No. 20-1650

In the Supreme Court of the United States

CARLOS CONCEPCION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to consider all legal and factual developments since the defendant's original sentencing—whether or not related to the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372—in connection with his motion for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Mass.):

Concepcion v. *United States*, No. 11-cv-10172 (Feb. 3, 2011)

Concepcion v. *United States*, No. 16-cv-11577 (Aug. 30, 2016)

United States Court of Appeals (1st Cir.):

United States v. *Concepcion*, No. 09-1691 (Dec. 30, 2009)

Concepcion v. *United States*, No. 16-2209 (Apr. 27, 2017)

Concepcion v. *United States*, No. 17-1637 (July 31, 2017)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 991 F.3d 279. The order of the district court (Pet. App. 68a-78a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2021. The petition for a writ of certiorari was filed on May 24, 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 District of Massachusetts, petitioner was convicted on one count of possessing with intent to distribute at least five grams of a mixture and substance containing a detectable amount of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1). Judgment 1.

The district court sentenced petitioner to 228 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3. The court of appeals summarily affirmed. 09-1691 C.A. Order (Dec. 30, 2009). Petitioner unsuccessfully sought collateral review of his sentence under 28 U.S.C. 2255 on three occasions. Following the enactment of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a sentence reduction under Section 404 of that Act. See Pet. App. 5a-6a. The district court denied the motion, see *id.* at 68a-78a, and the court of appeals affirmed, *id.* at 1a-67a.

1. In December 2006, the Drug Enforcement Administration (DEA) and the New Bedford, Massachusetts Police Department began investigating an individual known as "Papi" or "Big Papi"—later identified as petitioner—who was selling drugs in the New Bedford area. Presentence Investigation Report (PSR) ¶¶ 8-9. In January 2007, a cooperating witness made a controlled purchase of 13.7 grams of crack cocaine from petitioner. PSR ¶¶ 8, 21. The following month, an undercover DEA agent purchased 13.8 grams of crack cocaine from petitioner. PSR ¶¶ 10-17. A week after that, authorities arranged a third drug deal, during which petitioner was arrested. PSR ¶¶ 17-19. At the time of his arrest, petitioner had 61.5 grams of powder cocaine in his possession. PSR ¶ 19. During a subsequent search of petitioner's suspected residence, officers recovered an additional 124.84 grams of powder cocaine, scales, packaging material, over $9000 in cash, two firearms, and ammunition. PSR ¶ 20.

A federal grand jury in the District of Massachusetts returned an indictment charging petitioner with one count of possessing with intent to distribute crack

cocaine, in violation 21 U.S.C. 841(a)(1) and (b)(1)(B). Indictment 1. The government subsequently filed an information pursuant to 21 U.S.C. 851, stating that petitioner had been previously convicted of drug offenses under Massachusetts law, and was therefore subject to enhanced penalties. D. Ct. Doc. 12 (June 27, 2007). Petitioner pleaded guilty. Pet. App. 4a.

Before sentencing, the Probation Office determined that petitioner was responsible for 27.5 grams of crack cocaine and 186.34 grams of powder cocaine, resulting in a base offense level of 26. PSR ¶¶ 29-32. Its presentence report also assigned petitioner a two-level enhancement under Sentencing Guidelines § 2D1.1(b)(1) (2008) for possessing a dangerous weapon. PSR ¶ 33. And it calculated a criminal history score of 11, resulting in a criminal history category of V. PSR ¶¶ 60-63.

The Probation Office further determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (2008). PSR ¶¶ 40-42, 64. Section 4B1.1(a) provided, and still provides, that a defendant is a "career offender," subject to an increased offense level, if

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

Sentencing Guidelines § 4B1.1(a) (2008); see *id.* § 4B1.1(b) and (c) (2008); see also Sentencing Guidelines § 4B1.1. Section 4B1.2 of the 2008 Sentencing Guidelines defined a predicate "crime of violence" to include (*inter alia*) an "offense under * * * state law, punishable by imprison-

ment for a term exceeding one year, that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 4B1.2(a) (2008). The Probation Office found that petitioner qualified as a career offender based on a previous Massachusetts conviction for possessing with intent to distribute cocaine; a Massachusetts conviction for armed carjacking; a Massachusetts conviction for armed robbery; a Massachusetts conviction for assault and battery with a dangerous weapon; and a Massachusetts conviction for distribution of crack cocaine. PSR ¶¶ 40, 64; see PSR ¶¶ 56, 57, 59.

Petitioner's career-offender classification increased his offense level to 37 pursuant to Sentencing Guidelines § 4B1.1(b) (2008). PSR ¶ 41. After a three-level reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1 (2008), petitioner's total offense level was 34. PSR ¶¶ 38, 42. The Probation Office accordingly calculated an advisory guidelines range of 262 to 327 months of imprisonment. PSR ¶ 111. And based on the Section 851 information, the Probation Office determined that petitioner was subject to a statutory-minimum term of ten years' imprisonment and a maximum term of life imprisonment. PSR ¶ 110; see 21 U.S.C. 841(b)(1)(B).

At sentencing, the district court adopted the Probation Office's findings and calculations. Sent. Tr. 10-11. The court, however, varied downward from the advisory guidelines range and sentenced petitioner to 228 months imprisonment, to be followed by eight years of supervised release. *Id.* at 23; Judgment 2-3. The court of

appeals summarily affirmed in an unpublished order. 09-1691 C.A. Order (Dec. 30, 2009).

2. Congress subsequently enacted the Fair Sentencing Act of 2010 (Fair Sentencing Act), Pub. L. No. 111-220, 124 Stat. 2372, which altered the statutory penalties for certain crack-cocaine offenses. Before those amendments, a non-recidivist defendant convicted of trafficking 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 supervised-release term of five years. 21 U.S.C. 841(b)(1)(A)(iii) (2006). A non-recidivist defendant convicted of trafficking 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 supervised-release term of four years. 21 U.S.C. 841(b)(1)(B)(iii) (2006). 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).

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 21 U.S.C. 841(b)(1)(A) from 50 grams to 280 grams, and in 21 U.S.C. 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).

In 2018, Congress enacted Section 404 of the First Step Act, which allows a defendant sentenced for a "covered offense," defined in Section 404(a) 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," to seek a reduced sentence. 132 Stat. 5222. 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), in turn, provides that Section 404 "shall [not] be construed to require a court to reduce any sentence," and prohibits a court from reducing 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.*

3. After his conviction and sentence became final, petitioner filed three separate motions to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. D. Ct. Doc. 47 (Jan. 31, 2011); D. Ct. Doc. 58 (Aug. 1, 2016); D. Ct. Doc. 65 (June 23, 2017); see Pet. App. 5a. The district court denied the first motion on the merits. D. Ct. Order (Feb. 3, 2011). The second and third motions were referred to the court of appeals as applications for leave to file a second or successive collateral

attack. D. Ct. Doc. 60 (Aug. 30, 2016); D. Ct. Doc. 66 (June 26, 2017); see 28 U.S.C. 2255(h) ("A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals."). The court of appeals denied each application in a summary order. 16-2209 C.A. Order (Apr. 27, 2017); 17-1637 C.A. Order (July 31, 2017); see Pet. App. 5a.

In 2019, petitioner moved *pro se* for a sentence reduction under Section 404 of the First Step Act. D. Ct. Doc. 69 (Apr. 22, 2019). Petitioner contended that his conviction was for a "covered offense." *Id.* at 5-7. He observed that, under the Fair Sentencing Act, his offense would have been subject to a maximum term of imprisonment of 20 years, rather than life imprisonment, and that the statutory change would have affected his Sentencing Guidelines calculation, producing an advisory guidelines range of 188 to 235 months of imprisonment, rather than 262 to 327 months of imprisonment. *Id.* at 7. He suggested that, if the district court "chose to enter a comparable sentence" to his original sentence "under the reduced statutory penalties and guidelines"—*i.e.*, varying downward 38 months from the bottom of the guidelines range—his reduced sentence "could be as low as *154* months." *Ibid.*

The government agreed that petitioner was eligible for a sentence reduction; that petitioner's adjusted guidelines range was 188 to 235 months; and that the district court had discretion "whether to reduce [petitioner's] sentence." D. Ct. Doc. 78, at 3-4 (June 27, 2018). But the government maintained that because "there has been no change in the reasons that support [petitioner's original] sentence, no reduction is warranted." *Id.* at 1; see *id.* at 4. The government pointed out that the 228-month sentence that the district court

had originally imposed fell within the adjusted guidelines range after application of the Fair Sentencing Act. *Id.* at 6. And the government further stated that a court "may consider post-offense conduct, either positive or negative, in assessing whether to adjust a previously imposed sentence," and explained that petitioner had committed seven disciplinary infractions while incarcerated, including for possessing drugs and for possession of a weapon. *Id.* at 7.

In a counseled reply, petitioner argued for the first time that the district court should no longer consider him to be a career offender. D. Ct. Doc. 82, at 7-8 (July 19, 2019); see D. Ct. Doc. 71 (Apr. 26, 2019). Specifically, petitioner argued that one of his prior state court drug convictions had been vacated (and a notice of *nolle prosequi* had been entered in the case), and that his armed carjacking, armed robbery, and assault and battery with a dangerous weapon convictions no longer qualified as "crimes of violence" in light of post-sentencing amendments to Sentencing Guidelines § 4B1.1 and that his recalculated guidelines range was 57 to 71 months imprisonment. D. Ct. Doc. 82, at 2, 7-8. He also contended that, while his disciplinary infractions were "relevant," they should not "predominate" the inquiry. *Id.* at 10. And petitioner asserted, based on the amended statutory penalties and other more positive post-sentencing conduct, that the district court should "reduce his sentence to time served" or, at a minimum, "convene a resentencing hearing at which [petitioner] is present and may be heard." *Id.* at 2; see *id.* at 10-12.

The district court denied petitioner's motion. Pet. App. 68a-78a. The court noted the parties' agreement that because the mandatory statutory penalty for petitioner's offense would be reduced under the Fair Sen-

tencing Act, petitioner was eligible for a discretionary sentence reduction under Section 404 of the First Step Act. *Id.* at 71a. But the court observed that petitioner's sentence still fell "within the authorized range after the passage of the Fair Sentencing Act," and determined that no reduction was warranted because if petitioner "came before the [c]ourt today and the [c]ourt considered only the changes in law that the Fair Sentencing Act enacted, his sentence would be the same." *Ibid.* The court explained that petitioner's original sentence "was fair and just" when it was imposed and "remains so today." *Id.* at 72a. And the court declined to consider whether petitioner remained a career offender, reasoning that "Section 404 does not authorize a plenary resentencing" and therefore does not "authorize such relief." *Ibid.*

4. The court of appeals affirmed, finding the district court had not abused its discretion in declining to reduce petitioner's sentence. Pet. App. 1a-24a.

The court of appeals rejected petitioner's argument that the district court was required to recalculate petitioner's advisory guidelines range "under the current iteration of the sentencing guidelines." Pet. App. 8a-9a. The court of appeals observed that by requesting a "present day review of the section 3553(a) factors" and application "of the guidelines in effect at the time of resentencing," petitioner "seeks what amounts to a plenary review of his sentence." *Id.* at 10a (quotation marks omitted). The court explained: "[t]he permission granted in section 404(b) is only permission to 'impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect,'" not to conduct a plenary resentencing. *Id.* at 14a (quoting First Step Act § 404(b)-(c), 132 Stat. 5222). "Simply put, a First Step

Act resentencing is not the correct vehicle through which a defendant may demand the benefits of emerging legal developments unrelated to sections 2 and 3 of the Fair Sentencing Act." *Ibid.*

The court of appeals made clear, however, that the First Step Act does not entirely preclude a district court from considering such changes. The court of appeals elaborated that, although a district court's assessment of whether a sentence reduction is warranted requires "plac[ing] itself at the time of the original sentencing and keeping the then-applicable legal landscape intact, save only for the changes specifically authorized by sections 2 and 3 of the Fair Sentencing Act," Pet. App. 18a, a district court that finds a modification to be warranted "may, in its discretion, consider other factors relevant to fashioning a new sentence," including non-retroactive changes to the sentencing guidelines or the defendant's conduct since the original sentencing. *Id.* at 19a; see *id.* at 19a-20a. Applying that framework, the court of appeals found "nothing resembling" an abuse of discretion in the district court's "reasoned and reasonable" judgment in this case. *Id.* at 24a.

Judge Barron dissented. Pet. App. 25a-67a. He agreed with the panel majority that the First Step Act authorized only a limited modification of a previously imposed sentence and does not require the court to recalculate the defendant's guidelines range under current law. *Id.* at 36a-43a; see *id.* at 60a. But in his view, Section 404 should be "construed to permit a district court" to consider "post-sentencing developments (whether factual or legal)" both "in deciding whether to reduce the defendant's original sentence" and "in deciding by how much to reduce that sentence." *Id.* at 45a; see *id.* at 60a-61a. And although he interpreted the district

court's denial in this particular case to reflect a belief that it could not consider "intervening changes to the career offender Guideline," *id.* at 63a, he observed that "in many—maybe most—instances concerning § 404(b), the legal differences between [his] approach the majority's will not matter, practically speaking," and "[i]n that respect * * * agree[d]" with the majority that "there is not much 'daylight between" the two approaches, *id.* at 66a (quoting *id.* at 23a).

ARGUMENT

Petitioner contends (Pet. 23-30) that the district court was required to consider all intervening legal or factual changes since his original sentencing in deciding whether to grant him a discretionary sentence reduction under the First Step Act. The court of appeals correctly (and unanimously) rejected that contention, and its decision does not conflict with any decisions of this Court. And although the circuits' approaches to intervening legal developments in Section 404 proceedings are not uniform, this Court's intervention is not warranted. In any event, this case would be an unsuitable vehicle to consider the question. This Court has previously denied petitions for writs of certiorari presenting similar questions in *Hegwood* v. *United States*, 140 S. Ct. 285 (2019) (No. 19-5743), *Bates* v. *United States*, 141 S. Ct. 1462 (2021) (No. 20-535), *Harris* v. *United States*, No. 20-6832 (June 14, 2021), *Deruise* v. *United States*, No. 20-6953 (June 21, 2021), and *Kelley* v. *United States*, No. 20-7474 (June 28, 2021). The Court should follow the same course here.[*]

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[*] Counsel for petitioner has also submitted another petition for a writ of certiorari presenting the same question in *Maxwell* v. *United States*, No. 20-1653 (filed May 24, 2021).

1. The court of appeals correctly rejected petitioner's argument that the district court was required to consider all intervening legal and factual developments since his original sentencing when considering whether a sentence reduction under Section 404 of the First Step was warranted. Pet. App. 6a-24a.

"'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 expressly permits a court to reduce a previously imposed sentence for a "covered offense," § 404(a) and (b), 132 Stat. 5222, is such a statute. But its express authorization is narrowly drawn, permitting the district court only 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. Section 404 does not expressly authorize other changes to a sentence for a covered offense, and Section 3582(c)(1)(B) states that a previously imposed term of imprisonment may be modified only "to the extent otherwise expressly permitted." 18 U.S.C. 3582(c)(1)(B). Accordingly, Section 404 does not permit a plenary resentencing.

This Court reached a similar conclusion in *Dillon* v. *United States*, *supra*, explaining that Section 3582(c)(2) —which permits a sentence reduction for a defendant "sentenced to a term of imprisonment based on a

sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2)—"authorize[s] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon*, 560 U.S. at 826. The Court stressed that Section 3582(c)(2) allows district courts only to "'reduce'" sentences for a "limited class of prisoners" under specified circumstances. *Id.* at 825-826 (citation omitted). And because the statute permits only "a sentence reduction within * * * narrow bounds," a district court "properly decline[s] to address" alleged errors in the original sentence unrelated to the narrow remedy authorized by statute. *Id.* at 831.

The same logic applies to Section 404. Analogously to *Dillon*, Section 404(b) permits a district court to impose a "reduced sentence," and only for a limited set of prisoners—namely, those serving a sentence for a "covered offense" who are not excluded by Section 404(c). First Step Act § 404(b), 132 Stat. 5222. Analogously to *Dillon*, the district court may exercise discretion to reduce a sentence "only at the second step of [a] circumscribed inquiry," 560 U.S. at 827, in which it first determines eligibility for a reduction and thereafter the extent (if any) of such a reduction, see First Step Act § 404(b) and (c), 132 Stat. 5222. And analogously to *Dillon*, Section 404(b) limits the scope of relief available, authorizing a reduction only "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.

Accordingly, every court of appeals to consider the question has agreed that Section 404 does not create any entitlement to a plenary resentencing. See Pet. App. 18a-20a; *United States* v. *Moore*, 975 F.3d 84, 90 (2d

Cir. 2020); *United States* v. *Easter*, 975 F.3d 318, 326 (3d Cir. 2020); *United States* v. *Wirsing*, 943 F.3d 175, 181 & n.1 (4th Cir. 2019); *United States* v. *Hegwood*, 934 F.3d 414, 415 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019); *United States* v. *Smith*, 958 F.3d 494, 498 (6th Cir.), cert. denied, 141 S. Ct. 907 (2020); *United States* v. *Kelley*, 962 F.3d 470, 475-476 (9th Cir. 2020), cert. denied, No. 20-7474 (June 28, 2021); *United States* v. *Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020); *United States* v. *Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020); see also *United States* v. *Brewer*, 836 Fed. Appx. 468, 468-469 (8th Cir. 2021) (per curiam).

As those courts have explained, "[b]y its express terms, [Section 404] does not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing." *Moore*, 975 F.3d at 90. It does not, in other words, entitle movants to relitigate each and every legal issue that may have affected their original statutory and guidelines ranges. Instead, "[t]hrough its 'as if' clause, all that § 404(b) instructs a district court to do is to determine the impact of Sections 2 and 3 of the Fair Sentencing Act." *Id.* at 91 (citation omitted). The "as if" clause requires the district court to place itself in a "counterfactual legal regime," assessing how "the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape * * * would affect the defendant's sentence," before deciding whether to reduce the sentence to one "consistent with that change." *Kelley*, 962 F.3d at 475.

Petitioner is incorrect in asserting (Pet. 26) that the court of appeals implicitly "added the word 'only' to the First Step Act." As noted, it is not Section 404, but the "general rule of finality" that dictates that a defendant's

sentence "may not be modified by a district court except in limited circumstances," *Dillon*, 560 U.S. at 824, and Section 3582(c)(1)(B) that authorizes a reduction in a term of imprisonment "to the extent expressly permitted by statute," 18 U.S.C. 3582(c)(1)(B). And Section 404 does not create an exception to the finality of a sentence for changes unrelated to the Fair Sentencing Act. See *United States* v. *Fowowe*, 1 F.4th 522, 532 (7th Cir. 2021) ("Backdating §§ 2 and 3 is the explicit basis for and therefore the only requirement Congress imposed on a district court exercising its discretion.").

2. Petitioner appears to acknowledge that Section 404 does not require a "plenary resentencing," but he fails to explain why his construction of the statute would not require such a result. Pet. 29 (citation omitted). Petitioner contends, for example, that a Section 404 proceeding must begin with an "accurate calculation of the amended guidelines range at the time of resentencing." Pet. 24 (citation omitted). And he suggests that a district court must not "perpetuate a Guidelines calculation that was an error even at the time of initial sentencing." *Id.* at 25 (citation omitted). "[F]astening such requirements on district courts" comes "very close to requiring a plenary resentencing." *United States* v. *Lancaster*, 997 F.3d 171, 178 (4th Cir. 2021) (Wilkinson, J., concurring in the judgment). It is therefore difficult to see petitioner's basis for a gerrymandered carve-out of "relitigat[ing] old facts about [a defendant's] offense conduct[]" or "tak[ing] a second bite at the apple regarding the application of Sentencing Guidelines enhancements for which the law has not changed," Pet. 29-30, from the scope of arguments that a district court would have to consider under his theory.

Petitioner errs (Pet. 23-26) in relying on the term "impose" as used in Section 404(b) as support for his approach. See First Step Act § 404(b), 132 Stat. 5222 (court "may * * * impose a reduced sentence"). A district court that grants a motion under Section 404 does not "impose a new sentence in the usual sense," but instead—because the "impos[ition]" is limited by the "as if" clause—effects "a limited adjustment to an otherwise final sentence." *Dillon*, 560 U.S. at 826-827 (discussing Section 3582(c)(2) sentence reductions); see *Moore*, 975 F.3d at 91 ("[T]he First Step Act does not simply authorize a district court to 'impose a sentence,' period."); *Kelley*, 962 F.3d at 477 (rejecting argument that the word "'impose'" in the "resentencing context" signals Congress's intent to "authorize a plenary resentencing"). In that context, Congress's use of the phrase "impose a reduced sentence," First Step Act § 404(b), 132 Stat. 5222, simply clarifies that the court is not limited to reducing "the sentence" for the covered offense, but may also correspondingly reduce the overall sentence to the extent it embodies an intertwined sentencing package. Cf. *Dean* v. *United States*, 137 S. Ct. 1170, 1178 (2017).

Contrary to petitioner's suggestion (Pet. 27-28), Section 404's requirement to consider a sentence reduction as if Sections 2 and 3 of the Fair Sentencing Act were in effect "at the time the covered offense was committed," rather than at the time of the original sentencing, does not either explicitly or by necessary implication direct courts to consider unrelated post-sentencing changes. The statutory penalties for an offense are normally determined by the statutes in force at the time of commission, not the time of sentencing. See 1 U.S.C. 109; *Dorsey* v. *United States*, 567 U.S. 260, 272 (2012)

(explaining that statutory "penalties are 'incurred' * * * when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable"). Section 404's reference to the time of commission was therefore both the most natural and clearest way to describe the counterfactual circumstances that the court must evaluate. It does not indicate that a court is required to consider changes beyond Sections 2 and 3 of the Fair Sentencing Act.

Petitioner asserts that it would be "antithetical to Congress' intent and the Guidelines' purpose" and would create "practical problems" not to require district courts to consider all intervening changes of law and facts that have occurred since a defendant's original sentencing. Pet. 29 (citation omitted). But Section 3582 itself refutes the suggestion that Congress necessarily views reductions to otherwise-final sentences in such all-or-nothing terms. Section 3582(c)(2), while allowing reductions for retroactive Sentencing Guidelines amendments, treats the application of other changes in law or the correction of errors in the original sentence as "outside the scope of the proceeding." *Dillon*, 560 U.S. at 831. And petitioner provides no evidence that Congress's narrow and targeted approach to sentence reductions presents any insurmountable practicable problems for "arguing about and determining the appropriate" sentence reduction, if any, "to be imposed." Pet. 29.

Finally, petitioner errs in asserting (Pet. 28) that the purpose of Section 404 was not to "single out" defendants who were "subjected to harsh crack-cocaine sentences" as special beneficiaries of all intervening sentence-related developments. To the contrary, the First Step Act makes clear that defendants need not be granted

any relief at all. See § 404(c), 132 Stat. 5222 ("Nothing in this section shall be construed to require a court to reduce any sentence."). Instead, the manifest purpose of Section 404 was to finish the work of the Fair Sentencing Act, by eliminating the unwarranted sentencing disparities caused by the now-discredited 100-to-1 ratio in the treatment of powder and crack cocaine that led to those harsh sentences. Petitioner cannot dispute that interpreting Section 404(b) to require courts to reevaluate guidelines calculations under "case law unrelated to crack cocaine sentencing disparities would not create a level playing field but, rather, would put defendants convicted of crack cocaine offenses in a more advantageous position than defendants convicted of powdered cocaine offenses," Pet. 15a, as well as defendants sentenced after the First Step Act's enactment, neither of whom is entitled to seek reductions on such grounds. Such favoritism makes little sense. See *Lancaster*, 997 F.3d at 180 (Wilkinson, J., concurring in the judgment) ("This is not criminal justice. It is arbitrary readjustment, a haphazard windfall for a limited number of crack cocaine offenders.").

3. Petitioner asserts (Pet. 13-19) that further review is warranted because the courts of appeals are divided on the scope of proceedings under Section 404 of the First Step Act. But petitioner overstates the extent and practical effect of the disagreement. Petitioner posits three approaches prevailing in the courts of appeals as to whether and when a district court may consider intervening legal or factual developments in deciding to reduce a sentence under Section 404. He contends (*ibid.*) that three circuits (the Fifth, Ninth, and Eleventh Circuits) categorically forbid district courts from considering any legal developments; four circuits (the

Third, Fourth, Tenth, and D.C. Circuits) mandate that district courts invariably consider all legal and factual developments; and five circuits (the First, Second, Sixth, Seventh, and Eighth Circuits) permit, but do not require, district courts to consider such developments in the exercise of their discretion. In fact, most circuits fall into the third category, and none of the decisions petitioner cites necessarily would preclude a district court from considering intervening changes in law and fact in exercising its discretion whether to reduce a sentence under Section 404.

a. Petitioner describes (Pet. 16) the decision below as having "held that if the Fair Sentencing Act changes the applicable Guidelines range, the district court may, but is not required to, consider intervening legal and factual developments." Although the decision ostensibly limits the factors that may inform a threshold determination of whether to grant a reduction, petitioner—like all three judges below, see Pet. App. 23a (majority opinion); *id.* at 63a (Barron, J., dissenting)—attaches little practical significance to that. He instead describes (Pet. 16) the approach of the court below as "similar" to other circuits that have expressly recognized a district court's ability to, in its discretion, consider intervening changes in law or fact in deciding a motion for a Section 404 sentence reduction.

In *United States* v. *Maxwell*, 991 F.3d 685 (2021), for example, the Sixth Circuit explained that its decisions and those of "most of [its] sister circuits permit defendants to raise * * * intervening developments, such as changes to the career-offender guidelines, as grounds for reducing a sentence, and they permit (but do not require) district courts to consider these developments in balancing the § 3553(a) factors and in deciding whether

to modify the original sentence." *Id.* at 692. Likewise, in *United States* v. *Moore*, *supra*, the Second Circuit explained that "[w]e hold only that the First Step Act does not obligate a district court to consider post-sentencing developments. We note, however, that a district court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence." 975 F.3d at 92 n.36. Similarly, in *United States* v. *Hudson*, 967 F.3d 605 (2020), the Seventh Circuit determined that "a district court may consider all relevant factors when determining whether an eligible defendant merits relief under the First Step Act," including "current Guidelines" or "post-sentencing conduct." *Id.* at 611-612; see *Fowowe*, 1 F.4th at 531-532 ("§ 404 of the First Step Act authorizes but does not require a district court to apply intervening judicial decisions."). And the Eighth Circuit is in accord. See *United States* v. *Harris*, 960 F.3d 1103, 1106 (2020) ("[T]he § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines."), cert. denied, 141 S. Ct. 1438 (2021).

Although petitioner asserts (Pet. 17) otherwise, the Fifth Circuit has also adopted a similar approach. In *United States* v. *Robinson*, 980 F.3d 454, 465 (2020), the Fifth Circuit explained that its earlier decision in *United States* v. *Hegwood*, *supra*, on which petitioner relies (Pet. 17), holds only that a district court is not "*required* to consider [a] lower non-career offender guideline range that would apply" if the defendant were resentenced de novo. *Robinson*, 980 F.3d at 465. Like the circuits discussed above, the Fifth Circuit in *Robinson* made clear that "a district court, in exercising the sentencing discretion granted by the First Step Act, may

consider, as a § 3553(a) sentencing factor, that a defendant originally sentenced as a career offender, for purposes of U.S.S.G. § 4B1.1, would not hold that status if originally sentenced, for the same crime, today." *Ibid.* (emphasis omitted). And the Fifth Circuit has reached a similar conclusion about post-sentencing conduct—a district court is not "obliged" to consider it, but it may do so in its discretion. *United States* v. *Jackson*, 945 F.3d 315, 321-322 & n.7 (5th Cir. 2019), cert. denied, 140 S. Ct. 2699 (2020).

Petitioner does not identify any circuit that has categorically precluded district courts from considering intervening factual developments in Section 404 proceedings. See Pet. 17 (claiming only that some circuits "do not require" such consideration). And although the decisions that petitioner cites (Pet. 18-19) from the Ninth and Eleventh Circuits contain some language that could be read not to permit consideration of intervening legal developments, the question was not directly presented in those cases. See *Kelley*, 962 F.3d at 475 (explaining that the "only question on appeal" was "whether the First Step Act authorizes a plenary resentencing"); *Denson*, 963 F.3d at 1082 ("The issue on appeal is whether the district court is required to first hold a hearing at which [the defendant] was present" before resolving a Section 404 motion). As the Fifth Circuit's clarification of *Hegwood* in *Robinson* exemplifies, the courts' answers to the questions in those cases do not necessarily indicate that they would preclude all consideration of intervening legal developments in a case in which the issue is squarely presented. See Pet. App. 56a (Barron, J., dissenting) (noting that it is "not clear" whether the Ninth Circuit "would preclude consideration of legal changes" in the district court's discretion).

Indeed, petitioner himself states (Pet. 18) that the "Ninth Circuit acknowledged it was adopting the Fifth Circuit's" approach, and—as just explained—the Fifth Circuit has recognized that, in exercising its discretion under Section 404, a district court *may* consider intervening changes in law or fact. See pp. 20-21, *supra*; see also *United States* v. *Sims*, 824 Fed. Appx. 739, 744 (11th Cir. 2020) (per curiam) (assuming without deciding that district courts "may consider the current guideline range when 'determining whether and how to exercise their discretion,'" under *Denson*) (brackets and citation omitted).

b. Petitioner asserts that the Third, Fourth, Tenth, and D.C. Circuits do not merely permit, but instead invariably require, district courts to consider intervening developments in law and fact. See Pet. 13-15. But petitioner overstates both the differences between the approaches and the practical effect of those differences.

In *United States* v. *Easter*, *supra*, the Third Circuit concluded that Section 404 requires district courts to consider the Section 3553(a) factors. 975 F.3d at 325-326. And the court has since concluded, in a divided decision, that such consideration "must include any new, relevant facts that did not exist, or could not reasonably have been known by the parties, at the time of the first sentencing" and "a fresh inquiry into whether the defendant qualifies as a career offender" in light of intervening case law. *United States* v. *Murphy*, 998 F.3d 549, 555, 560 (3d Cir. 2021); see *id.* at 560 (Bibas, J., dissenting). But at the same time, the court "emphasize[d] that nothing in [its] holding" would "constrain[] a district court's discretion to depart or vary from the Guidelines range as it sees fit," including by "consider[ing] a defendant's changed career-offender status and still retain[ing] his previously imposed sentence." *Id.* at 559

(majority opinion). Given that no court of appeals categorically precludes a district court from consulting intervening changes in law or fact, the practical effect of the Third Circuit's decision on offenders who might seek a Section 404 reduction at this point (two-and-a-half years after such reductions became available) may be limited.

In *United States* v. *Chambers*, 956 F.3d 667 (2020), the Fourth Circuit concluded that a district court erred by declining to apply intervening case law, which had been declared retroactive, concerning the defendant's career-offender designation in considering a sentence reduction under Section 404. *Id.* at 668. And in *United States* v. *Lancaster*, *supra*, the court held that "[t]o determine the sentence that the court would have imposed under the Fair Sentencing Act," a district court "must engage in a brief analysis that involves the recalculation of the Sentencing Guidelines in light of [any] 'intervening case law,' and a brief reconsideration of the factors set forth in 18 U.S.C. § 3553(a)." 997 F.3d at 175 (citations omitted). Nevertheless, the Fourth Circuit stated only that the district court "can," not must, "take into account a defendant's conduct after initial sentencing." *Ibid.* It also emphasized that its interpretation of Section 404 "nonetheless leaves the court with much discretion," including the discretion to deny any relief if the court determines that the "sentence it would have imposed under the Fair Sentencing Act in light of intervening circumstances * * * would not be reduced." *Ibid.*

Recent Tenth and D.C. Circuit decisions have intermingled permissive and mandatory language in describing the way in which district courts should approach intervening developments. Compare, *e.g.*, *United States* v. *Brown*, 974 F.3d at 1139-1140 (stating that Section

404 "*allows* a district court to at least consider [the defendant's] claim that sentencing him as a career offender would be error given subsequent decisional law") (emphasis added), with *id.* at 1146 ("Upon remand, the district court *shall* consider [the defendant's] challenge to his career offender status in accordance with this opinion.") (emphasis added); compare also, *e.g.*, *United States* v. *White*, 984 F.3d 76, 90 (D.C. Cir. 2020) (agreeing with the Seventh Circuit that a district court "*may* consider all relevant factors when determining whether an eligible defendant merits relief under the First Step Act") (emphasis added) (quoting *Hudson*, 967 F.3d at 611), with *id.* at 93 ("[T]he court *must* do this on remand.") (emphasis added); see *United States* v. *Crooks*, 997 F.3d 1273, 1278 (10th Cir. 2021) ("The district court should have recalculated the guidelines range."); see also *United States* v. *Lawrence*, 1 F.4th 40, 43-44 (D.C. Cir. 2021) ("[T]he district court must consider 'all relevant factors[,]' including * * * potentially * * * 'new statutory minimum or maximum penalties; current Guidelines; post-sentencing conduct; and other relevant information about a defendant's history and conduct.'") (citation omitted). Either circuit could follow the trend of tightening up, refining, or reconciling statements in prior opinions on those points. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). And, again, where no circuit categorically precludes consideration of all legal and factual developments, the significance of these circuits' decisions is also yet to be determined.

In sum, "[a]lthough the case law is still evolving, it appears that most circuits generally permit, but [do] not require," consideration of intervening legal and factual

developments "in evaluating a First Step Act motion, insofar as the information relates to § 3553(a) factors." *Robinson*, 980 F.3d at 465 (emphases omitted); see *Fowowe*, 1 F.4th at 531 (noting the "growing consensus that a district court is not required to apply intervening judicial decisions"). And because a Section 404 sentence reduction is discretionary, see First Step Act § 404(b)-(c), 132 Stat. 5222, different approaches may not have a substantial practical effect. Accordingly, this Court's intervention is unwarranted.

4. Finally, even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it. Petitioner argues (Pet. 22) that his case is a superior vehicle to those in which the Court has previously declined further review, because the question presented in his petition "is broad enough to encompass the disagreement among all courts of appeals" regarding the scope of Section 404 proceedings as to both legal and factual developments. But while petitioner's question presented may be sufficiently broad to cover both legal and factual developments, it is not clear that either aspect of the question is squarely implicated here.

As for factual developments, the parties agreed in the district court that post-sentencing factual developments could be considered in resolving petitioner's Section 404 motion. See pp. 7-8, *supra*. The district court then determined that petitioner's sentence was "fair and just" when it was imposed *and* "remains so today." Pet. App. 72a. And even the dissenting judge in the court of appeals identified "no ground for finding error on th[at] score of the case" even assuming that consideration of "subsequent factual developments" is "obligatory." *Id.* at 61a.

As for intervening legal developments, it is unlikely that adopting petitioner's preferred view of the statute would alter the outcome here. Petitioner's argument that he would no longer qualify as a career offender under Sentencing Guidelines § 4B1.1 turns on whether his Massachusetts convictions for armed carjacking, armed robbery, and assault and battery with a dangerous weapon continue to qualify as convictions for "crime[s] of violence" after the Sentencing Commission amended the definition in 2018. See Pet. App. 72a. Because petitioner does not challenge that a prior Massachusetts drug conviction qualifies as a predicate conviction, see PSR ¶ 56, petitioner would remain a career offender if any one of the challenged convictions continues to qualify as a "crime of violence." See Sentencing Guidelines § 4B1.1(a) (requiring "at least two prior felony convictions of either a crime of violence or a controlled substance offense").

As the district court explained, answering that question would "require identifying and tracking down *Shephard* documents," Pet. App. 77a n.1 (citation omitted), to determine whether petitioner was convicted of a form of those crimes that "has an element the use, attempted use, or threatened use of physical force against the person of another" or otherwise qualifies as a crime of violence under the current definition, Sentencing Guidelines § 4B1.2(a)(1); see, *e.g.*, *United States* v. *Tavares*, 843 F.3d 1, 13 (1st Cir. 2016) (determining that Massachusetts assault and battery with a deadly weapon is a divisible and that one form of the offense qualifies as a crime of violence under the elements clause). Petitioner did not make such a showing when he raised the issue in his reply brief before the district court. It is therefore far from clear that petitioner

would avoid career-offender classification even under the Guidelines as they exist today. And even if he could, the district court's determination that his sentence remains "fair and just," Pet. App. 72a, suggests that a reduction would still be unlikely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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