. Crews*, 385 F. Supp. 3d 439, 444-45 (W.D. Pa. 2019) (same); *United States v. Sampson*, 360 F. Supp. 3d 168, 171 (W.D.N.Y 2019) (same); *United States v. Davis*, 2019 WL 1054554, at *2 (W.D.NY. Mar. 6, 2019) (same), *appeal filed*, No. 19-874 (Apr. 5, 2019), *United States v. Delaney*, 2019 WL

861418, at *1 (W.D. Va. Feb. 22, 2019) (same), *United States v. Fountain*, 2019 WL 637715 (W.D. N.C. Feb. 14, 2019) (same); *United States v. Copple*, 2019 WL 486440 (S.D. Ill. Feb. 7, 2019) (same).

Other lower courts have held to the contrary. For example, in *United States v. Payton*, 2019 WL 2775530 (S.D. Mich. July 2, 2019), the court held that the defendant was no longer a career offender and agreed that "the First Step Act vests the Court with the broad discretion to resentence defendants considering the § 3553(a) factors, including case law and Guidelines in effect today." *Id.* at *4-*5 (citing *United States v. Stone*, 2019 WL 2475750, at *2 (N.D. Ohio June 13, 2019), *appeal filed*, No. 19-3665 (6th Cir. July 15, 2019), *United States v. Black*, 2019 WL 2402969, at *5 (E.D. Va. June 7, 2019), *United States v. Rose*, 379 F. Supp. 3d 223, 233-34 (S.D.N.Y. May 24 2019), *United States v. Biggs*, 2019 WL 2120226, at *3 (N.D. Ill. May 15, 2019), *United States v. Simons*, 375 F. Supp. 3d 379 (E.D.N.Y. Apr. 22, 2019), *United States v. Dodd*, 372 F. Supp. 3d 795, 797-98 (S.D. Iowa Apr. 9, 2019), *United States v. Powell*, 360 F. Supp. 3d 134, 140 (N.D.N.Y. 2019), and *United States v. Newton*, 2019 WL 1007100, at *5 (W.D. Va. Mar. 1, 2019)).

In sum, the interpretation of § 404(b) of the First Step Act presents an important question of federal statutory construction on which the lower courts are divided and which has not been, but should be, settled by this Court. This Court, therefore, should grant certiorari.

CONCLUSION

For the foregoing reasons, petitioner Michael Dewayne Hegwood prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

Date: August 26, 2019

Respectfully submitted,

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United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff - Appellee
v.
Michael Dewayne HEGWOOD,
Defendant - Appellant

No. 19-40117
|
FILED August 8, 2019

Synopsis

Background: Defendant who pled guilty to conspiracy and possession with intent to distribute five grams or more of cocaine base appealed from order of the United States District Court for the Southern District of Texas, Lynn N. Hughes, J., which failed to conduct plenary resentencing in reducing his sentence under the First Step Act.

[Holding:] The Court of Appeals, Southwick, Circuit Judge, held that a district court does not conduct plenary resentencing under the First Step Act.

Affirmed.

West Headnotes (4)

[1] **Criminal Law**

The Court of Appeals reviews a district court's interpretation of a federal statute de novo.

Cases that cite this headnote

[2] **Statutes**

When courts interpret a statute, they start with the text.

Cases that cite this headnote

[3] **Statutes**

In statutory construction, the expression of one thing generally excludes another.

Cases that cite this headnote

[4] **Sentencing and Punishment**

In reducing a defendant's sentence pursuant to the First Step Act, the district court does not conduct plenary resentencing; rather, the court decides on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the Fair Sentencing Act, which increased the amount of cocaine base required to impose certain mandatory minimum sentences and eliminated a mandatory minimum sentence for simple possession of cocaine base. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(B)(iii).

Cases that cite this headnote

Appeal from the United States District Court for the Southern District of Texas, Lynn N. Hughes, U.S. District Judge

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Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges.

Opinion

LESLIE H. SOUTHWICK, Circuit Judge:

*1 This appeal concerns the First Step Act, in which Congress permitted a sentencing court to "impose a reduced sentence as if ... the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed." The issue is whether district courts are authorized to conduct a plenary resentencing, which would include recalculating the Sentencing Guidelines range as if the defendant were being sentenced for the first time under present law, or whether courts are limited to reductions resulting from the Fair Sentencing Act. Concluding that the First Step Act does not allow plenary resentencing, we AFFIRM.

FACTUAL AND PROCEDURAL HISTORY

On July 24, 2008, Michael Dewayne Hegwood was charged with conspiracy and possession with intent to distribute 5 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(iii), and 846. He pled guilty on November 12, 2008, pursuant to a plea agreement, to possession with intent to distribute 5 grams or more of cocaine base.

Hegwood admitted to what was in the government's proposed factual basis, which stated he sold approximately 8 grams of cocaine base to a cooperating witness. The cocaine sale was arranged through a phone call that was recorded by law enforcement. The cocaine transaction was recorded by video and audio. The PSR found that Hegwood was responsible for a total of 9.32 grams of cocaine base.

Using the 2008 Guidelines, the PSR calculated Hegwood's total offense level at 31, recommending a term of imprisonment between 188 and 235 months. The PSR calculated his base offense level as 24. U.S.S.G. § 2D1.1(c)(8) (2008). The probation officer recommended a two-level reduction for acceptance of responsibility and a one level reduction for timely notification of his intent to plead guilty.

Relevant to this appeal, the PSR recommended an enhancement under U.S.S.G. § 4B1.1 because Hegwood was determined by the probation officer to be a "career offender." The PSR stated that Hegwood had been convicted of two prior felony controlled-substance offenses, which, combined with his guilty plea to possession with intent to distribute cocaine base, satisfied the career-offender guideline. Under the career-offender guideline his offense level was 34, which, after subtracting the three levels for acceptance of responsibility, resulted in a final offense level of 31. Hegwood was within a criminal-history category of VI, having 20 criminal history points. Hegwood claims, and the government does not seem to dispute, that the career-offender enhancement was based on a 2002 conviction for delivery of a controlled substance for which the sentence was one year in jail and a 2007 conviction for delivery of a controlled substance for which the sentence was three years in prison.

In January 2010, Hegwood was sentenced to serve 200 months "after the credit" for 27 months on a related state sentence, with five years of supervised release. We subsequently dismissed Hegwood's appeal pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

*2 In October 2011, Hegwood filed a motion under 28 U.S.C. § 2255 to, among other things, request retroactive application of the Fair Sentencing Act of 2010. The district court construed the motion as a motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) and denied his motion, stating that he was "deemed a career offender and thus is ineligible under" Section 3582(c)(2). Hegwood filed again to apply the new Sentencing Guidelines retroactively, which the district court denied in June 2016.

In January 2019, Hegwood filed a motion for appointment of counsel and a sentencing hearing. In that motion, Hegwood invoked the First Step Act of 2018, which allowed the court to reduce his sentence by making the Fair Sentencing Act of 2010 retroactive. The effect would be to change his Guidelines range to 151-188 months, less than his original 200-month sentence. In addition, the motion argued that after *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir.), *opinion supplemented*, 854 F.3d 284 (5th Cir. 2017), he no longer qualified for the career-offender enhancement. Without that enhancement, his Guidelines range would be reduced to 77-96 months.

In February 2019, the probation office issued a "First Step Act Addendum to the Presentence Report," which concluded that a statutory mandatory minimum penalty was no longer applicable and that the statutory range of imprisonment for Hegwood was now zero to twenty years. The PSR Addendum calculated Hegwood's new offense level at 32, which includes a career offender enhancement and credit for acceptance of responsibility. The Guidelines range was therefore 151-188 months. The PSR recounted Hegwood's post-sentencing conduct and noted that the court should consider the 18 U.S.C. § 3553(a) factors in determining whether a reduction

is warranted and the extent of such reduction. Hegwood responded, arguing that since new caselaw meant none of his prior convictions would justify a career-offender enhancement, his Guidelines range should be 77-96 months.

After a hearing, the district court left the career-offender enhancement in place, holding it was "going to resentence [Hegwood] on the congressional change and that alone." The court then sentenced Hegwood to 153 months in prison, which, consistent with the previous sentence, was imposed after the credit for the related state offense and was 96 percent of the original top-of-Guidelines range.

DISCUSSION

On December 21, 2018, the First Step Act of 2018 became law, introducing a number of criminal justice reforms. *See generally* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5194-249 (2018). Applicable here, Section 404 of the First Step Act concerns the "application of [the] Fair Sentencing Act" of 2010. *Id.* at 5222. Section 404 provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> ***3** (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Id.

The government argues the First Step Act of 2018 is clear that the only permissible reductions are those that result from the operation of the 2010 Fair Sentencing Act, which reduced sentences for certain cocaine drug offenses.

[1] The underlying facts are not in dispute, leaving us to decide only the meaning of a federal statute. For that interpretive task, we have *de novo* review. *See United States v. Kaluza*, 780 F.3d 647, 653 (5th Cir. 2015). The parties do not dispute that Hegwood's offense is covered by Section 404(a). Section 2 of the Fair Sentencing Act amended 21 U.S.C. § 841(b)(1)(B)(iii) by increasing the cocaine base amount for the statutory imprisonment range of 5 to 40 years from 5 grams to 28 grams. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010). Hegwood committed his offense under that statute in May 2007, prior to the Fair Sentencing Act. The Fair Sentencing Act caused the statutory maximum for Hegwood's sentence to be reduced from 40 years to 20 years. *Compare* 21 U.S.C. § 841(b)(1)(C), *with* 21 U.S.C. § 841(b)(1)(B)(iii). The Guidelines range is now 151-188 months.

The district court's error, Hegwood claims, is that it did not apply our *Tanksley* decision to remove his career-offender enhancement, making his Guidelines range 77-96 months. For the district court to have erred, then, the First Step Act would have to encompass a broad resentencing rather than a reduction solely based on the Fair Sentencing Act.

Hegwood's argument has several components. He considers it to be significant that Section 404(b) of the First Step Act requires the district court to "impose" a reduced sentence, rather than to "modify" one. The word "impose" is used elsewhere to describe the original sentencing of a defendant: a "court, in determining whether to impose a term of imprisonment ... shall consider the factors set forth in section 3553(a)." 18 U.S.C. § 3582(a). Section 3553(a) directs that a district court, "in determining the particular sentence to be imposed, shall consider ... the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines." 18 U.S.C. § 3553(a). Hegwood argues that because Congress used the word "impose," the district court is required to calculate his Guidelines offense level anew, which would include recalculating his career-offender enhancement.

Hegwood contrasts 18 U.S.C. § 3582(c), which directs that a court may "modify a term of imprisonment once it has been imposed" only in certain specific instances, which he argues is support for giving distinct meanings to "modify" and "impose" in the sentencing context. Furthermore, Hegwood refers to the section of the Sentencing Guidelines governing reducing sentences under Section 3582(mc) due to amended Guidelines. It states that the new proceedings "do not constitute a full resentencing of the defendant." U.S.S.G. § 1B1.10(a)(3). Tying all this together, Hegwood argues that a new sentence under the First Step Act requires a Guidelines calculation to be made that is correct as of the time of the new sentencing, and Section 3553(a) factors are to be applied anew.

*4 [2] When we interpret a statute, we start with the text. *See POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 113, 134 S.Ct. 2228, 189 L.Ed.2d 141 (2014). Beginning in Section 404(a), the First Step Act's application is limited to a " 'covered offense' [which] means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." 132 Stat. at 5222. Section 404(b) then states that the court *may* reduce a sentence for a covered offense, giving it discretion. Section 404(b) then sets the ground rules: the reduced sentence may be imposed "as if sections 2 and 3 of the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed." *Id.* (citation omitted). Section 2 of the Fair Sentencing Act increases the amount of cocaine base required to impose certain mandatory minimum sentences, which the act titled "Cocaine Sentencing Disparity Reduction." *See* Fair Sentencing Act § 2. Section 3 eliminated a mandatory minimum sentence for simple possession of cocaine base. *See id.* § 3.

[3] It is clear that the First Step Act grants a district judge limited authority to consider reducing a sentence previously imposed. The calculations that had earlier been made under the Sentencing Guidelines are adjusted "as if" the lower drug offense sentences were in effect at the time of the commission of the offense. That is the only explicit basis stated for a change in the sentencing. In statutory construction, the expression of one thing generally excludes another. *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001). The express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 — saying the new sentencing will be conducted "as if" those two sections were in effect "at the time the covered offense was committed" — supports that Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense.

These limits make the First Step Act similar to Section 3582(c), which opens the door only slightly for modification of previously imposed sentences for certain specified reasons, including the lowering by the Sentencing Commission of the sentencing range that was in effect for the defendant at the time of initial sentencing. 18 U.S.C. § 3582(c)(2). The Supreme Court held that "Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon v. United States*, 560 U.S. 817, 826, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010).

We do not see any conflict in this interpretation of Section 404 of the First Step Act with the provisions of 18 U.S.C. §§ 3582 and 3553. The district court under Section 3582(a) is only required to consider the Section 3553(a) factors "to the extent that they are applicable." The government, relying on the fact that the First Step Act gives the court discretion whether to reduce a sentence, argues that the ordinary Section 3553(a) considerations apply to determine whether to reduce the defendant's sentence.

[4] The mechanics of First Step Act sentencing are these. The district court decides on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act. The district court's action is better understood as imposing, not modifying, a sentence, because the sentencing is being conducted as if all the conditions for the original sentencing were again in place with the one exception. The new sentence conceptually substitutes for the original sentence, as opposed to modifying that sentence.

The district court committed no error in continuing to apply the career-criminal enhancement when deciding on a proper sentence for Hegwood.

AFFIRMED.

All Citations

--- F.3d ----, 2019 WL 3729590

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