NO._____

IN THE SUPREME COURT OF THE UNITED STATES

ODIS LEE JACKSON,
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

Petitioner Odis Lee Jackson was sentenced nearly two decades ago to mandatory life in prison for non-violent drug offenses. Congress has since recognized that penalty as unfair and too harsh and, under current law, a life sentence is no longer mandatory. Section 404 of the First Step Act presented Mr. Jackson with his first opportunity to seek a reduced sentence. The district court denied his Section 404 motion without a hearing, without notice that there would be no hearing, without an updated presentence report, and without giving Mr. Jackson the opportunity to present information about his seventeen years of good post-sentencing conduct. On appeal, the Fifth Circuit affirmed the district court's truncated procedures as "blameless" because (1) the court had previously held that the First Step Act is akin to a limited sentence modification under 18 U.S.C. § 3582(c)(2) and (2) nothing in Section 404 of the First Step Act requires a court to hold a hearing or consider post-sentencing conduct. Yet Section 404 authorize a district court to "impose," not just "modify" a sentence, and Section 404 indicates that a district court must conduct "a complete review of the motion on the merits."

In light of the foregoing, the questions presented are:

I. What procedures does Section 404 of the First Step Act require a district court to follow when conducting its statutorily required "complete review of the motion on the merits"?

II. 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)?

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

United States v. Jackson, No. 02-CR-373-4, U.S. District Court for the Southern District of Texas. Judgment entered May 14, 2019; order pursuant to limited remand entered November 19, 2019.

United States v. Jackson, No. 19-20346, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 16, 2019.

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MISCELLANEOUS

PRAYER

Petitioner Odis Lee Jackson 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 December 16, 2019.

OPINIONS BELOW

On December 16, 2019, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming Mr. Jackson's judgment of conviction and sentence. *See United States v. Jackson*, 945 F.3d 315 (5th Cir. 2019). The Fifth Circuit's opinion is reproduced as Appendix A. On November 5, 2019, the Fifth Circuit entered a non-dispositive opinion ordering a limited remand to the district court while retaining jurisdiction. *United States v. Jackson*, 783 Fed. Appx. 438 (5th Cir. 2019) (unpublished). That opinion is reproduced as Appendix B.

The district court's order denying Mr. Jackson's motion for resentencing under Section 404 of the First Step Act was entered on May 15, 2019, and is reproduced as Appendix B. The district court's order pursuant to limited remand was entered on November 19, 2019, and is reproduced as Appendix C.

JURISDICTION

On December 16, 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, excluding the Sunday that was the last date of the period, and thus is timely. *See* Sup. Ct. R. 13.1, 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

SEC. 404. APPLICATION OF FAIR SENTENCING ACT

(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".

(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.A. § 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.

STATEMENT OF THE CASE

Petitioner Odis Lee Jackson was sentenced to serve the rest of his life in prison for non-violent drug offenses committed in June 2002. Mr. Jackson's role in the offenses was to serve as a lookout. When his sentence was originally imposed in March 2003, it was mandatory two reasons. First, a jury found Mr. Jackson guilty of (1) conspiracy to possess with intent to distribute and (2) aiding and abetting the possession with intent to distribute 50 grams or more of a mixture and substance containing a detectable amount of cocaine base, also known as "crack," in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), and 846 and 18 U.S.C. § 2.

Second, the government filed an enhancement under 21 U.S.C. § 851 based on Mr. Jackson's prior drug convictions, which carried prison sentences ranging in length from just 30 days to a maximum of 16 months. Before receiving a life sentence, Mr. Jackson's longest prison sentence was 16 months, for the simple possession of 19.7 milligrams of cocaine residue on a crack pipe. Mr. Jackson's other prior prison sentences ranged from 10 days to one year:

- 10 days for unlawfully carrying a weapon in the glovebox of his car;
- 30 days for simple possession of less than a 1/4 ounce of marijuana;
- 180 days for delivering $10 worth of cocaine;
- 1 year for possession of 9 milligrams of cocaine on a crack pipe;
- 12 months for possession of 231.9 milligrams of cocaine; and
- 75 days for assault of a family member.

Under the 2002 edition of the United States Sentencing Guidelines ("USSG"), Mr. Jackson's Guidelines imprisonment range was 262 to 327 months (about 21.83 to 27.25 years). This range was based on a criminal history score of 14 and criminal history category of VI, as well as a base and total offense level of 34 under USSG § 2D1.1(a)(3) and USSG § 2D1.1(c)(3). Regarding the statutory parameters, the mandatory minimum for each count began as 10 years with a maximum of life, but with the government's § 851 enhancement, the mandatory minimum sentence increased to life.[1]

In the thirteen years after the Fifth Circuit affirmed his conviction and sentence, Mr. Jackson filed many *pro se* motions in the district court. All were denied. Mr. Jackson was never eligible for a sentence reduction based on various changes to the law because his life sentence remained mandatory and the statutory modifications to reduce the disparity between powder and crack cocaine offenses in the Fair Sentencing Act of 2010 were not made retroactive.

But on December 21, 2018, the First Step Act was passed, and Section 404 provided Mr. Jackson with his first opportunity for relief from his life sentence. The district court granted Mr. Jackson's motion for court-appointed counsel and access to the presentence report on March 15, 2019. Eighteen days later, Mr. Jackson filed a motion for resentencing pursuant to Section 404 of the First Step Act. In that motion, he explained that the First Step Act permits the district court to impose a reduced sentence upon Mr. Jackson because

[1] In addition to the two concurrent life sentences, the district court imposed a mandatory 10-year term of supervised release on each count, to run concurrently, and the statutory special assessment of $100 per count.

his offenses carried mandatory life sentences at the time of his offenses and sentencing, but now his offenses carry a statutory range of 10 years to life and a mandatory eight years of supervised release. The motion further pointed out that the current Sentencing Guidelines would recommend an advisory Guidelines imprisonment range of 168 to 210 months (14 to 17.5 years). Finally, the motion requested that the district court order a hearing to impose a reduced sentence, order an updated presentence report, and order Mr. Jackson to be present at the hearing.

The district court ordered the government to respond. The government did so and argued that Mr. Jackson was not eligible for relief under the First Step Act. The government claimed that eligibility under Section 404 of the First Step Act should turn on the amount of crack cocaine listed in the presentence report, not the drug quantity charged in the indictment and found beyond a reasonable doubt by a jury. The government argued solely that Mr. Jackson was ineligible for relief under Section 404; never did the government argue that Mr. Jackson did not deserve a reduction for case-specific reasons.

On May 15, 2019, without holding a hearing, without providing notice that there would be no hearing, without ordering an updated presentence report, and without giving Mr. Jackson the ability to present information about his seventeen years of good post-sentencing conduct, the district court entered an order denying Mr. Jackson's motion. The order stated, in full:

Having considered the defendant's motion for resentencing, the government's response and the arguments and law therein, the Court orders that the defendant's motion is:

Mr. Jackson timely filed notice of appeal. On appeal, he argued that he was eligible for relief under Section 404 of the First Step Act because eligibility should be determined by the statute of conviction and drug quantity charged in the indictment, not on the drug quantity listed in the presentence report. The government filed its responsive brief, appearing to concede eligibility but arguing for the first time on appeal that Mr. Jackson did not deserve a reduction for case-specific reasons.

On November 5, 2019, the Fifth Circuit issued a non-dispositive opinion ordering a remand, while retaining jurisdiction, "for the limited purpose of allowing the [district] court to explain its reasons for the denial." *United States v. Jackson*, 783 Fed. Appx. 438 (5th Cir. 2019) (unpublished). Three days later, Mr. Jackson filed a Brief on Limited Remand in the district court, arguing that the court's denial of his motion was not a discretionary denial but rather a determination of ineligibility. He explained that, had the district court ordered an updated presentence report and scheduled a hearing as he had requested, he would have submitted additional evidence: a letter directly from Mr. Jackson as well as letters from numerous individuals regarding his good conduct while in custody, including from his counselor, his prison industries foreman, his case manager, his drug treatment specialist, and several other Bureau of Prisons employees. The government did not file a response.

On November 19, 2019, the district court issued an Order Pursuant to Limited Remand. The court assumed without deciding that Mr. Jackson was eligible, but "exercise[d] its discretion" to deny Mr. Jackson's motion for resentencing. The Fifth Circuit ordered the parties to file simultaneous letter briefs addressing what action the court should take in light of the district court's order after remand. Mr. Jackson contended that the Fifth Circuit should vacate the district court's original order denying his motion for resentencing and its order after remand and remand for further proceedings for the district court to conduct the statutorily required "complete review of the motion on the merits." The government's supplemental brief consisted of arguments it never made in the district court as to why it was appropriate that the district court denied relief on a discretionary basis.[2]

On December 16, 2019, the Fifth Circuit affirmed the district court's judgment, noting its previous opinion in *United States v. Hegwood*, 934 F.3d 414 (5th Cir.), *cert. denied*, 140 S. Ct. 285 (2019), where the court had "recognized that section 404 is similar to 18 U.S.C. § 3582(c)(2), which generally permits resentencing of a defendant whose original sentence was based on a range later lowered by the Sentencing Commission." *Jackson*, 945 F.3d at 319. Although the Fifth Circuit held that Section 404 eligibility "depends only on the statute under which [the defendant] was convicted," the lower court rejected Mr. Jackson's argument that the district court erred by not holding a hearing, not

[2] The government's filings claim that Mr. Jackson committed the offenses while armed. At the original sentencing hearing, however, the district court ***granted*** Mr. Jackson's objection to the two-level enhancement to his Guidelines offense level for possession of a dangerous weapon. The government appears to have overlooked that fact.

ordering an updated presentence report, and not considering evidence of Mr. Jackson's "apparently admirable post-sentencing conduct." *Id.* at 320-21. The Fifth Circuit agreed with the Eighth Circuit that nothing in the First Step Act requires the court to hold a hearing. *Id.* (citing *United States v. Williams*, 943 F.3d 841 (8th Cir. 2019)). The court characterized the district court's procedures as "blameless." *Id.* at 322.

The lower court further held, following in the steps of its *Hegwood* decision, that a district court considering a First Step Act motion is not required to consider a defendant's post-sentencing conduct. *Id.* In *Hegwood*, the Fifth Circuit had interpreted Section 404 as requiring a district court to place "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." *Id.* (quoting *Hegwood*, 934 F.3d at 418) (brackets and emphasis omitted). Because the court's statutory interpretation in *Hegwood* meant that a district court "couldn't consider other post-sentencing changes in the law," the Fifth Circuit in Mr. Jackson's case held that it would "make little sense to mandate . . . that the court consider a defendant's post-sentencing conduct, which would be to peer outside 'the time frame of the original sentencing.'" *Id.* at 321-22.

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 important questions of federal statutory construction on which lower courts are divided and which has not been, but should be, settled by this Court.

I. Introduction.

When Mr. Jackson was sentenced nearly two decades ago, the statutory penalties for his non-violent drug offenses were driven by Congress's decision in the Anti-Abuse Drug Act of 1986 to treat one gram of crack cocaine as the equivalent of 100 grams of powder cocaine. This disparity was "strongly criticized" by the "[United States Sentencing Commission and others in the law enforcement community." *Dorsey v. United States*, 567 U.S. 260, 268 (2012). The criticism focused on research demonstrating that "the relative harm between crack and powder cocaine [was] less severe than 100-to-1"; the ratio was counterproductive in terms of accomplishing sentencing objectives of uniformity and proportionality; and the ratio disproportionately impacted African-American defendants. *Id.* at 268-69.

In 2010, Congress responded to the criticism and enacted the Fair Sentencing Act, which increased the threshold amounts required to trigger mandatory minimum and enhanced maximum sentences for crack offenses. Section 2 of the Fair Sentencing Act increased the minimum qualifying amount of crack from 50 grams to 280 grams for offenses covered by 21 U.S.C. §§ 841(b)(1)(A)(iii) and 960(b)(1)(C). *See* Fair Sentencing Act of 2010, PL 111-220, 124 Stat 2372, Sec. 2(a)(1), (b)(1) (Aug. 3, 2010) (the "Fair Sentencing Act"). Section 2 also increased the minimum qualifying amount of crack from 5 grams to 28 grams for offenses covered by 21 U.S.C. §§ 841(b)(1)(B)(iii) and

960(b)(2)(C). *See* Fair Sentencing Act, Sec. 2(a)(2), (b)(2). Section 3 eliminated mandatory minimums for simple possession offenses under 21 U.S.C. § 844(a). *See* Fair Sentencing Act, Sec. 3.

Congress did not make the Fair Sentencing Act retroactive, however. And so these modifications to drug amounts triggering the statutory penalties applied only to individuals sentenced after the Fair Sentencing Act's effective date of August 3, 2010. *See, e.g.*, *United States v. Doggins*, 633 F.3d 379, 384 (5th Cir. 2011).

On December 21, 2018, Congress passed the First Step Act. Section 404 of that Act makes the penalty provisions of the Fair Sentencing Act discussed above retroactive and gives district courts the discretion to impose a reduced sentence within the statutory parameters of the Fair Sentencing Act. The full text of Section 404 of the First Step Act 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.
>
> (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.

First Step Act of 2018, PL 115-391, 132 Stat 5194, Sec. 404 (Dec. 21, 2018) (the "First Step Act").

The Fifth Circuit, agreeing with the Fourth and Eighth Circuits,[3] adopted the plain meaning of the statute to hold that "whether a defendant has a 'covered offense' under section 404(a) depends only on the statute under which he was convicted." *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019). The court therefore concluded that Mr. Jackson was eligible for a sentence reduction because he "has a covered offense" and "meets all the requirements" of Section 404(a). *Id.* at 320-21. "He was convicted of violating a statute whose penalties the Fair Sentencing Act modified, and the violation occurred 'before August 3, 2010.'" *Id.* "He also doesn't transgress the 'limitations' of section 404(c): He hasn't made a 'previous motion' under section 404 to reduce his sentence, nor was his sentence 'previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act.'" *Id.*

But the lower court rejected Mr. Jackson's procedural arguments. Mr. Jackson contended that the district court erred by not holding a hearing, not providing notice that it would not hold a hearing, not ordering an updated presentence report, and not considering evidence of Mr. Jackson's "apparently admirable post-sentencing conduct." *Id.* at 320-21. The court characterized these truncated procedures as "blameless" because (1) the court

[3] *United States v. McDonald*, 944 F.3d 769, 771-72 (8th Cir. 2019); *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019).

had previously held that the First Step Act is akin to a limited sentence modification under 18 U.S.C. § 3582(c)(2) and (2) nothing in Section 404 of the First Step Act requires a court to hold a hearing or consider post-sentencing conduct. *Id.* at 322.

The result is that Mr. Jackson and other similarly situated federal inmates will languish in prison for the rest of their lives, serving sentences that Congress has now deemed unfair and too harsh, without having received a fair opportunity to make their best case for a reduced sentence. As discussed below, this Court should grant certiorari to decide the important federal questions of statutory construction, on which the lower courts are divided, concerning the meaning of Section 404 of the First Step Act and to correct the Fifth Circuit's misapplication of this Court's precedent on statutory interpretation.

II. This Court should grant certiorari to resolve important questions of federal statutory construction on which lower courts are divided and which has not been, but should be, settled by this Court.

Two provisions in Section 404 of the First Step Act are of particular importance to the statutory interpretation questions at issue in this case. First, Section 404(b) 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, Sec. 404(b) (emphasis added). Second, the Act indicates that a district court must conduct "a complete review of the motion on the merits." First Step Act, Sec. 404(c).

Congress's use of the word "impose" in Section 404 conveys a particular meaning in the context of federal sentencing law. In 18 U.S.C. § 3582(a), Congress has directed 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 [18 U.S.C. §] 3553(a)." 18 U.S.C. § 3582(a) (emphasis added). Section 3553(a), in turn, requires courts to consider the enumerated factors "in determining the particular sentenced to be ***imposed***." 18 U.S.C. § 3553(a) (emphasis added). Those listed factors include "the history and characteristics of the defendant" and the Sentencing Guidelines. 18 U.S.C. § 3553(a)(1), (a)(4).

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. P'ship*, 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.

The Fifth Circuit's reliance on *Dillon* to construe the First Step Act was therefore mistaken. This Court in *Dillon* interpreted the scope of a district court's authority under 18 U.S.C. § 3582(c)(2). That provision allows district courts to "reduce the term of imprisonment" for "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," but only "if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The applicable policy statement, in turn, provides two express limitations on the scope of a district court's sentence-reduction authority. First, in determining whether to grant a reduction, "the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected." USSG § 1B1.10(b)(1). Second, "the court shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range." *Id.* § 1B1.10(b)(2)(A). In *Dillon*, the Court held that these

policy-statement limitations are binding on a sentencing court considering a Section 3582(c)(2) motion.

If Congress had intended these limitations to apply under the First Step Act, it would have said so. After all, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Applying that principle makes sense here because if Congress wanted to emulate Section 3582(c)(2)'s limitations, it surely knew where to find language to accomplish that goal. Instead, it chose not to include that language.

Incorporating these limitations despite Congress's decision not to include them in the First Step Act would usurp legislative authority. The Supreme Court rejected a similar usurpation in *Russello*. The statute there used differing language in adjacent provisions, and the petitioner argued—much like the Fifth Circuit in *Hegwood*, which the Fifth Circuit relied on heavily in Mr. Jackson's case—that Congress actually intended the two provisions to carry the same meaning. The Court disagreed:

> We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

Rusello, 464 U.S. at 23.

The same principle applies here. Congress could have incorporated Section 3582(c)(2)'s limitations into the First Step Act, but chose not to do so. Given that the First Step Act's text differs so markedly from Section 3582(c)(2) and USSG § 1B1.10, the Fifth Circuit should not have treated this Court's decision in *Dillon* as applicable.

These differences demonstrate that Congress intended the First Step Act to be a freestanding statutory remedy, where a district court has authority to "impose" a sentence pursuant to such statutes as §§ 3553(a) and 3582(a), a remedy that is distinct from a sentence modification under a retroactive Guideline amendment. The text of the First Step Act establishes 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 what the court may consider; and (3) does not direct or rely on the Sentencing Commission to take any action at all or refer to the Commission's policy statements. In other words, in the First Step Act, Congress chose to adopt only Sections 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, Sec. 5-8. Moreover, unlike the First Step Act, a retroactive Guidelines 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 Sections 2 and 3 of the Fair Sentencing Act were in effect at the time of the offense. *See Jackson*, 945 F.3d at 321 (quoting *Hegwood*'s interpretation of the First Step Act as requiring a district court to place "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") (emphasis omitted); *Hegwood*, 934 F.3d at 418-19 (interpreting a district court's action on a Section 404 motion as conducting a sentencing "as if all the conditions for the original sentencing were again in place with the one exception"). 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 Section 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, Sec. 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.

Although the Fifth Circuit is not alone in its interpretation of Section 404(b) of the

First Step Act, the lower courts are divided on the issue. A number of district courts have decided that Section 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 dismissed*, No. 19-3665 (6th Cir. Sept. 15, 2019), *United States v. Black*, 388 F. Supp. 3d 682, 2019 WL 2402969, at *5 (E.D. Va. 2019), *United States v. Rose*, 379 F. Supp. 3d 223, 233-34 (S.D.N.Y. 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. 2019), *United States v. Dodd*, 372 F. Supp. 3d 795, 797-98 (S.D. Iowa 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)).

Finally, Section 404 indicates that a district court must conduct "a complete review of the motion on the merits" when considering a Section 404 motion. First Step Act, Sec. 404(c). The Fifth Circuit dismissed this phrase as devoid of meaning because it appeared in the section of the Act "establish[ing] that a defendant can file only one motion for resentencing." *Jackson*, 945 F.3d at 321. By doing so, the Fifth Circuit essentially reads "complete" out of the statute, contrary to this Court's precedent. *See, e.g.*, *Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 502 (1998) (rejecting a statutory interpretation that would "read . . . words out of the statute entirely"). Had Congress intended to convey in that part of the Act only that a defendant has one chance to seek a sentence reduction under Section 404, Congress could have done that without using the word "complete." Instead, Congress specifically used the phrase "complete review," and, once again, the Fifth Circuit failed to appreciate the stark contrast that creates with a sentence modification under *Dillon* where § 3582(c)(2) contains no such phrase.

The Fifth Circuit's dismissal of the phrase "complete review" led the court to reject Mr. Jackson's argument that the district court erred by not holding a hearing, not providing notice that there would be no hearing, not ordering an updated presentence report, and not giving Mr. Jackson the ability to present information about his seventeen years of good post-sentencing conduct. *See Jackson*, 945 F.3d at 321-22. With respect to the last point, the Fifth Circuit's decision created a circuit split with the Fourth Circuit's decision in *United States v. Martin*, 916 F.3d 389 (4th Cir. 2019). In *Martin*, the Court vacated a district court order denying a sentence reduction under § 3582(c)(2). Although the defendant

advanced several mitigating arguments, the district court "failed to address any of this new mitigation evidence." *Id.* at 396. Instead, the court's explanation for denying a reduction "was merely a recitation of Martin's original criminal behavior." *Id.* at 397. On appeal, the Fourth Circuit held that the district court failed "to follow [that court's] precedent which requires a district court to consider evidence of post-sentencing mitigation that would be relevant to the § 3553(a) factors." *Id.* Based on that error, the Fourth Circuit remanded for the district court to reconsider the motion and instructed that, if the court denied relief, it "must provide an individualized explanation for why" it rejected Martin's mitigating arguments. *Id.* In *Martin*, therefore, the Fourth Circuit held that even when a district court is evaluating a limited sentence modification under § 3582(c)(2), the court must consider post-sentencing mitigating arguments. But the Fifth Circuit, despite the broad language and absence of restrictions in text of Section 404 of the First Step Act, reached the opposite conclusion, not even requiring the district court to receive the mitigating evidence that was clearly relevant to the § 3553(a)(a) sentencing factor of Mr. Jackson's "history."

In sum, the interpretation of Section 404(b) of the First Step Act presents important questions 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 Odis Lee Jackson prays that this Court grant certiorari to review the judgment of the Fifth Circuit in his case.

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Respectfully submitted,

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