No. 20-1479

In the Supreme Court of the United States

EDDIE HOUSTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error in declining to reduce petitioner's sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, without expressly discussing the factors set forth in 18 U.S.C. 3553(a).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Cal.):

United States v. *Houston*, No. 07-cr-109 (Jan. 17, 2020)

United States Court of Appeals (9th Cir.):

United States v. *Houston*, No. 20-10043 (May 22, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is reprinted at 805 Fed. Appx. 546. The order of the district court (Pet. App. 5a-12a) is not published in the Federal Supplement but is available at 2020 WL 264362.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2020. A petition for rehearing was denied on November 20, 2020 (Pet. App. 13a-15a). On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on April 19, 2021. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of California, petitioner was convicted on one count of conspiring to possess with an intent to distribute at least 50 grams of cocaine base (crack cocaine), to possess with an intent to distribute at least 500 grams of cocaine, and to manufacture at least 50 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 846. Pet. App. 5a. The district court sentenced petitioner to 200 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 6a. Petitioner did not appeal.

The district court subsequently granted petitioner a sentence reduction under 18 U.S.C. 3582(c)(2), reducing the term of imprisonment to 188 months. Pet. App. 6a. Neither party appealed.

After the enactment of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a further sentence reduction under Section 404 of that Act. Pet. App. 7a. The district court denied relief. *Id.* at 5a-12a. The court of appeals affirmed. *Id.* at 1a-4a.

1. Petitioner trafficked crack and powder cocaine from a residence in Sacramento, California, in which his sister and mother lived. Plea Agreement 11; Presentence Investigation Report (PSR) ¶ 9. Petitioner "owned and controlled" the drugs that he "concealed and stored" at the home. Plea Agreement 11. In March 2007, based on information provided by a confidential informant, federal agents and Sacramento police established surveillance outside the residence. *Ibid.*; PSR ¶¶ 9-11. On March 8, petitioner directed his sister to

deliver 26.6 grams of crack cocaine to a man in a car outside the home; the law-enforcement officers outside observed the drug transaction. Plea Agreement 11.

Officers subsequently found petitioner in possession of $12,000 in cash. Plea Agreement 11-12. And after executing a search warrant at the residence, the officers discovered, among other things, another $2000 in cash, crack and powder cocaine, and drug-trafficking paraphernalia. See *id.* at 12-13. Law enforcement later learned that petitioner had "been regularly supplying" others "with crack cocaine for re-sale for several years" and directing his sister's involvement in drug-trafficking activities. *Id.* at 13; see *id.* at 11-13.

2. A grand jury in the Eastern District of California indicted petitioner on one count of conspiring to possess with an intent to distribute at least 50 grams of crack cocaine, to possess with an intent to distribute at least 500 grams of cocaine, and to manufacture at least 50 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 846; one count of possessing with an intent to distribute at least 50 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1); one count of possessing with an intent to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1); and one count of manufacturing at least 50 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1). Superseding Indictment 1-3. Petitioner pleaded guilty to the conspiracy count pursuant to a plea agreement. Pet. App. 5a; see Judgment 1; Plea Agreement 1-13.

At sentencing, the district court found that petitioner was responsible for 2831.69 grams of crack cocaine and 750.3 grams of powder cocaine, which resulted in a base offense level of 36. Pet. App. 5a-6a. After applying a two-level role enhancement and a three-level

reduction for acceptance of responsibility, the court calculated a total offense level of 35. *Id.* at 6. When combined with petitioner's criminal history category IV, that resulted in an advisory Guidelines sentencing range of 235 to 293 months of imprisonment. *Id.* at 6a. The court sentenced petitioner to 200 months of imprisonment, to be followed by ten years of supervised release. *Ibid.* Petitioner did not appeal.

3. In the Fair Sentencing Act of 2010 (Fair Sentencing Act), Pub. L. No. 111-220, 124 Stat. 2372, Congress altered the statutory penalties for certain crack-cocaine offenses. Before those amendments, a non-recidivist defendant convicted of trafficking (or conspiring to traffic) 50 grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, faced a minimum term of imprisonment of ten years, a maximum term of imprisonment of life, and a minimum term of supervised release of five years. 21 U.S.C. 841(b)(1)(A)(iii) (2006) and 21 U.S.C. 846. A non-recidivist defendant convicted of trafficking (or conspiring to traffic) five grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, faced a minimum term of imprisonment of five years, a maximum term of imprisonment of 40 years, and a minimum term of supervised release of four years. 21 U.S.C. 841(b)(1)(B)(iii) (2006) and 21 U.S.C. 846. For powder-cocaine offenses, Congress had set the threshold amounts necessary to trigger the same penalties significantly higher. 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii) (2006) and 21 U.S.C. 846.

The Fair Sentencing Act reduced that disparity in the treatment of crack and powder cocaine by increasing the amount of crack cocaine necessary to trigger the penalties described above. Specifically, Section 2(a) of

the Fair Sentencing Act increased the threshold quantities of crack cocaine necessary to trigger the statutory penalties set forth in Section 841(b)(1)(A) from 50 grams to 280 grams, and in Section 841(b)(1)(B) from five grams to 28 grams. 124 Stat. 2372. Those changes applied only to offenses for which a defendant was sentenced after the Fair Sentencing Act's effective date (August 3, 2010). See *Dorsey* v. *United States*, 567 U.S. 260, 273 (2012).

Under the Sentencing Guidelines, the base offense level for controlled-substance offenses varies depending on the type and amount of substance involved. In 2014, the Sentencing Commission promulgated Amendment 782, which retroactively reduced the base offense level for most drug quantities. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014); see *id.* Amend. 788. In 2015, the parties in this case agreed that in light of Amendment 782, petitioner was eligible for a sentence reduction under Section 3582(c)(2), which permits a district court to reduce a previously imposed term of imprisonment if the term was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see Pet. App. 6a. At the recommendation of both parties, the district court reduced petitioner's term of imprisonment to 188 months. Pet. App. 6a.

4. In 2018, Congress enacted Section 404 of the First Step Act to create a mechanism for certain defendants sentenced before the effective date of the Fair Sentencing Act to seek sentence reductions based on that Act's changes. The mechanism is available if a defendant was sentenced for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section

2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." 132 Stat. 5222; see *Terry* v. *United States*, 141 S. Ct. 1858, 1862 (2021).

Under Section 404(b), 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 * * * were in effect at the time the covered offense was committed." 132 Stat. 5222. Section 404(c) provides, *inter alia*, that Section 404 "shall [not] be construed to require a court to reduce any sentence." 132 Stat. 5222. It also states that a court may not reduce a sentence under Section 404 "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 * * * or if a previous motion made under [Section 404] to reduce the sentence was, after the date of enactment of [the First Step Act], denied after a complete review of the motion on the merits." *Ibid.*

In 2019, petitioner moved for a reduction of sentence under Section 404 of the First Step Act. D. Ct. Doc. 89 (Nov. 25, 2019). Petitioner contended that his conviction was for a "covered offense," and argued that he had a "remarkable" post-conviction record and the district court should reduce his sentence to 169 months of imprisonment and four years of supervised release in light of, among other things, the sentencing factors in 18 U.S.C. 3553(a). D. Ct. Doc. 89, at 8; see *id.* at 6-12. The government agreed that petitioner was eligible for a sentence reduction under Section 404 because, after the Fair Sentencing Act, his offense would be subject to the lesser penalties in Section 841(b)(1)(B)(iii). D. Ct. Doc. 92, at 4-5 (Jan. 2, 2020). But the government recommended that the district court exercise its discretion

not to further reduce petitioner's term of imprisonment. *Id.* at 5-8.

The government agreed with petitioner that the court "should consider the familiar factors in 18 U.S.C. § 3553(a)," including as informed by petitioner's post-offense conduct. D. Ct. Doc. 92, at 4. It contended, however, that "the nature of the offense conduct, the nature and characteristics of the defendant, the need to protect the public from future crimes of the defendant, and the need to avoid unwarranted sentencing disparities all support[ed]" petitioner's current sentence of 188 months of imprisonment, not the reduced sentence petitioner requested. *Id.* at 6. The government also observed that petitioner's term of imprisonment did not directly implicate the First Step Act's modification to the penalty provisions and that the guidelines range that petitioner faced had far exceeded the statutory minimum sentences specified in those provisions. *Id.* at 7. The government did not oppose petitioner's request for a reduction in his term of supervised release. *Id.* at 7-8.

The district court declined to further reduce petitioner's sentence. Pet. App. 5a-11a. The court acknowledged petitioner's argument that "the 18 U.S.C. 3553(a) factors and his post-conviction record" support a reduced sentence. *Id.* at 8a-9a. But the court found that Section 404 of the First Step Act did not provide a "compelling reason" for such a reduction. *Id.* at 10a. The court observed that petitioner's 188-month sentence is "far from the statutory maximum" for petitioner's offense either before or after the Fair Sentencing Act. *Id.* at 9a. And it "decline[d] to reduce a well-supported sentence * * * within the modified statutory penalty range." *Id.* at 11a.

5. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-4a. The court "assume[d] without deciding that [petitioner] is eligible for a sentence reduction under the First Step Act," but found that "the district court did not abuse its discretion in rejecting his request for a further sentence reduction." *Id.* at 3a. The court of appeals disagreed with petitioner's assertion that the district court did not "'provide a sufficient explanation' for rejecting his specific contention that he merited a reduced sentence based on the section 3553(a) factors," stating that 18 U.S.C. 3582(c)(1)(B), which permits a sentencing court to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute," including the First Step Act, "omits the requirement that courts consider section 3553(a) factors in modifying sentences." Pet. App. 3a. The court determined that the district court acted "reasonably" and did not "abuse its discretion in denying [petitioner] a further sentence reduction of a sentence that is already 'well supported.'" *Id.* at 4a.

The court of appeals denied panel rehearing and rehearing en banc. Pet. App. 13a-15a. District Judge Chhabria, who sat on the panel by designation, dissented from the denial of panel rehearing, suggesting that panel rehearing could address "the possibility that [the panel] erred in resting [its] ruling on the conclusion that the district court was not required to consider the sentencing factors in connection with the motion to reduce [petitioner's] sentence." *Id.* at 15a.

ARGUMENT

Petitioner contends (Pet. 10-26) that the Court should grant review to consider whether a district court is required to expressly consider the Section 3553(a) sentencing factors when determining whether to grant

a discretionary sentence reduction under Section 404 of the First Step Act. The court of appeals' unpublished, nonprecedential decision does not warrant this Court's review. The district court reasonably declined to further reduce petitioner's sentence. And the court of appeals' unpublished affirmance does not implicate any circuit conflict that warrants this Court's consideration. The petition for a writ of certiorari should be denied.

1. "'A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon* v. *United States*, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. 3582(b)) (brackets omitted); see 18 U.S.C. 3582(c). Section 3582(c)(1)(B) creates an exception to that general rule of finality by authorizing a court to modify a previously imposed term of imprisonment "to the extent otherwise expressly permitted by statute." 18 U.S.C. 3582(c)(1)(B). Section 404 of the First Step Act, which permits a court to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed," § 404(b), 132 Stat. 5222, is such a statute.

A court is never "require[d] * * * to reduce any sentence pursuant to [Section 404]." First Step Act § 404(c), 132 Stat. 5222. When petitioner was originally sentenced, his drug-trafficking conspiracy offense was subject to a statutory penalty range of ten years to life imprisonment and a minimum term of supervised release of five years. 21 U.S.C. 841(b)(1)(A)(iii) (2006) and 21 U.S.C. 846; see Pet. App. 9a. After the Fair Sentencing Act, that offense would instead have been subject to a statutory sentencing range of five to 40 years of imprisonment and a minimum term of supervised release

of four years. 21 U.S.C. 841(b)(1)(B)(iii), and 846; see Pet. App. 9a.

Petitioner's sentence—188 months of imprisonment (just under 16 years), to be followed by ten years of supervised release—lies in the middle of each range. Pet. App. 6a. His underlying offense conduct, as stipulated to in the plea agreement, involved orders of magnitude more than the five grams of crack cocaine necessary to trigger those penalties. Plea Agreement 6, 11-13; see Pet. App. 6a & n.1; PSR ¶ 19. He has also already received a sentence reduction based on the retroactive Guidelines amendments, see p. 5, *supra*, and that already-reduced sentence was neither dictated by nor proximate to the top or bottom of either of the relevant statutory penalty ranges. Thus, although petitioner was eligible for a discretionary sentence reduction under Section 404, because he was convicted of a crack-cocaine offense that "triggered [a] mandatory-minimum penalt[y]" that was subsequently modified by the Fair Sentencing Act, *Terry* v. *United States*, 141 S. Ct. 1858, 1864 (2021), the district court reasonably declined to further reduce petitioner's sentence under the First Step Act in those circumstances.

Given the lack of any apparent connection between the pre-Fair Sentencing Act statutory minimum for petitioner's offense and petitioner's actual sentence, "[t]he mere fact that the Fair Sentencing Act lowered [petitioner's] statutory penalty range is not a compelling reason to reduce his sentence further." Pet. App. 10a-11a. And as the district court observed, petitioner's current 188-month sentence is "well-supported." *Id.* at 11a. Petitioner served as the leader of a massive crack and cocaine trafficking operation. Although petitioner was charged with conspiring to distribute at least 50

grams of crack cocaine (the maximum statutory quantity at the time), when police searched petitioner's residence, they discovered approximately 2.8 kilograms of crack cocaine, in addition to powder cocaine. PSR ¶ 19; see Plea Agreement 11-13. His criminal history, moreover, includes violently attacking the mother of his child and serving as an accessory to the beating of an individual that resulted in the victim's death. PSR ¶¶ 41-42, 44-45. And while petitioner emphasizes (Pet. 18-19) his favorable post-conviction record, even in a plenary resentencing, a court is not required to "reduce a defendant's sentence upon *any* showing of postsentencing rehabilitation." *Pepper* v. *United States*, 562 U.S. 476, 505 n.17 (2011) (emphasis added). Even less does Section 404 of the First Step Act entitle petitioner to a sentence reduction that an offender with the same prison record, but a different (perhaps much less serious) offense of conviction would have no opportunity to receive. See First Step Act § 404(c), 132 Stat. 5222 ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

Petitioner argues (Pet. 20-21) that the court of appeals should have vacated the district court's decision on the ground that it failed to sufficiently consider the Section 3553(a) sentencing factors, as informed by his post-conviction record. Both parties urged the district court to consider the Section 3553(a) factors in resolving his Section 404 motion. See D. Ct. Doc. 89, at 11; D. Ct. Doc. 92, at 5; see also Pet. App. 8a-9a. And the government did not argue in the court of appeals that the Section 3553(a) factors were irrelevant to the consideration of a motion under Section 404 of the First Step Act. See generally Gov't C.A. Br. 14-21. But the district court provided no indication that it would have reduced

petitioner's "well-supported sentence" were it required to more expressly consider those factors on remand. Pet. App. 11a. And in the absence of such an indication, the court of appeals' unpublished and nonprecedential decision does not warrant this Court's review.

2. Petitioner moreover fails to identify any sound systemic reason for reviewing the question presented at this time. The decision below does not suggest that a district court is precluded from considering the Section 3553(a) factors in a Section 404 proceeding, and petitioner identifies no circuit that has forbidden district courts from doing so. And the question whether a court "may" or "must" consider them is of much less practical import than petitioner suggests.

Even courts that have not required express consideration of the Section 3553(a) factors have cautioned that a "district court's decision" whether to reduce a sentence under Section 404 "must allow for meaningful appellate review" and that the district court must "provide some justification for the exercise of its decision-making authority." *United States* v. *Stevens*, 997 F.3d 1307, 1311 (11th Cir. 2021); see *United States* v. *Concepcion*, 991 F.3d 279, 290 (1st Cir. 2021) (listing factors district courts may consider, including the Section 3553(a) factors, "conduct that occurred between the date of the original sentencing and the date of resentencing," "guideline changes, whether or not made retroactive by the Sentencing Commission," and "any relevant factors (other than those specifically proscribed)"), petition for cert. pending, No. 20-1650 (filed May 24, 2021); *United States* v. *Mannie*, 971 F.3d 1145, 1158 (10th Cir. 2020) (affirming in light of the district court's "thorough and reasonably articulated basis for its conclusion" "that sentencing relief was not

warranted"). Such justifications may often involve an analysis that mirrors, if not expressly invokes, consideration of the Section 3553(a) factors that is required in other circuits. See, *e.g.*, *Mannie*, 971 F.3d at 1157-1158 (noting that the district court specifically considered, among other things, defendant's "criminal career"); *United States* v. *Moore*, 963 F.3d 725, 727 (8th Cir. 2020) (collecting decisions in which district courts "applied section 3553 factors on a section 404 motion"), cert. denied, 141 S. Ct. 1118 (2021).

Particularly because "courts are well versed in using § 3553 as an analytical tool for making discretionary decisions," *United States* v. *Shaw*, 957 F.3d 734, 741 (7th Cir. 2020), it is natural for a district court considering a Section 404 sentence reduction to consider the "nature and circumstances of the offense and the history and characteristics of the defendant," "the seriousness of the offense," and whether the current sentence "afford[s] adequate deterrence to criminal conduct." 18 U.S.C. 3553(a)(1) and (2). Accordingly, even in circuits that do not mandate such consideration, "many district courts are considering § 3553(a) sentencing factors in exercising their First Step Act discretion." *United States* v. *Hoskins*, 973 F.3d 918, 921 (8th Cir. 2020). Indeed, petitioner's only example of a district court decision granting a Section 404 sentence reduction based on the defendant's post-conviction record did not even cite Section 3553(a) and was not premised on any then-governing circuit precedent that required consideration of the Section 3553(a) factors in every case. See Pet. 17.

As a general matter, the courts of appeals permit district courts to take into account a broad array of considerations in determining whether to reduce sentences under Section 404. See, *e.g.*, *Mannie*, 971 F.3d at 1158

n.18 ("There is nothing in the [First Step Act] or § 3582(c)(1)(B) that precludes application of common sense, regardless of whether a common-sense consideration also happens to be codified in § 3553.") (citation omitted). Petitioner thus errs in suggesting (Pet. 17) that this Court's review is "vital" to "[e]nsuring even-handed application of § 404." Instead, the deferential abuse-of-discretion review applicable to sentencing determinations means that factual differences between cases are, in practice, likely to be far more significant than whether a district court is required to expressly consider Section 3553(a)'s codification of traditional sentencing factors. See *Gall* v. *United States*, 552 U.S. 38, 49 (2007) ("[T]he abuse-of-discretion standard of review applies to appellate review of all sentencing decisions."). In the absence of a strong indication that different courts are regularly reaching different results on similar facts, review in this Court—and particularly in this case—is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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