No. 20-1479

IN THE

Supreme Court of the United States

EDDIE HOUSTON, JR.,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

Other Authorities

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year, NACDL files numerous briefs as *amicus curiae* in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.[1]

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[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Whether a district court must address the sentencing factors in 18 U.S.C. § 3553(a) in ruling on motions brought under § 404 of the First Step Act is a question with real-world implications. A survey of cases in which sentencing courts have been ordered to consider the § 3553(a) factors in First Step Act proceedings, or have elected to exercise their discretion within that well-established framework, reveals that such consideration produces richer, more multifaceted decisions that promote appellate review and public trust.

First Step Act cases remanded by the courts of appeal with instructions to undertake or more fully explain a § 3553(a) analysis strikingly illustrate this phenomenon. On remand, a court's heightened attention to the § 3553(a) factors, particularly post-sentencing rehabilitation, not infrequently forms the basis for a much lower sentence. But at present, such remands—and hence, such required consideration—are unevenly distributed on the basis of geography.

By definition, defendants who are eligible for First Step Act relief are serving long sentences for crack-cocaine sentences imposed under a superseded legal regime. Often, the judge presiding over the First Step Act motion is not the same judge who imposed the initial sentence. Nevertheless, only litigants in the Third, Fourth, and Sixth Circuits are guaranteed renewed consideration of the § 3553(a) factors. Eligible defendants fortunate enough to be sentenced in one of those circuits, or by a district

court that regards the § 3553(a) factors as mandatory despite the absence of controlling authority, may well benefit from presenting evidence of post-sentencing developments. Others, like petitioner Eddie Houston, Jr., get procedural short shrift.

The familiar § 3553(a) framework is flexible enough to account for developments in the law and in a defendant's personal circumstances. Yet it is also firm enough to ensure that a statute designed to remedy crack-powder disparity does not create new, unintended geographical disparities. This Court should intervene now to resolve the circuit split as to whether district courts must consider the § 3553(a) factors, before additional eligible defendants are deprived of this crucial procedural opportunity or end up overserving their sentences.

ARGUMENT

A. Timely Resolution of the Question Presented Is of Great Practical Importance to First Step Act Movants.

NACDL agrees with Mr. Houston that the question of whether a district court must consider the § 3553(a) factors is extremely important. Defendants in circuits where such consideration is required, and defendants resentenced by district courts that have undertaken § 3553(a) analysis of

their own accord, have received dramatic sentence reductions on the basis of § 3553(a) factors alone.[2]

1. *Appellate-court decisions remanding for consideration of the § 3553(a) factors have resulted in significantly reduced sentences.*

The difference between permitting district courts to consider the § 3553(a) factors in First Step Act proceedings, and requiring them to do so, is not merely theoretical. Making § 3553(a) consideration and explanation mandatory results in meaningful sentence reductions. Here, NACDL highlights a handful of the many First Step Act cases in which the § 3553(a) factors played a make-or-break role.

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The Fourth Circuit is one of the courts of appeal that requires district courts to apply the § 3553(a) sentencing factors in proceedings under § 404 of the First Step Act. *See United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020) (agreeing with government's concession that § 3553(a) factors apply in § 404 context). Relatedly, the Fourth Circuit has held that a district court may vary from the Guidelines range in a § 404 resentencing, and may also consider a defendant's post-sentencing conduct. *Id.* In the wake of *Chambers*, the Fourth Circuit remanded a number of cases for consideration and explanation of § 3553(a) factors, such as post-

[2] The average First Step Act reduction is 72 months. U.S. Sentencing Comm'n, First Step Act of 2018 Resentencing Provisions Retroactivity Data Report tbl.6 (May 2021).

sentencing conduct. *See, e.g.*, *United States v. McDonald*, 986 F.3d 402, 411–12 (4th Cir. 2021) (vacating and remanding sentences in three separate cases due to district court's failure to explain rejection of mitigating post-sentencing evidence).

Anthony Olvis benefited from one of those remands. In 1997, at age 22, Mr. Olvis was sentenced to 460 months of imprisonment following convictions for crack cocaine, firearms, and money laundering offenses. *United States v. Olvis*, No. 95-38-RGD, ECF 342 at 2–3 (E.D. Va. Mar. 12, 2021). Thus, he was sentenced well before the Fair Sentencing Act's effective date of August 3, 2010, and was therefore ineligible to seek resentencing under that statute's new, lowered penalties for crack cocaine. *See Dorsey v. United States*, 567 U.S. 260, 280–81 (2012). In 2014, the district court reduced Mr. Olvis's sentence to 404 months, based on a retroactive amendment to the Sentencing Guidelines. *United States v. Olvis*, No. 95-38-RGD, ECF 297 (E.D. Va. Dec. 9, 2014).

Shortly after passage of the First Step Act, Mr. Olvis filed a pro se motion requesting application of the Fair Sentencing Act's penalties and appointment of counsel. *United States v. Olvis*, No. 95-38-RGD, ECF 319 (E.D. Va. Feb. 22, 2019). Without receiving input from the government, the district court denied the motion. *United States v. Olvis*, No. 95-38-RGD, ECF 320 (E.D. Va. May 1, 2019). The district court concluded that Mr. Olvis had two covered offenses and was therefore eligible for a sentence reduction under the First Step Act. *Id.* at 4. But it "decline[d]

to exercise its discretion" to reduce Mr. Olvis's sentence because the sentence for one covered offense (344 months) fell under the new 40-year statutory maximum, a reduction on the other covered offense would not affect the total prison term, and the advisory Guidelines range had not changed. *Id.* at 5.

Mr. Olvis filed motions for reconsiderations, in which he argued that the district court should consider the § 3553(a) factors and impose a lower sentence on both covered offenses based on his post-sentencing rehabilitation. *United States v. Olvis*, 828 F. App'x 181, 181–82 (4th Cir. 2020) (per curiam). The district court dismissed those motions without prejudice. *Id.*

The Fourth Circuit reversed the First Step Act denial. *Id.* at 182. It noted that the district court had ruled without the benefit of *Chambers*, which held that the § 3553(a) factors apply in a First Step Act resentencing, and that a district court may vary from the Guidelines range to account for post-sentencing conduct. *Id.* Accordingly, the Fourth Circuit vacated the denial order and remanded for the district court "to address Olvis's arguments in light of *Chambers*." *Id.*

On remand, Mr. Olvis, now assisted by counsel, filed a supplemental memorandum and exhibits elaborating on his post-conviction rehabilitation. He noted that he had not incurred a single disciplinary infraction in more than twenty-five years in custody, had earned his GED and completed substantial coursework, served the prison community by

becoming a GED tutor and trained observer in the BOP's Suicide Prevention Program, and received enthusiastic letters of recommendation from BOP staff members for his work ethic and attitude. *United States v. Olvis*, No. 95-38-RGD, ECF 342 at 11–13 (E.D. Va. Mar. 12, 2021). Mr. Olvis had also accepted responsibility for his actions, maintained family ties despite his long incarceration, and rebuilt his relationship with his father. *Id.* at 14–15, 19–20.

In addition to providing the court with this up-to-date picture of his "history and characteristics," 18 U.S.C. § 3553(a)(1), Mr. Olvis stressed the § 3553(a) factor of "avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). To that end, he presented the district court with ten cases where defendants with similar criminal histories and convictions for similar conduct had received significant sentence reductions under the First Step Act. *Id.* at 15–19.

The government, asked to weigh in on the § 3553(a) factors for the first time, agreed with the requested sentence of time served after conducting a searching review of Mr. Olvis's record. *United States v. Olvis*, No. 95-38-RGD, ECF 343 at 2 (E.D. Va. Mar. 24, 2021). While noting the serious nature of the offenses of conviction, the government concluded that Mr. Olvis had "redeemed himself." *Id.* In particular, the government lauded Mr. Olvis's "determined approach to post-conviction rehabilitation," "spotless disciplinary record," and "thorough Re-entry Plan." *Id.*

Upon reviewing the § 3553(a) factors, the district court reduced Mr. Olvis's 404-month sentence. *United States v. Olvis*, No. 95-38-RGD, ECF 344 (E.D. Va. Apr. 23, 2021). In doing so, it relied heavily on Mr. Olvis's "exemplary" post-sentencing conduct and personal growth while incarcerated: his pursuit of educational opportunities, his sterling work history, and his clean disciplinary record. *Id.* at 8. The district court also emphasized Mr. Olvis's family support and noted his argument about unwarranted sentence disparities. *Id.* Ultimately, the district court concluded that the § 3553(a) factors warranted a reduction to 240 months, considerably below the approximately 325 months he had already served. *Id.* at 9.

Had the Fourth Circuit not remanded for consideration of the § 3553(a) factors, including post-sentencing conduct, Mr. Olvis would still be serving the 404-month sentence.[3]

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[3] Although the magnitude of Mr. Olvis's sentence reduction is notable, other defendants whose cases were remanded by the Fourth Circuit after *Chambers* have also received First Step Act relief after nuanced consideration of § 3553(a) factors. *See, e.g.*, *United States v. Davey*, No. 02-201-H, ECF 112 (E.D.N.C. May 6, 2021) (reducing sentence from 360 months to 280 months for "first-time drug offender who has positive post-sentencing conduct"); *United States v. McDonald*, No. 03-29-H, ECF 115 (E.D.N.C. May 6, 2021) (reducing sentence from 272 months to 262 months based on "excellent" post-sentencing conduct and family support); *United States v. Ballard*, No. 04-81-H, ECF 192 (E.D.N.C. May 4, 2021) (reducing term of supervised release for already-released defendant; citing post-sentencing conduct); *United States v. Armstead*, 2021 WL

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Like the Fourth Circuit, the Sixth Circuit requires district courts to apply the § 3553(a) factors and to explain their reasoning. *United States v. Smith*, 959 F.3d 701, 703 (6th Cir. 2020); *accord United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020). Dwight Latham's First Step Act proceedings in the Western District of Michigan demonstrate that giving teeth to this requirement not only facilitates meaningful appellate review; it also results in substantively different outcomes.

In 2008, Mr. Latham was sentenced to life imprisonment following his conviction for a conspiracy involving 50 grams or more of crack cocaine. *United States v. Latham*, 809 F. App'x 320, 321 (6th Cir. 2020). His two prior felony drug convictions made life imprisonment mandatory by

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267825, at *2 (D.S.C. Jan. 27, 2021) (reducing 262-month sentence to time served, approximately 141 months, based on post-sentencing conduct); *United States v. Badger*, 2021 WL 248582, at *3 (D.S.C. Jan. 26, 2021) (reducing 360-month sentence to 300 months; citing defendant's "admirable steps to rehabilitate himself while incarcerated"); *United States v. Brown*, 2020 WL 6482397, at *3 (D.S.C. Nov. 4, 2020) (reducing 262-month sentence to time served, resulting in release approximately seven months early, citing disparity and "Defendant's productive use of time while in custody without minimizing his disciplinary record"); *United States v. Patterson*, 2020 WL 5370953, at *3–*4 (W.D.N.C. Sept. 8, 2020) (reducing 210-month sentence to time served plus ten days, resulting in release two months early; balancing "exemplary" post-sentencing conduct against offense conduct and criminal history).

statute, and also rendered him a career offender under the Guidelines. *Id.*

The First Step Act reduced Mr. Latham's statutory penalties from mandatory life to ten years to life. *United States v. Latham*, No. 07-209-PLM, ECF 159 at 11 (W.D. Mich. Apr. 2, 2019). Acting pro se, Mr. Latham filed a brief motion asking for a reduced sentence; he did not address the § 3553(a) factors. *United States v. Latham*, No. 07-209-PLM, ECF 154 (W.D. Mich. Jan. 14, 2019). The government conceded Mr. Latham's eligibility but argued that he remained a career offender, with a resulting Guidelines range of 360 months to life. *United States v. Latham*, No. 07-209-PLM, ECF 159 at 10–11 (W.D. Mich. Apr. 2, 2019). Although the government stated that the court should consider the § 3553(a) factors, it did not discuss them. *Id.* at 9–12. Rather, it simply asked for the court to impose a within-Guidelines sentence if it was inclined to grant a reduction. *Id.* at 12.

In his pro se reply, Mr. Latham argued that his disciplinary, educational, and work history while incarcerated merited a sentence below the Guidelines range. *United States v. Latham*, No. 07-209-PLM, ECF 161 (W.D. Mich. June 10, 2019). Newly appointed counsel also filed a reply arguing that the career-offender guideline overstated Mr. Latham's culpability, because the predicate offenses were nonviolent and relatively minor. *United States v. Latham*, No. 07-209-PLM, ECF 163 (W.D. Mich. June 20, 2019).

The district court granted a partial sentence reduction to 360 months, the low end of the Guidelines range. *United States v. Latham*, No. 07-209-PLM, ECF 164 (W.D. Mich. June 24, 2019). The court checked the box for "GRANTED" on a form that "simply recited (in preprinted language) that the court had considered the relevant [§ 3553(a)] factors." *Id.*; *Latham*, 809 F. App'x at 321.

Mr. Latham appealed, arguing that the district court did not adequately explain why it rejected his arguments for a sentence below 360 months. *Id.* The Sixth Circuit agreed, explaining that the "exceedingly slim" record for the initial sentence and First Step Act reduction did not permit "meaningful review of the court's decision." *Id.* at 322. It noted that Mr. Latham's arguments were not frivolous, vacated the sentence, and remanded for a more fulsome explanation. *Id.*

Expanding on the § 3553(a) factors in his post-remand brief, Mr. Latham argued that the career-offender guideline did not apply, and that the court should vary from it if it did apply. *United States v. Latham*, No. 07-209-PLM, ECF 172 at 5–9 (W.D. Mich. Aug. 4, 2020). He presented letters commending his work performance in the prison laundry and pledging community support upon his release. *United States v. Latham*, No. 07-209-PLM, ECF 172-1, 172-2, 172-3, 172-4 (W.D. Mich. Aug. 4, 2020).

The government argued that Mr. Latham remained a career offender. *United States v. Latham*, No. 07-209-PLM, ECF 173 at 11 (W.D.

Mich. Sept. 3, 2020). It acknowledged that the court must consider the § 3553(a) factors, including post-sentencing conduct, and explain its reasons for rejecting the defense's arguments. *Id.* But again, it did not dispute Mr. Latham's updated account of his history and characteristics. *Id.*

On remand, the district court granted an additional reduction, to 324 months. *United States v. Latham*, No. 07-209-PLM, ECF 174 (W.D. Mich. Jan. 14, 2021). Eschewing the form order it had previously used, the court issued a five-page opinion that addressed Mr. Latham's § 3553(a) arguments. *Id.* Although it determined that the career-offender guidelines still applied, and that the offense was serious, the court reduced the sentence by three years to recognize Mr. Latham's "efforts at rehabilitation." *Id.* at 5.

This Court has stressed the salutary effects of adequate explanation at sentencing. "Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution." *Rita v. United States*, 551 U.S. 338, 356 (2007). And adequate explanation promotes meaningful appellate review. *Gall v. United States*, 552 U.S. 38, 50 (2007). But these systemic benefits are not the whole story: requiring consideration and explanation of the § 3553(a) factors has a direct impact on individual defendants' sentences.

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Curtis Robertson's case, from the Western District of Oklahoma, illustrates how a uniform rule

requiring consideration of the § 3553(a) factors can lead to different sentencing outcomes.

In 2007, Mr. Robertson was sentenced to life imprisonment for crack-cocaine and firearms offenses. *United States v. Robertson*, No. 07-56-C-1, ECF 302 at 3 (Dec. 27, 2019). His prior convictions for felony drug offenses mandated a statutory term of life imprisonment; he also was determined to be a career offender, which resulted in an advisory Guidelines range of life. *Id.* at 2–3.

Mr. Robertson filed a § 404 motion in 2019, asserting that the First Step Act and Fair Sentencing Act reduced his statutory range for the crack offenses to ten years to life and his Guidelines range to 360 months to life,[4] assuming he was still a career offender. *United States v. Robertson*, No. 07-56-C-1, ECF 301 at 7–9 (Oct. 28, 2019). He also urged the district court to consider, in the exercise of its discretion, that he might not be a career offender if sentenced under current Tenth Circuit law. *Id.* at 9. Finally, he argued that the § 3553(a) factors—a minimal disciplinary history, the stringent conditions of confinement at United States Penitentiaries, his willingness to avail himself of the limited programming opportunities available therein, and family support—weighed in favor of a reduced sentence. *Id.* at 9–14.

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[4] Mr. Robertson's conviction under 18 U.S.C. § 924(c) carried a mandatory consecutive sentence of 60 months' imprisonment. *United States v. Robertson*, No. 07-56-C-1, ECF 301 at 7 (Oct. 28, 2019).

In response, the government acknowledged that Mr. Robertson had covered offenses, and that he was no longer subject to mandatory life imprisonment pursuant to statute. *United States v. Robertson*, No. 07-56-C-1, ECF 302 at 6 (Dec. 27, 2019). But it argued that the district court could not revisit the career-offender designation in a First Step Act resentencing. *Id.* at 6–7.

The government did not refute, or otherwise respond to, Mr. Robertson's § 3553(a) arguments. *Id.* at 6–8. While it noted that Mr. Robertson's co-defendant had received a First Step Act sentence reduction to 180 months, and had a similar criminal history, it contended that the co-defendant was not similarly situated because he had not been determined to be a career offender or initially subject to mandatory life imprisonment. *Id.* at 7–8.

The district court reduced Mr. Robertson's sentence from life imprisonment to a total term of 420 months (360 months for the crack offenses, plus a consecutive 60 months for the § 924 conviction). *United States v. Robertson*, No. 07-56-C-1, ECF 303 at 4 (Jan. 16, 2020). It agreed with the government that it could not reevaluate the career-offender determination in a First Step Act proceeding. *Id.* at 3. And in declining to reduce the sentence below the amended Guidelines range, the district court did not discuss any of the § 3553(a) considerations raised by Mr. Robertson. *Id.* at 1–4.

The Tenth Circuit reversed. *United States v. Robertson*, 837 F. App'x 639, 641 (10th Cir. 2020). Its intervening decision in *United States v. Brown*, 974

F.3d 1137 (10th Cir. 2020), gave district courts discretion to reconsider a career-offender designation in the light of subsequent decisional law. *Id.* at 1144–46. The Tenth Circuit noted that in *Brown*, which involved the same disputed career-offender predicate as Mr. Robertson's case, it had remanded "for the district court to exercise its discretion to choose whether to reconsider Brown's career-offender status, as well as the appropriateness of his sentence after considering the 18 U.S.C. § 3553(a) factors." *Robertson*, 837 F. App'x at 641.[5] In the Tenth Circuit's view, Mr. Robertson stood in "the same legal position as Brown," and "deserve[d] the same relief." *Id.*

Mr. Robertson filed a renewed motion on remand, requesting a sentence at or near the mandatory minimum of 180 months. *United States v. Robertson*, No. 07-56-C-1, ECF 323 at 10 (Feb. 4, 2021). He reraised his career-offender and § 3553(a) arguments, supplementing the latter with additional information regarding the violence he had witnessed and suffered in prison, his disciplinary history, pre-incarceration work history, continued family support, and his co-defendant's sentence reduction. *Id.* at 6–10.

The government acknowledged that, regardless of whether Mr. Robertson remained a career offender, the district court had discretion to vary

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[5] In a previous decision, however, the Tenth Circuit had held that consideration of the § 3553(a) factors was "not required." *See United States v. Mannie*, 971 F.3d 1145, 1158 n.18 (10th Cir. 2020).

below the career-offender guideline under § 3553(a). *United States v. Robertson*, No. 07-56-C-1, ECF 324 at 5 (Feb. 25, 2021). It further stated that it had no reason to dispute Mr. Robertson's factual support for the § 3553(a) factors, and again highlighted the co-defendant's 180-month sentence. *Id.* It did not recommend a particular sentence, simply noting that any further reduction based on § 3553(a) factors was committed to the court's discretion. *Id.* at 6.

The district court declined to exercise its discretion to reconsider Mr. Robertson's career-offender status. *United States v. Robertson*, No. 07-56-C-1, ECF 326 at 1 (Mar. 4, 2021). Instead, it proceeded straight to other § 3553(a) factors, including Mr. Robertson's disciplinary history, age, participation in BOP programming, family and correctional facility support, and employability, as well as the co-defendant's statutory-minimum sentence. *Id.* at 1–2. Those factors, it concluded, supported a mandatory-minimum sentence of 180 months. *Id.* at 2.

Most of this § 3553(a) information was before the court when it reduced Mr. Robertson's sentence from life to 420 months. But the district court did not give full play to those factors—to the tune of an additional *twenty-year* reduction—until required to do so by the court of appeals.

2. *The temporal gap between the original sentencing and First Step Act proceedings underscores the importance of an updated § 3553(a) analysis.*

Fresh consideration of the § 3553(a) factors in the First Step Act context is crucial given the significant time that has necessarily elapsed between the original sentencing and a § 404 motion for reduction of sentence. Any defendant eligible for a First Step Act reduction was sentenced before August 3, 2010, the effective date of the Fair Sentencing Act. *See* Pub. L. 115-391, § 404, 132 Stat. 5194, 5222 (2018); *Dorsey*, 567 U.S. at 264. Some eligible defendants have been incarcerated much longer. *See e.g.*, *United States v. Merrick*, No. 94-163-RBS-19, ECF 1154 (E.D. Va. Nov. 6, 2020) (reducing 420-month sentence imposed in 1995 to time served under First Step Act).

Given this passage of time, the § 3553(a) factors—especially the defendant's history and characteristics, the need to afford adequate deterrence, and the need to protect the public—will not have remained static. Post-sentencing rehabilitation, in particular, is "highly relevant" to all of these sentencing considerations. *Pepper v. United States*, 562 U.S. 476, 491–93 (2011).

The cases featured below represent but a small sample of First Step Act proceedings where district courts used the § 3553(a) factors to guide their discretion, whether due to controlling circuit authority or on their own initiative, and imposed a

reduced sentence based on an updated § 3553(a) analysis.

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Because of the lengthy sentences being served by crack-cocaine offenders, the original sentencing judge may be unavailable to rule on a First Step Act motion. *See United States v. Shaw*, 957 F.3d 734, 741 (7th Cir. 2020). This discontinuity "could hamper a judge's consideration of a defendant's arguments, because the new judge would be heavily reliant on a previous explanation and record that was 'not created with the current statutory framework in mind.'" *Id.* (quoting *United States v. Allen*, 956 F.3d 355, 358 (7th Cir. 2020)).

In such cases, the new judge will have to discern the rationale for the original sentence from the cold record. In *United States v. Welch*, 2020 WL 6389830 (N.D. Ala. Oct. 30, 2020), for instance, the district court attempted to ascertain the original sentencing judge's reasons for imposing a below-Guidelines, 420-month sentence for Larry Welch's crack-cocaine and firearms convictions. *Id.* at *2. The new judge concluded that the original judge likely believed that the overall guideline range, driven by a crack-cocaine conviction, was "excessive"—as evidenced by the partly concurrent sentencing package he had put together. *Id.* The new judge stated that she would consider the original judge's "apparent rationale" but was "not bound to mimic [it]." *Id.*

Ultimately, the district court in *Welch* relied on its thorough, renewed consideration of the § 3553(a) factors to reduce the total sentence from 420 months

to 240 months, despite an unchanged advisory Guidelines range. *Id.* at *4–*5. It noted Mr. Welch's minimal parental guidance, severe past substance abuse, and sobriety while incarcerated. *Id.* at *5. It took into account Mr. Welch's age (64 years old), clean disciplinary record, positive programming, and institutional and family support. *Id.* While the district court did not downplay the seriousness of Mr. Welch's offenses or his criminal history, it observed that those offenses were tied to his drug addiction, and that continued sobriety would reduce the risk of recidivism. *Id.*

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Likewise, in *United States v. Knight*, 2021 WL 266341 (W.D. Pa. Jan. 27, 2021), a new judge imposed a significantly reduced sentence after conducting a fresh evaluation of the § 3553(a) factors. Carl Knight had been sentenced to life imprisonment for a crack-cocaine conspiracy under the mandatory Guidelines in 1999. *Id.* at *4. By the time Mr. Knight sought First Step Act relief, two decades later, a new judge had been assigned to his case. *Id.* at *4–*6.

The new judge rejected the government's suggestion to "follow the sentencing rationale utilized at a defendant's original sentencing hearing and simply arrive at the same sentence." *Id.* at *2. Reasoning that the First Step Act was intended to give the defendant a "'do-over of sorts,'" the district court declined to "shirk[] the responsibility of performing that task under the guise of prior judicial musings rendered under meaningfully different

circumstances." *Id.* Further, the district court pointed out, the Third Circuit had already required courts to apply the traditional § 3553(a) factors to a defendant's *current* circumstances when ruling on First Step Act sentence reductions. *Id.* at *3 (citing *United States v. Easter*, 975 F.3d 318, 325–27 (3d Cir. 2020)).

In accordance with *Easter*, the district court undertook a robust § 3553(a) analysis. Although it concluded that the (now-advisory) Guidelines range remained life, it took note of the fact that the Sentencing Commission had ameliorated the penalties for crack-cocaine offenses since the time of the original sentencing. *Id.* at *8–*9. The court also deemed Mr. Knight an "exemplary inmate," based on his work ethic, completion of dozens of educational and vocational classes, respected position as an inmate chaplain and mentor, and good institutional conduct. *Id.* at *9–*10.

The district court did not limit its consideration of § 3553(a) factors to post-sentencing rehabilitation, however. The record in *Knight* also included evidence of unwarranted disparity with respect to the conspiracy's kingpin, who cooperated with the government and was sentenced to eight years of imprisonment; indeed, the former prosecutor on the case submitted a letter stating his belief that Mr. Knight's mandatory life sentence was unjust. *Id.* While the district court acknowledged that the offense of conviction was serious, it concluded that Mr. Knight's maturation and post-sentencing rehabilitation reduced the risk of recidivism. *Id.* at *10–*11. Taken together, the § 3553(a) factors

convinced the district court to reduce Mr. Knight's life sentence to time served, approximately 280 months. *Id.* at *1.

Requiring renewed consideration of the § 3553(a) factors in First Step Act proceedings ensures that the court exercises its discretion "in accordance with the prevailing standards of today notwithstanding the government's perception that yesterday's views were better." *Id.* at *3.

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When a new judge presides over a First Step Act proceeding, a reviewing court cannot presume consideration of the relevant § 3553(a) factors based on the judge's prior familiarity with the defendant. *Cf. United States v. Eggersdorf*, 126 F.3d 1318, 1323 (11th Cir. 1997) (holding that district court had adequately considered § 3553(a) factors, based partly on fact that "the same district court judge who sentenced Defendant originally was the one who declined to resentence him"). Nor, in such cases, can sufficient explanation of the § 3553(a) factors be gleaned from the judge's statements at the initial sentencing. *Cf. Chavez-Meza v. United States*, 138 S. Ct. 1959, 1967 (2018) (in review of sentence-modification proceeding, declining to "turn a blind eye to what the [same] judge said at petitioner's initial sentencing").

Moreover, the fundamental premise of the First Step Act precludes fallback on the original sentencing rationale. The Act presents eligible defendants with "the opportunity" to reduce a quantity-based sentence "imposed . . . during what

must now be regarded as an obsolete era in federal sentencing jurisprudence." *United States v. Burrell*, 2020 WL 5014783, at *9 (E.D.N.Y. Aug. 25, 2020). In *Burrell*, the district court noted that the offense of conviction and the Guidelines range had not changed since Stanley Burrell was sentenced to life imprisonment in 2000, under the then-mandatory Guidelines. *Id.* at *9 & n.14. But it concluded that Mr. Burrell's "commendable record of substantial self-rehabilitation," in tandem with the sea change in sentencing law over the past two decades, justified a reduction to 30 years. *Id.* at *9–*10.

In the absence of guidance from the Second Circuit regarding the factors that a district court "may (or must) consider" when ruling on a First Step Act motion, *United States v. Holloway*, 956 F.3d 660, 666 (2d Cir. 2020), the district court in *Burrell* looked to the § 3553(a) factors to organize its discretionary decisionmaking. *Burrell*, 2020 WL 5014783, at *9. Under that rubric, it scrutinized the particulars of Mr. Burrell's coursework, employment, counseling programs, and disciplinary record. *Id.* This Court's review would ensure that other First Step Act movants receive similar consideration, regardless of geographical happenstance or the sentencing judge's personal inclination to invoke § 3553(a).

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Even when the same judge is available to rule on a First Step Act motion, the sheer lapse of time may have rendered the original § 3553(a) factors stale. Bervick McClendon sought a First Step Act

reduction from the same judge who sentenced him to life imprisonment in 2005. *United States v. McClendon*, 05-80091-DMM, ECF 79 (S.D. Fla. June 17, 2020). Although the district court did not recalculate Mr. McClendon's Guidelines range of 360 months to life, it reduced his sentence to 180 months, commenting, "Much has transpired since the original sentencing, both in the law and in Mr. McClendon's life." *Id.* at 1, 8 & n.2. The § 3553(a) factors, which the district court regarded as mandatory, provided the familiar framework for consideration of those intervening developments. *Id.* at 8–11.

To be sure, Mr. McClendon's post-sentencing rehabilitation loomed large in the district court's decision to reduce his life sentence to fifteen years. *Id.*at 6–7. However, the district court first checked recent average sentences imposed on crack-cocaine offenders (78 months) and career offenders (152 months) to gauge the current seriousness of the offense. *Id.* at 9–10.

The district court explained that it initially imposed a sentence of life imprisonment based on Mr. McClendon's criminal history, which led it to believe that he posed a serious threat to public safety. *Id.* at 2. But Mr. McClendon's performance during fifteen years in prison had eroded that view: he had overcome his drug addiction, completed his GED, taken numerous courses and taught anger-management classes, excelled in his work in prison industries (UNICOR), and received one of the first UNICOR scholarships to participate in Louisiana

State University's distance-learning program. *Id.* at 6–7. The district court stated: "When I sentenced Mr. McClendon in 2005, I underestimated his potential and capacity for change." *Id.* at 10. When consideration of the § 3553(a) factors is required, a court must reckon with such changes in the defendant, and in the prevailing legal climate.

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NACDL submits that Mr. Houston's post-sentencing rehabilitation is on a par with the updated history and characteristics detailed by the courts in *Welch*, *Knight*, *Burrell*, and *McClendon* in imposing significantly below-Guidelines sentences. But consideration of these circumstances is conspicuously missing from the decision in Mr. Houston's case. Pet. App. 8a–11a. NACDL agrees that this Court's review is warranted because the difference in procedural opportunity will be outcome dispositive in many cases.

3. *In light of the very real possibility that renewed § 3553(a) consideration results in lower sentences, the Court must intervene now.*

NACDL agrees with Mr. Houston that this Court should act swiftly to resolve the entrenched conflict among the courts of appeals. Declining to decide whether consideration of § 3553(a) factors in § 404 proceedings is mandatory, or merely permissible, will result in defendants fully serving sentences that are "greater than necessary" to achieve the purposes of sentencing, 18 U.S.C. § 3553(a).

Cases remanded by the courts of appeal for consideration of the § 3553(a) factors reveal the costs of additional delay. In *Olvis*, for instance, the district court ultimately reduced a 404-month sentence to 240 months. *United States v. Olvis*, No. 95-38-RGD, ECF 344 at 9 (E.D. Va. Apr. 23, 2021). But Mr. Olvis had already served approximately 325 months by the time the case was decided on remand. *Id.* Nearly a year elapsed between the initial denial and the grant of relief on remand — time devoted to the direct appeal and supplemental post-remand briefing. *Id.* at 4–5. Absent prompt resolution of the question presented, other movants with meritorious claims may likewise end up overserving their sentences.

Similarly, the Fourth Circuit vacated the district court's denial of Robert Richardson's First Step Act motion, stating that it was unclear whether the district court had found Mr. Richardson ineligible or had "accepted that Richardson was eligible for a reduction but summarily denied it, without considering the § 3553(a) sentencing factors, on the grounds that his advisory Guidelines range would remain unchanged." *United States v. Richardson*, 807 F. App'x 264, 265 (4th Cir. 2020) (per curiam). Either ruling would amount to error, the Fourth Circuit held. *Id.* By the time the Fourth Circuit ruled in his favor, however, Mr. Richardson had completed serving his term of imprisonment and had been released from custody. *United States v. Richardson*, No. 05-40-GMG, ECF 329 at 3 (N.D. W. Va. June 24, 2020).

Limiting the real-world relief that a First Step Act sentence reduction can provide is at odds with the statute's "strong" remedial purpose: to rectify a sentencing regime that imposed "disproportionate and racially disparate sentencing penalties." *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020). The Act "makes possible the fashioning of the most complete relief possible" to eligible defendants, who "are serving sentences that Congress now deems unfair." *Id.* (cleaned up). While required consideration of the § 3553(a) factors advances this remedial purpose, it is unavailable to many eligible defendants depending on their geographical location. Because this uneven procedural opportunity translates into disparate sentencing outcomes, this Court's review is warranted now.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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