No. 20-1650

In the Supreme Court of the United States

CARLOS CONCEPCION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
MATTHEW GUARNIERI
Assistant to the Solicitor General
JOEL S. JOHNSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a district court is required to consider all legal and factual developments occurring after an offender'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 a motion for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes, guidelines, and rules:

Statutes, guidelines, and rules—Continued: Page

Statutes, guidelines, and rules—Continued: Page

In the Supreme Court of the United States

No. 20-1650

CARLOS CONCEPCION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 991 F.3d 279. The opinion of the district court (Pet. App. 68a-78a) is not published in the Federal Supplement but is available at 2019 WL 4804780.

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, and was granted on September 30, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation

of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.

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

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

132 Stat. 5222.

Sections 2 and 3 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, provide:

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

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

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

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

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

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

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

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

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

124 Stat. 2372. Additional pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-28a.

STATEMENT

Following a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted of possessing five grams or more of cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2006). Judgment 1; Pet. App. 3a-4a. 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 affirmed. 09-1691 C.A. Judgment (Dec. 30, 2009). After the enactment of the First

Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a sentence reduction under Section 404 of that Act. The district court found petitioner eligible for a Section 404 reduction, but declined to grant one. Pet. App. 68a-78a. The court of appeals affirmed. *Id.* at 1a-67a.

A. Legal Background

1. The Anti-Drug Abuse Act of 1986

a. The Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, created a "two-tiered scheme" of enhanced minimum and maximum penalties for drug-trafficking offenses involving certain amounts of specified controlled substances. *Kimbrough* v. *United States*, 552 U.S. 85, 95 (2007); see 1986 Act § 1002(2), 100 Stat. 3207-2 to 3207-4. Both then and now, 21 U.S.C. 841(a) has made it "unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as authorized by federal law. 21 U.S.C. 841(a)(1); see 21 U.S.C. 812 (defining "controlled substance"). And the penalties for a violation of Section 841(a), which depend in part on the amount and type of controlled substance involved, have been set forth in 21 U.S.C. 841(b).

Subparagraph (A) of Section 841(b)(1) prescribes the most serious penalties—"a term of imprisonment which may not be less than 10 years or more than life," with potential enhancements—for offenses involving specified minimum amounts of particular Schedule I or II controlled substances, such as offenses involving "1 kilogram or more * * * of heroin." 21 U.S.C. 841(b)(1)(A)(i). Subparagraph (B) prescribes lesser

penalties—"a term of imprisonment which may not be less than 5 years and not more than 40 years," with potential enhancements—for violations involving lesser amounts of the same substances covered by Subparagraph (A), such as offenses involving "100 grams or more" of heroin. 21 U.S.C. 841(b)(1)(B)(i); cf. 21 U.S.C. 960(b)(1) and (2) (analogous tiered penalty structure for unlawful importation or exportation of Schedule I or II controlled substances).

The 1986 Act's penalties distinguished sharply between "[p]owder cocaine" and "[c]rack cocaine, a type of cocaine base." *Kimbrough*, 552 U.S. at 94. Specifically, Congress treated crack-cocaine offenses 100 times more harshly than corresponding powder-cocaine offenses for purposes of triggering the enhanced statutory penalties. Fifty grams of crack cocaine, as opposed to 5000 grams of powder cocaine, triggered the penalties prescribed in Subparagraph (A), and 5 grams of crack cocaine, as opposed to 500 grams of powder cocaine, triggered the penalties prescribed in Subparagraph (B). See 21 U.S.C. 841(b)(1)(A)(ii)-(iii) and (B)(ii)-(iii) (1988).

b. In 1987, the United States Sentencing Commission promulgated the first edition of the Sentencing Guidelines. See *Kimbrough*, 552 U.S. at 96 & n.7. For controlled-substance offenses that do not result in death or serious bodily injury, the Guidelines "use a drug quantity table based on drug type and weight to set base offense levels." *Id.* at 96; see Sentencing Guidelines § 2D1.1(a)(5) and (c). When the Commission created the drug-quantity table in the first edition of the Guidelines, it adopted the same 100-to-1 ratio for crack and powder cocaine that Congress had used in the 1986 Act. *Kimbrough*, 552 U.S. at 97.

Although the 1986 Act had used that ratio only in setting the threshold amounts of cocaine necessary to trigger increased minimum and maximum penalties, the Guidelines went "further and set sentences for the full range of possible drug quantities using the same 100-to-1 quantity ratio." *Kimbrough*, 552 U.S. at 97 (quoting U.S. Sent. Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 1 (Feb. 1995) (1995 Report)). Using the statutory drug quantities and corresponding minimum penalties as "reference points," the Commission "extrapolat[ed] * * * upward and downward to set proportional offense levels for other drug amounts." *Dorsey* v. *United States*, 567 U.S. 260, 268 (2012). For example, the Guidelines specified a base offense level of 24 for offenses involving either four grams of crack cocaine or 400 grams of powder cocaine, see Sentencing Guidelines § 2D1.1 (1987), "which for a first-time offender meant a sentencing range of 51 to 63 months," designed to fall just below the five-year statutory-minimum penalty for Section 841 offenses involving five or more grams of crack cocaine or 500 or more grams of powder cocaine. *Dorsey*, 567 U.S. at 267. As a result, the "100-to-1 quantity ratio was maintained throughout the offense levels." 1995 Report 126.

"During the next two decades, the Commission and others in the law enforcement community strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100 to 1." *Dorsey*, 567 U.S. at 268. The Commission issued four reports to Congress describing the disparity as "too high and unjustified." *Ibid.* The Commission "also asked Congress for new legislation embodying a lower crack-to-powder ratio." *Id.* at 269. In particular, the Commission proposed increasing the amounts of crack cocaine necessary to

trigger statutory-minimum penalties while leaving the equivalent powder-cocaine amounts unchanged. U.S. Sent. Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* viii (May 2002).

2. The Fair Sentencing Act of 2010

In 2010, Congress "accepted the Commission's recommendations," *Dorsey*, 567 U.S. at 269, by enacting the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. That Act "lower[ed] the 100-to-1 crack-to-powder ratio" in Sections 841(b)(1)(A) and (B) "to 18 to 1." *Dorsey*, 567 U.S. at 269. But the changes applied only to offenses for which the defendant was sentenced after the Fair Sentencing Act's effective date of August 3, 2010. *Id.* at 273.

Section 2 of the Fair Sentencing Act raised the threshold amounts of crack cocaine necessary to trigger statutory-minimum penalties in 21 U.S.C. 841(b)(1)(A) and (B) while leaving the powder-cocaine amounts unchanged. Specifically, Section 2(a)(1) of the Fair Sentencing Act amended Section 841(b)(1)(A)(iii) by striking the words "50 grams" and replacing them with "280 grams." § 2(a)(1), 124 Stat. 2372. Section 2(a)(2) amended Section 841(b)(1)(B)(iii) by striking the words "5 grams" and replacing them with "28 grams." § 2(a)(2), 124 Stat. 2372. Section 2(b) modified the analogous thresholds in 21 U.S.C. 960(b) for export/import offenses. § 2(b)(1) and (2), 124 Stat. 2372. And Section 3 of the Fair Sentencing Act separately eliminated the independent statutory-minimum penalty for simple possession of crack cocaine. § 3, 124 Stat. 2372.

Section 8 of the Fair Sentencing Act directed the Sentencing Commission to revise the Guidelines on an emergency basis within 90 days to "achieve consistency with other guidelines provisions and applicable law." § 8, 124

Stat. 2374. The Commission responded by promulgating Amendment 748. See 75 Fed. Reg. 66,188 (Oct. 27, 2010); Sentencing Guidelines App. C, Amend. 748 (Nov. 1, 2010). Amendment 748 "reduc[ed] the base offense levels for all crack amounts proportionally (using the new 18-to-1 ratio), including the offense levels governing small amounts of crack that did not fall within the scope of the mandatory minimum provisions." *Dorsey*, 567 U.S. at 276.

The Commission later made those changes permanent and retroactive, thereby allowing offenders sentenced before the Fair Sentencing Act to take advantage of the revised Guidelines by seeking retroactive Guidelines-based sentence reductions under 18 U.S.C. 3582(c)(2). Sentencing Guidelines App. C, Amends. 750, 759 (Nov. 1, 2011); see 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10. Courts considering such reductions "were still constrained, however, by the statutory minimums in place before" the Fair Sentencing Act, which were higher in some cases than what the Guidelines, revised to reflect an 18-to-1 ratio, recommended. *Terry* v. *United States*, 141 S. Ct. 1859, 1861 (2021).

3. The First Step Act of 2018

Eight years later, Congress enacted the First Step Act, which "made the 2010 statutory changes retroactive and gave courts authority to reduce the sentences of certain crack offenders." *Terry*, 141 S. Ct. at 1862. The First Step Act's retroactivity provision applies only in the case of a "covered offense," which Section 404(a) of the Act 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 of 2010, that was committed before August 3, 2010." § 404(a), 132 Stat. 5222 (citation omitted). Under Section 404(b) of

the Act, a district court that "imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222 (citation omitted).

Section 404(c) of the First Step Act provides that a court may not entertain a Section 404 motion to reduce a sentence when 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 when a "previous motion made under [Section 404] to reduce the sentence" has already been "denied after a complete review of the motion on the merits." § 404(c), 132 Stat. 5222. Section 404(c) further provides that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." *Ibid.*

B. Petitioner's Conviction And Sentence

1. At around noon on February 1, 2007, petitioner sold 13.8 grams of crack cocaine to an undercover federal agent in the parking lot of a convenience store in New Bedford, Massachusetts. Presentence Investigation Report (PSR) ¶¶ 10-17. Petitioner had also sold 13.7 grams of crack cocaine to a cooperating witness earlier in the investigation. PSR ¶ 21. The phone calls arranging the sale to the federal agent were recorded; the agent wore a recording device during the sale; and another agent videotaped the sale. PSR ¶¶ 11-12, 15. The undercover agent then arranged another proposed deal the following week, at which petitioner was arrested. PSR ¶¶ 18-19. After petitioner's arrest, authorities found 61.5 grams of powder cocaine in his car and

124.84 grams of powder cocaine at his residence—along with scales, packaging material, over $9000 in cash, and two loaded guns. PSR ¶¶ 19-20.

A grand jury in the District of Massachusetts charged petitioner with possessing five grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii) (2006). Indictment 1. Before trial, the government gave notice of its intent to seek an enhanced statutory penalty based on petitioner's prior state-court convictions for two cocaine offenses. D. Ct. Doc. 12, at 1 (June 27, 2007); see 21 U.S.C. 851. Under the version of Section 841(b)(1)(B) in effect at the time, any violation committed "after a prior conviction for a felony drug offense has become final" was subject to a higher minimum penalty of ten years rather than five years of imprisonment, and a higher maximum imprisonment term of life rather than 40 years. 21 U.S.C. 841(b)(1)(B) (2006).

Petitioner pleaded guilty to the indictment without a plea agreement. PSR ¶¶ 3, 6. Before sentencing, the Probation Office determined that petitioner qualified as a "career offender" under Sentencing Guidelines § 4B1.1 (2008), based on five prior state-court convictions. PSR ¶ 40; see PSR ¶¶ 56-57, 59, 64. A defendant is a career offender if he was at least 18 years old when he committed the current offense, the offense was "a felony that is either a crime of violence or a controlled substance offense," and he has prior convictions for two other such felonies. Sentencing Guidelines § 4B1.1(a). The base offense level for an offense committed by a career offender is the greater of either the base offense level prescribed in the Guidelines without regard to career-offender status or an offense level specified in the career-offender guideline itself, which is keyed to the

maximum statutory penalty. *Id.* § 4B1.1(b). A career offender is also automatically in criminal history category VI (the highest category). *Ibid.*

Here, because petitioner faced a maximum statutory penalty of life, the Probation Office calculated an offense level of 37 under the career-offender guideline. PSR ¶ 41. After an adjustment for acceptance of responsibility, the Probation Office found petitioner's advisory guidelines range to be 262 to 327 months of imprisonment. PSR ¶¶ 25, 42, 111. At sentencing, the district court adopted the Probation Office's calculations. Sent. Tr. 10-11. After considering the factors set forth in 18 U.S.C. 3553(a), the court imposed a below-Guidelines sentence of 228 months, to be followed by eight years of supervised release. Sent. Tr. 23-25; see Judgment 2-3. The court of appeals summarily affirmed. 09-1691 C.A. Judgment 1.

2. In 2011, petitioner sought collateral review by filing a pro se motion to vacate his sentence under 28 U.S.C. 2255, based principally on a claim that he had received ineffective assistance of counsel. D. Ct. Doc. 48, at 2-5 (Jan. 31, 2011). Petitioner noted in passing that the 100-to-1 ratio in the drug-quantity table in the Guidelines had been reduced to 18-to-1 since his sentencing. *Id.* at 6 n.1. The district court denied the motion but later granted petitioner's request to appoint counsel "to determine whether [he] is eligible for a sentence reduction as a result of the amendments to the Sentencing Guidelines for crack offenses." D. Ct. Doc. 50, at 1 (Oct. 20, 2011). Petitioner did not ultimately seek any relief on that basis.

Petitioner later filed two additional pro se Section 2255 motions raising other issues. See D. Ct. Doc. 58, at 1-2 (Aug. 1, 2016); D. Ct. Doc. 65, at 1 (June 23, 2017).

The district court found both motions to be unauthorized second or successive Section 2255 motions and referred them to the court of appeals, which declined to authorize them. See Pet. App. 5a; 28 U.S.C. 2255(h).

3. In 2019, petitioner filed a pro se motion seeking a reduction of his sentence under Section 404 of the First Step Act. D. Ct. Doc. 69, at 1 (Apr. 22, 2019). The district court declined to grant such a reduction. Pet. App. 68a-78a.

a. In response to the motion, the government acknowledged that petitioner was eligible for a Section 404 reduction because his prior conviction was a "covered offense" as defined in Section 404(a), but urged the district court to exercise its discretion to deny the motion. D. Ct. Doc. 78, at 3 (June 27, 2019) (citation omitted); see *id.* at 4-8. The government noted that, had Section 2 of the Fair Sentencing Act been in effect at the time of petitioner's offense, the statutory penalty range for his offense would have been zero to 30 years under 18 U.S.C. 841(b)(1)(C), rather than ten years to life under Section 841(b)(1)(B). *Id.* at 3-4. The government also noted that the statutory change would have lowered petitioner's advisory Guidelines range under the career-offender enhancement, which is keyed to the statutory maximum, to 188 to 235 months. *Id.* at 4.

The government maintained, however, that no reduction was warranted, in part because petitioner's 228-month sentence already fell within that revised advisory range. D. Ct. Doc. 78, at 6. The government also took the position that the district court "may consider post-offense conduct, either positive or negative, in assessing whether to adjust a previously imposed sentence." *Id.* at 7. And the government observed that petitioner's "record of regular and occasionally serious" disciplinary

infractions in prison—including for possessing drugs and a weapon—weighed against any reduction. *Ibid.*

In a counseled reply, petitioner argued that "under current law, he is no longer a career offender." D. Ct. Doc. 82, at 2 (July 19, 2019). Specifically, petitioner argued that one of his two prior drug convictions had been vacated and that the other three state-court convictions previously found to be qualifying prior convictions under the career-offender guideline—for armed carjacking, armed robbery, and assault and battery with a dangerous weapon—would no longer qualify as "crime[s] of violence" under the current version of the Sentencing Guidelines. *Id.* at 7-8. Petitioner requested that his sentence be reduced to time served. *Id.* at 12.

b. The district court agreed that petitioner was eligible for a reduction under Section 404, but declined to reduce his sentence. Pet. App. 68a-78a. The court explained that, 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." *Id.* at 71a. The court further explained that petitioner's 228-month sentence had been "carefully crafted to apply the factors in section 3553(a)," that the sentence was "fair and just," and that "[i]t remains so today." *Id.* at 72a.

The district court found petitioner's argument for a reduced sentence in light of changes to the career-offender enhancement, unrelated to the Fair Sentencing Act, to be "unavailing." Pet. App. 72a. The court observed that, while the Sentencing Commission had amended the definition of "crime of violence" used in the career-offender enhancement, the Commission had not made that amendment retroactive. *Id.* at 74a-75a; see Sentencing Guidelines App. C Supp., Amend. 798 (Aug.

1, 2016). And the court further observed that determining how to apply the amended crime-of-violence definition to petitioner's prior convictions would require a "complex" inquiry into the state-court records and the statutes of conviction, which it declined to undertake. Pet. App. 77a; see *id.* at 77a-78a & n.1.

4. The court of appeals affirmed. Pet. App. 1a-67a. The court rejected petitioner's argument that the district court was required to recalculate his advisory Guidelines range "under the current iteration of the sentencing guidelines." *Id.* at 8a-9a. The court of appeals observed that by demanding a "present day review of the section 3553(a) factors" and application of the current Guidelines, petitioner "seeks what amounts to a plenary review of his sentence." *Id.* at 10a. And the court explained that "[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) and (c), 132 Stat. 5222). "Simply put," the court observed, "the 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 did not, however, foreclose discretionary consideration of such developments in the context of adjudicating a Section 404 motion. Instead, it viewed Section 404 as entailing a "two-step inquiry," in which a district court first "place[s] itself at the time of the original sentencing and keep[s] 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. If the district court at that

point considers a sentence modification to be warranted, it may then, "in its discretion, consider other factors relevant to fashioning a new sentence," including nonretroactive changes to the Guidelines or post-sentencing conduct. *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 particular case. *Id.* at 24a. The court of appeals observed, among other things, that the district court had "consider[ed] the amended career offender guideline * * * and decided not to pantomime it as a matter of discretion." *Ibid.*

Judge Barron dissented. Pet. App. 25a-67a. He agreed with the panel majority that the First Step Act authorizes only a limited modification of a previously imposed sentence and does not require the district court to recalculate the offender's advisory Guidelines range under current law. *Id.* at 36a-43a; see *id.* at 60a. But he took the view that 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 unlike the panel majority, he interpreted the district court's order to reflect a belief that it could not consider "intervening changes to the career offender Guidelines" in deciding whether to reduce petitioner's sentence. *Id.* at 63a. He therefore would have reversed and remanded for additional consideration. See *id.* at 63a-66a.

SUMMARY OF ARGUMENT

Section 404 of the First Step Act requires a district court to consider whether an eligible crack-cocaine

offender should receive a sentence reduction in light of the amendments in "sections 2 and 3 of the Fair Sentencing Act." § 404(b), 132 Stat. 5222. It does not, however, mandate that the court also consider other post-sentencing developments. Section 404 instead allows the court to do so, or not, in the course of its discretionary decision. The district court in this case properly understood the scope of its discretion and permissibly exercised that discretion. The court's judgment should be affirmed.

I. Bedrock finality doctrine, codified in 18 U.S.C. 3582(c), generally precludes a sentencing court from modifying a preexisting term of imprisonment. Section 3582(c)(1)(B) creates a limited exception to that principle for modifications expressly authorized by statute. The modification authorized by Section 404 of the First Step Act fits within that exception and allows a focused sentence reduction, at the discretion of the district court, for certain crack-cocaine offenders. In *Dillon* v. *United States*, 560 U.S. 817 (2010), this Court explained that analogous modifications to a final sentence under 18 U.S.C. 3582(c)(2), based on retroactive Sentencing Guidelines amendments, do not call for a plenary resentencing. The same factors on which the Court relied in *Dillon*—text referring to a "modification of a term of imprisonment" to "reduce" it, and a limited scope of relief for a limited group of offenders, 560 U.S. at 825 (brackets omitted)—are present here. Thus, as the courts of appeals have uniformly recognized, the adjudication of a Section 404 motion is likewise not a plenary resentencing.

Instead, the only mandatory consideration for a district court in deciding whether or how much relief to grant is the one in Section 404's text—consideration of

a reduced sentence "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time" of the offense. First Step Act § 404(b), 132 Stat. 5222. That explicit singular mandate does not leave room for other implicit ones, such as a mandate to consider nonretroactive Guidelines amendments or other legal or factual developments that postdate the offender's sentencing. Indeed, the First Step Act itself makes changes to sentencing law that are expressly not retroactive and which therefore could not plausibly be mandatory considerations in the context of a Section 404 motion. Section 404 creates an avenue for seeking the benefit of the Fair Sentencing Act's amelioration of the prior 100-to-1 crack-to-powder sentencing disparity—not a general entitlement to seek the benefit of other postsentencing developments.

Petitioner only briefly defends the contention, on which he sought this Court's review, that Section 404 requires consideration of changes unrelated to the Fair Sentencing Act. His arguments lack merit. Petitioner primarily advances the syllogism that because Section 404 uses the term "impose" to describe a discretionary sentence reduction, and because 18 U.S.C. 3553 sets forth procedures for the "imposition" of a sentence, Section 404 necessarily incorporates Section 3553(a), including the requirement to calculate an offender's current Sentencing Guidelines range. But sentence-modification provisions that require consideration of the Section 3553(a) factors do so in an express and cabined way, that has no analogue in the context of Section 404 motions. Section 404 simply uses the phrase "impose a reduced sentence" to describe "reduc[ing] a sentence." First Step Act § 404(b) and (c), 132 Stat. 5222. The totality of Section 3553(a) factors anticipate

a blank-slate sentencing inconsistent with a motion that can result only in the reduction of a preexisting sentence, and implicit incorporation of Section 3553(a) would improperly transform Section 404 motions into the functional equivalent of a plenary resentencing.

Reading Section 404 to mandate that district courts consider postsentencing developments unrelated to the Fair Sentencing Act would also lead to unwarranted sentencing disparities. An eligible offender would have an opportunity—not available to defendants sentenced after the Fair Sentencing Act—to demand that a court take account of later developments unrelated to that Act, such as the nonretroactive Guidelines amendment that petitioner relies on here. Indeed, such offenders could potentially demand remedies that would circumvent the carefully delineated boundaries of the main federal collateral-relief statute, 28 U.S.C. 2255.

Rather than creating such a disparate entitlement, Section 404 instead supports a permissive approach to consideration of postsentencing changes, in line with the result for which most of petitioner's brief advocates. Although Section 404 does not require district courts to consider postsentencing changes unrelated to the Fair Sentencing Act, neither does it prohibit them from taking such changes into account. Rather, it leaves the consideration of such changes to the discretion of the district court that is assessing whether or how much of a reduction is warranted for a particular offender sentenced under the 100-to-1 crack-to-powder ratio. And because the Section 3553(a) factors provide a useful and familiar framework for the exercise of a court's discretion, district courts will frequently find those factors helpful in the Section 404 context. But courts are not required to recalculate the offender's Guidelines range

under current law, or otherwise treat the offender as though he had never been sentenced before.

II. The judgment below should be affirmed because the district court did not abuse its discretion in declining to reduce petitioner's sentence. The court properly understood the scope of its discretion and expressly determined that petitioner's existing sentence remains fair and just. That case-specific determination should be affirmed.

ARGUMENT

Section 404 of the First Step Act creates a mechanism for certain offenders sentenced before the Fair Sentencing Act to benefit from that Act's changes to the statutory-minimum sentencing regime for crack-cocaine offenses. Section 404 does not authorize a plenary resentencing, and it does not mandate that courts consider factual or legal developments unrelated to the Fair Sentencing Act.

As the government has consistently maintained, however, a district court considering a Section 404 motion *may*, in its discretion, consider such postsentencing developments, and may look to the traditional sentencing factors set forth in 18 U.S.C. 3553(a) when doing so. The Section 3553(a) factors provide a sensible and familiar framework for evaluating whether a particular offender merits a favorable exercise of the court's discretion, and nothing in the First Step Act or elsewhere prohibits a court from choosing to consider those factors.

In seeking this Court's review, petitioner opposed that permissible-but-not-mandatory approach, which he characterized (Pet. 23) as wrongly "permitting district courts to ignore present-day legal and factual circumstances." See Pet. 23-30. Now, however, petitioner

devotes most of his opening merits brief to defending that approach, which he styles as his fallback position. See, *e.g.*, Pet. Br. 4-5, 17-18, 21-33. That approach, which most courts of appeals have adopted, see Br. in Opp. 19-21, is correct. And because the district court in this case followed that approach, the judgment should be affirmed.

I. SECTION 404 OF THE FIRST STEP ACT LEAVES CONSIDERATION OF DEVELOPMENTS UNRELATED TO THE FAIR SENTENCING ACT TO THE DISTRICT COURT'S DISCRETION

Nothing in Section 404 of the First Step Act requires a district court to consider postsentencing developments unrelated to the Fair Sentencing Act in considering a discretionary sentence reduction for an offender sentenced under the now-discredited 100-to-1 crack-to-powder cocaine ratio. At the same time, however, nothing precludes the district court from considering such developments, and courts are often well-advised to take them into account.

A. Section 404 Motions Operate As A Limited Exception To The General Rule Of Finality In Criminal Sentencing And Do Not Require A Plenary Resentencing

1. As this Court has repeatedly recognized, the finality of criminal judgments is "essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments."). Once a district court has pronounced a sentence and the sentence becomes final, the court may not alter that sentence except as Congress allows. See, *e.g.*, *United*

States v. *Addonizio*, 442 U.S. 178, 189 n.16 (1979) ("The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it.") (citation omitted).

That bedrock principle is codified in 18 U.S.C. 3582(c), which provides that a court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). The statutory prohibition against such modifications is subject only to limited exceptions. As the court of appeals recognized, and as petitioner appears to accept, the exception codified in 18 U.S.C. 3582(c)(1)(B) provides "the appropriate framework for the evaluation" of a sentence-reduction motion under Section 404 of the First Step Act. Pet. App. 14a; cf. Pet. Br. 43.

Section 3582(c)(1)(B) provides that a "court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." 18 U.S.C. 3582(c)(1)(B). Section 404, in turn, "expressly permit[s]" a district court to "modify an imposed term of imprisonment" under Section 3582(c)(1)(B), *ibid.*, by providing that a "court that imposed a sentence for a covered offense may * * * 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." First Step Act § 404(b), 132 Stat. 5222.

2. The adjudication of a Section 404 motion is not a plenary resentencing akin to an initial sentencing. Although this Court has not directly considered the scope of a proceeding under Section 3582(c)(1)(B) and Section 404 specifically, the Court's decision in *Dillon* v. *United States*, 560 U.S. 817 (2010), has addressed the scope of Section 3582(c) sentence-modification proceedings, in

the context of a request for a reduced sentence under 18 U.S.C. 3582(c)(2). Section 3582(c)(2) codifies an exception, analogous to a Section 404 modification for modifications based on retroactive Guidelines amendments, providing that "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o)," a court "may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2).

In *Dillon*, the Court rejected an offender's characterization of a Section 3582(c)(2) proceeding as a "resentencing." 560 U.S. at 825. "By its terms," the Court observed, Section 3582(c)(2) "does not authorize a sentencing or resentencing proceeding." *Dillon*, 560 U.S. at 825. "Instead, it provides for the 'modif[ication of] a term of imprisonment' by giving courts the power to 'reduce' an otherwise final sentence in circumstances specified by the Commission." *Ibid.* (quoting 18 U.S.C. 3582(c)(2); brackets in original). The Court also found it "notable that the provision applies only to a limited class of prisoners—namely, those whose sentence was based on a sentencing range subsequently lowered by the Commission." *Id.* at 825-826. The Court accordingly determined that "Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Id.* at 826.

The same considerations apply equally to Section 404 motions under Section 3582(c)(1)(B). Section

3582(c)(1)(B), like Section 3582(c)(2), authorizes only a "modification of a term of imprisonment." *Dillon*, 560 U.S. at 825 (brackets omitted). Indeed, the language quoted in *Dillon* is the introductory language of Section 3582(c), which directly controls the scope of all Section 3582(c) exceptions. And Section 404, like Section 3582(c)(2), allows only for a "reduce[d]" sentence, for a "limited class of prisoners—namely, those whose sentence was based on a sentencing range subsequently lowered by" Sections 2 or 3 of the Fair Sentencing Act. *Id.* at 825-826; see First Step Act § 404(a) and (b), 132 Stat. 5222. The "text" and "narrow scope" of a Section 404 motion under Section 3582(c)(1)(B) thus "shows that," as in Section 3582(c)(2), "Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon*, 560 U.S. at 826.

As petitioner observes (Br. 43-45), *Dillon* identified "further support[]" for its "narrow view" of Section 3582(c)(2) proceedings in "[t]he substantial role Congress gave the Commission" in such proceedings, which has no direct analogue in the Section 404 context. *Dillon*, 560 U.S. at 826. But the Court in *Dillon* looked to the Commission's role only *after* determining that the "text" contemplated a "limited adjustment," not a plenary resentencing, by authorizing only a sentence "'modification'" with a "narrow scope." *Id.* at 825-826 (quoting 18 U.S.C. 3582(c); brackets omitted). As discussed above, those same factors apply with full force in the context of Section 404 motions.

Furthermore, the Court in *Dillon* looked to the Commission's role only to provide "context" for adhering to a "narrow view" of Section 3582(c)(2) proceedings notwithstanding Section 3582(c)(2)'s express "reference to

§ 3553(a)," which enumerates the factors that a court must consider in selecting a sentence de novo. 560 U.S. at 826. Neither Section 3582(c)(1)(B) nor Section 404 contains such an express reference to the Section 3553(a) factors. If anything, therefore, the textual distinctions between the relevant provisions only underscore the narrow scope of a district court's adjudication of a Section 404 motion. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

3. In accord with the text, context, and this Court's decision in *Dillon*, the courts of appeals have uniformly recognized that Section 404 motions are much more limited than plenary sentencings. 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, 141 S. Ct. 2878 (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).

That distinction carries important procedural and substantive consequences. For example, unlike a defendant at an initial sentencing or a plenary resentencing, an

offender seeking a sentence modification has no right to appointed counsel, see *United States* v. *Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (per curiam), or to be present at a hearing, see Fed. R. Crim. P. 43(b)(4); see also *Dillon*, 560 U.S. at 828. Correspondingly, as the Second Circuit has explained, Section 404 does not "oblig[e] a court to reconsider all aspects of an original sentencing," because "[b]y its express terms," it "does not require plenary resentencing or operate as a surrogate for collateral review." *Moore*, 975 F.3d at 90. Section 404 does not, in other words, entitle offenders to relitigate each and every legal or factual issue that may have affected their original sentences.

B. Section 404 Does Not Mandate A Resentencing That Incorporates Legal Or Factual Changes Unrelated To The Fair Sentencing Act

Petitioner has never taken direct issue with the consensus recognition that Section 404 motions stop well short of plenary sentencing proceedings. At the certiorari stage, he assured this Court that even if it were to hold that district courts considering Section 404 motions must take account of intervening factual and legal developments unrelated to the Fair Sentencing Act, Section 404 still would not permit an offender to "relitigate preexisting facts" relevant to the Section 3553(a) factors or to "reopen previously decided legal arguments from the initial sentencing about the application of a particular Sentencing Guideline cross-reference or enhancement." Cert. Reply Br. 11. His opening merits brief neither says otherwise nor contends that adjudication of a Section 404 motion triggers the various procedural rights of a plenary sentencing, such as an in-court hearing in the defendant's presence. The undisputedly limited substantive and procedural nature of a

Section 404 motion should foreclose any contention that Section 404 *compels* consideration of intervening factual and legal developments unrelated to the crack-cocaine-specific changes in Sections 2 and 3 of the Fair Sentencing Act.

1. The text, context, and purpose of Section 404 all refute a mandatory approach

a. The "task of resolving" the meaning of Section 404 "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 404 permits a court to reduce a previously imposed sentence for a "covered offense," which the statute 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 of 2010, that was committed before August 3, 2010." § 404(a), 132 Stat. 5222 (citation omitted). Under Section 404(b), the district court that "imposed a sentence" for such a covered offense "may * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed," subject to the additional limitations in Section 404(c). § 404(b), 132 Stat. 5222 (citation omitted).

By its plain terms, the "as if" clause in Section 404(b) mandates only consideration of the changes stemming from "sections 2 and 3 of the Fair Sentencing Act"—not every other postsentencing factual or legal change an offender might invoke. Section 404(b) "tells the court to alter just one variable in the original sentence, not all variables." *United States* v. *Maxwell*, 991 F.3d 685, 689 (6th Cir. 2021), petition for cert. pending, No. 20-1653 (filed May 24, 2021). Specifically, Section 404(b)'s text instructs the court to "plac[e] itself in the time frame of

the original sentencing" and then "alter[] the relevant legal landscape" by considering the penalties that would have applied if Sections 2 and 3 of the Fair Sentencing Act had been in effect at the time of the covered offense. *Hegwood*, 934 F.3d at 418; see *Moore*, 975 F.3d at 91; *Kelley*, 962 F.3d at 475. "Backdating" Sections 2 and 3 of the Fair Sentencing Act in that manner is "the only requirement Congress imposed" on the court's decisionmaking process. *United States* v. *Fowowe*, 1 F.4th 522, 532 (7th Cir. 2021).

By explicitly including the "as if" clause to require a "baseline of process," *Fowowe*, 1 F.4th at 529 (citation omitted), Congress excluded any additional mandatory requirement to account for postsentencing developments unrelated to the Fair Sentencing Act. See *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 583 (2000) (explaining that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode") (brackets and citation omitted). A district court must, of course, properly account for the effect of Sections 2 and 3 of the Fair Sentencing Act on the statutory penalties for a covered offense, including any effect those statutory changes would have had on the guidelines range as of the time of the offense conduct. See, *e.g.*, Sentencing Guidelines § 4B1.1 (2008) (tying career-offender offense levels to applicable statutory maximums). But Section 404(b) does not require the court to give an offender the benefit of other legal or factual developments since the original sentencing.

b. Contrary to petitioner's suggestion (Br. 35), Congress did not need to add the word "only" to Section 404(b) in order to limit the mandatory scope of Section 404 motions to the expressly referenced sections of the Fair Sentencing Act. Understanding a statute's

express requirements to exclude other unstated, implicit requirements is commonplace in statutory construction. See *Christensen*, 529 U.S. at 583; see also *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28-29 (2001) (relying on the maxim "'[*e*]*xpressio unius est exclusio alterius*'" to determine that "Congress implicitly excluded a general discovery rule by explicitly including a more limited one") (citation omitted). Had Congress intended to entitle Section 404 movants to a sentence reflecting changes other than those made by Sections 2 and 3 of the Fair Sentencing Act, it would have said so. Particularly given Section 3582(c)'s express limitations on the modification of otherwise-final sentences, and the bedrock finality principles that they reflect, courts should not interpret statutory silence to mandate consideration of additional grounds for a sentence reduction.

Neighboring provisions of the First Step Act reinforce that the mandatory scope of a Section 404 motion is limited to "sections 2 and 3 of the Fair Sentencing Act," First Step Act § 404(b), 132 Stat. 5222, and does not include other postsentencing developments. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation omitted). Sections 401 and 403 of the First Step Act contain new sentencing amendments, unrelated to the former crack-powder sentencing disparity, that "shall apply" only if "a sentence for the offense has not been imposed as of [the] date of enactment" of the First Step Act. § 401(c), 132 Stat. 5221 (amendments to recidivist penalties for drug offenders); see § 403(b), 132 Stat. 5222 (amendments to repeat-offender sentences under 18 U.S.C. 924(c)). Congress plainly did not intend those solely prospective

legal changes, or any corresponding amendments to the Sentencing Guidelines, to play a mandatory role in the adjudication of a Section 404(b) proceeding. And no sound basis exists to interpret Section 404(b) to adopt a piecemeal approach that mandates treating the movant like a current offender for purposes of other legal changes.

Such an interpretation is particularly unwarranted in light of the background principle, codified in 1 U.S.C. 109, that the statutory penalties for an offense are typically determined by the statutes in force at the time of commission. See *Dorsey* v. *United States*, 567 U.S. 260, 272 (2012). Congress would not silently mandate a contrary approach in the context of a modification of an already-final sentence.

c. A rigid requirement for district courts to consider intervening legal and factual developments unrelated to the Fair Sentencing Act would also run counter to the purpose and history of the First Step Act. The Fair Sentencing Act, enacted in 2010, was designed "[t]o restore fairness to Federal cocaine sentencing," 124 Stat. 2372 (title), in part by reducing the 100-to-1 disparity in treatment between crack and powder cocaine in triggering statutory-minimum penalties. See *Dorsey*, 567 U.S. at 269-270. But those changes applied only to defendants sentenced after the Act's effective date of August 3, 2010. *Id.* at 273. Later, in 2018, Congress enacted Section 404 of the First Step Act to "make[] those changes retroactive and give[] certain crack offenders an opportunity to receive a reduced sentence." *Terry* v. *United States*, 141 S. Ct. 1859, 1860 (2021); see *id.* at 1861-1862.

The manifest purpose of Section 404 is to provide a means for discretionary relief from the now-discredited

100-to-1 ratio—a point underscored by Section 404(c), which precludes a sentence reduction for a movant whose sentence for a covered offense was "previously imposed * * * in accordance with" the changes made by the Fair Sentencing Act. First Step Act § 404(c), 132 Stat. 5222. That purpose is not furthered by transforming Section 404 into a mandate for "post-conviction relief for defendants bringing legal claims unrelated to crack cocaine sentencing." *United States* v. *Chambers*, 956 F.3d 667, 677 (4th Cir. 2020) (Rushing, J., dissenting). Such an approach would give Section 404 movants a considerable and disparate *advantage* over counterparts sentenced under the Fair Sentencing Act, who cannot demand the benefit of postsentencing changes like the nonretroactive Sentencing Guidelines amendments that petitioner invokes here.

2. Petitioner provides no sound reason for mandatory incorporation of the Section 3553(a) factors in the context of a Section 404 motion

Although nominally styled as his primary argument—and the one on which he sought certiorari, see Pet. 23-30—petitioner's brief devotes little space to trying to support an approach that would "mandate an assessment of current facts and law" and "require[]" a court determining whether to reduce a sentence under Section 404 "to consider the section 3553(a) factors" anew. Pet. Br. 4; see *id.* at 18-21. The arguments that petitioner does proffer are unsound.

a. Petitioner principally rests (Br. 18) on the syllogism that because Section 404 gives a district court discretion to "impose a reduced sentence," First Step Act § 404(b), 132 Stat. 5222, and because Section 3553(a) specifies "[f]actors to be considered in imposing a sentence" (capitalization omitted), all those factors—

including the requirement to use the current Sentencing Guidelines, see 18 U.S.C. 3553(a)(4)—must apply to Section 404 motions. That syllogism is flawed in multiple respects.

First, the full text of Section 404, which must be "read as a whole," *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), makes clear that Congress was not using the phrase "impose a reduced sentence" as a specialized way of incorporating or otherwise requiring application of the Section 3553(a) factors, but instead as an alternative way of referring to a sentence reduction. Had Congress meant to use "impose" in the specialized way that petitioner's syllogism presumes, one "would at least expect it to have uniformly relied on that term to characterize the relief available." *United States* v. *Foreman*, 958 F.3d 506, 511 (6th Cir. 2020). It did not.

Although Section 404(b) describes the sentence reduction authorized by that provision as "impos[ing] a reduced sentence," § 404(b), 132 Stat. 5222, Section 404(c) describes asking for that same relief as a "motion * * * to *reduce* a sentence," forbids granting such a motion if "the sentence was * * * previously *reduced*" in accord with Sections 2 and 3 of the Fair Sentencing Act, and specifies that a court need not "*reduce* any sentence" pursuant to Section 404, § 404(c), 132 Stat. 5222 (emphases added). The equivalence that Section 404(c) maintains between imposing a reduced sentence and reducing a sentence makes clear that Congress perceived no significant difference between those concepts in the Section 404 context.

It was natural for Congress in Section 404 to use the phrase "impose a reduced sentence" as a substitute for "reduc[ing] a sentence." It would have been odd to inform district courts of their discretion to "*reduce* a

sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect," because those sections do not themselves address reductions. And even supposing that Congress understood the term "impose" in Section 404(b) to carry a broader meaning in this context, that would not suggest that such breadth would encompass postsentencing developments unrelated to Sections 2 and 3 of the Fair Sentencing Act. Congress may instead have intended to clarify that a court granting a Section 404 reduction is not limited solely to reducing the specific "sentence for a covered offense" for an offender who was simultaneously sentenced for other offenses, but may reduce the overall "sentence" to the extent it embodies an intertwined sentencing package. First Step Act § 404(b), 132 Stat. 5222; see, *e.g.*, *United States* v. *Hudson*, 967 F.3d 605, 610-611 (7th Cir. 2020); cf. *Dean* v. *United States*, 137 S. Ct. 1170, 1178 (2017).

Second, mandatory wholesale incorporation of the Section 3553(a) factors is fundamentally inconsistent with a sentence-modification provision that only permits reductions. A district court's "overarching duty" under Section 3553(a) is "to 'impose a sentence sufficient, but not greater than necessary,' to serve the purposes of sentencing." *Pepper* v. *United States*, 562 U.S. 476, 493 (2011) (quoting 18 U.S.C. 3553(a)). A district court limited solely to reducing a preexisting sentence cannot follow that primary directive, because it has no recourse if it deems the preexisting sentence insufficient. The court might, for example, have originally based the sentence on a belief that the defendant presented little risk of recidivating, only to find that he has engaged in extensive gang-affiliated drug-dealing while in prison. But Section 404 would not permit an upward

adjustment to ensure a "sufficient" sentence in light of current circumstances.

Presumably due to those potential incongruities, sentence-modification provisions that *do* require consideration of the Section 3553(a) factors incorporate them only "to the extent that they are applicable." 18 U.S.C. 3582(c)(1)(A); see 18 U.S.C. 3582(c)(2); cf. 18 U.S.C. 3582(a) (using same phrase to describe "determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term"). In contrast, neither Section 3582(c)(1)(B) nor Section 404 refers to the Section 3553(a) factors at all. Inferring an even broader, inherently incongruous, incorporation of those factors from Congress's silence would run directly counter to normal principles of statutory interpretation. See, *e.g.*, *Russello*, 464 U.S. at 23.

Third, petitioner's "impose" syllogism proves too much, as it would necessarily transform a Section 404 motion into the functional equivalent of a plenary resentencing. See Pet. App. 10a. Section 3553(a) is just one part of an integrated statutory scheme for federal sentencing, enacted primarily in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*). Many other provisions in that scheme are likewise keyed to "imposing" sentence. For example, the Probation Office is required to prepare a "presentence investigation of [the] defendant * * * before the imposition of sentence." 18 U.S.C. 3552(a). Similarly, when a court imposes a sentence in the Section 3553(a) sense, it must "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. 3553(c); cf. *Chavez-Meza* v. *United States*, 138 S. Ct. 1959, 1965 (2018) (distinguishing, for

purposes of any requirement to give a statement of reasons, between "initially sentencing a defendant" and "later modifying the sentence"). And the offender has a right to be present in the courtroom, Fed. R. Crim. P. 43(a)(3), as do the victims of the crime, see 18 U.S.C. 3771(a)(2) and (4).

The implications of petitioner's argument thus belie his previous assurance (Cert. Reply Br. 11) that mandatory consideration of the Section 3553(a) factors would not require a plenary resentencing. He does not explain how adoption of his syllogism could, in fact, avoid "relitigat[ing] preexisting facts regarding 'the nature and circumstances of the offense and the history and characteristics of the defendant,' 'the need for the sentence imposed,' or 'the need to avoid unwarranted sentence disparities.'" *Ibid.* (quoting 18 U.S.C. 3553(a)). Nor does he reconcile his syllogism with circuit decisions that properly avoid weighing down Section 404 motions with all the procedural trappings of a plenary sentencing. See *United States* v. *Lawrence*, 1 F.4th 40, 46-47 (D.C. Cir. 2021) (no categorical right to allocution during a Section 404 motion); *United States* v. *Blake*, 986 F.3d 756, 758 (7th Cir. 2021) (no right to counsel in a Section 404 motion); *Denson*, 963 F.3d at 1086-1087 (no right to a hearing in a Section 404 motion).

b. Beyond his reliance on the term "impose," petitioner does not offer any meaningful independent argument for mandatory incorporation of the Section 3553(a) factors into Section 404 motions. To the extent that petitioner contends (Br. 30-33) that any background principle of sentencing law supports that approach, he is mistaken. The principles that petitioner cites are drawn from the context of plenary sentencing or resentencing proceedings—for example, after a

conviction is vacated on direct appeal or in collateral proceedings under 28 U.S.C. 2255. See, *e.g.*, *Pepper*, 562 U.S. at 490-493 (district court may consider "evidence of a defendant's rehabilitation" when "a defendant's sentence has been set aside on appeal and his case remanded for resentencing"); *Peugh* v. *United States*, 569 U.S. 530, 536 (2013) (district court must "correctly calculat[e] the applicable Guidelines range" in an initial sentencing) (quoting *Gall* v. *United States*, 552 U.S. 38, 49 (2007)); *United States* v. *Smith*, 756 F.3d 1179, 1181-1182 (10th Cir. 2014) (Gorsuch, J.) (district court may take account of sentence imposed for predicate offense supporting a conviction under 18 U.S.C. 924(c) when fashioning sentence for the Section 924(c) conviction in the same proceeding). Those principles do not control where, as here, Congress has authorized only a limited motion for a sentence reduction. Cf. *Chavez-Meza*, 138 S. Ct. at 1965; *Dillon*, 560 U.S. at 830.

Petitioner observes (Br. 36) that Section 404(b) anchors consideration of Sections 2 and 3 of the Fair Sentencing Act to "the time the covered offense was committed," 132 Stat. 5222, rather than the time of the original sentencing. But that feature of the statute in no way suggests that the original sentencing is irrelevant and must be redone nunc pro tunc. As noted above, sentencing law normally depends on the statutes in force when the offense is committed. See 1 U.S.C. 109; *Dorsey*, 567 U.S. at 272 (explaining that statutory "penalties are 'incurred' * * * when an offender * * * 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 retroactive application of Sections 2 and 3 of the Fair Sentencing Act. It does not suggest

that consideration of unmentioned legal or factual changes, beyond those related to the Fair Sentencing Act, is mandatory.

Nor does the rule of lenity (Pet. Br. 33-34) support a mandatory approach. That rule applies only to "interpretations of the substantive ambit of criminal prohibitions, [and] to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Anyone seeking relief under Section 404 has already been found guilty beyond a reasonable doubt (or admitted culpability), was already subjected to punishment, and is seeking to benefit from Congress's postsentencing largesse. Application of Section 404 can neither expand the offender's criminal liability nor lengthen his sentence. Section 404 therefore implicates neither of the concerns that this Court has identified as justifying the rule of lenity: fair notice of the scope and magnitude of potential criminal liability, and deference to Congress's exclusive prerogative to "define criminal activity" to reflect "the moral condemnation of the community." *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

In any event, the rule of lenity comes into play only if, after considering all of the traditional tools of statutory construction, "there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 173 (2014) (citation omitted). Section 404's express directive to consider the changes in "Sections 2 and 3 of the Fair Sentencing Act" creates no ambiguity, let alone grievous ambiguity, about the existence of a directive to consider other changes as well.

3. A mandatory approach would produce unwarranted sentencing disparities

A mandatory approach to the Section 3553(a) factors not only lacks any sound footing in the statutory text, but would also produce disparities among crack-cocaine offenders inconsistent with the basic design and purpose of Section 404. As already explained, Section 404 of the First Step Act creates a limited opportunity for certain crack-cocaine offenders sentenced before the effective date of the Fair Sentencing Act to obtain the benefit of that 2010 Act's amelioration of the unsound 100-to-1 crack-to-powder ratio. A mandatory approach would anomalously entitle crack-cocaine offenders convicted before the enactment of the Fair Sentencing Act to a *greater* opportunity for relief than those sentenced directly under it.

In this particular case, for example, petitioner seeks to take advantage of a change in the career-offender guideline, adopted in 2018, that the Sentencing Commission declined to make retroactive. A defendant who was sentenced after the effective date of the Fair Sentencing Act, but before 2018, would not be permitted to demand a reconsideration of his sentence in light of that change under Section 3582(c)(2), which allows sentence modifications only for retroactive changes. See 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10(a)(1); *Dillon*, 560 U.S. at 826. By insisting that Section 404 nevertheless requires the nonretroactive change to be considered, petitioner would transform Section 404 from a provision designed to "cure inequalities between crack-cocaine defendants sentenced after the Fair Sentencing Act of 2010 and those sentenced before it" into one that "*creates* inequalities." *Brown*, 974 F.3d at 1150 (Phillips, J., dissenting).

A mandatory approach would also put the subset of crack-cocaine offenders eligible for relief under Section 404 in a better position than defendants convicted of any other federal drug offense. For example, crack-cocaine offenders with a covered offense would be entitled to "have their career offender statuses reevaluated, * * * while other criminal defendants would be deprived of such a benefit." *Kelley*, 962 F.3d at 478; see *Brown*, 974 F.3d at 1150 n.10 (Phillips, J., dissenting). Those anomalous outcomes would amount to an "arbitrary readjustment, a haphazard windfall for a limited number of crack cocaine offenders." *United States* v. *Lancaster*, 997 F.3d 171, 180 (4th Cir. 2021) (Wilkinson, J., concurring in the judgment). Nothing in the text or history of the First Step Act suggests that Congress intended to promote such disparities.

Indeed, a mandatory approach could give rise to the even greater anomaly of requiring a district court adjudicating a Section 404 motion to entertain a range of arguments, unrelated to the Fair Sentencing Act, far broader than those available to offenders under longstanding and carefully delimited avenues for collateral relief, such as 28 U.S.C. 2255. That discrepancy is already emerging in circuits with the mandatory approach, where offenders eligible for Section 404 relief can "circumvent" the "detailed requirements and strict scope of Section 2255" by "smuggling" sentencing claims unrelated to the Fair Sentencing Act into a Section 404 motion. *Chambers*, 956 F.3d at 677 (Rushing, J., dissenting). Compare *United States* v. *Foote*, 784 F.3d 931, 936 (4th Cir.) (rejecting availability of Section 2255 relief on the basis of a career-offender status invalidated by intervening case law), cert. denied, 576 U.S. 1027 (2015), with *Chambers*, 956 F.3d at 668

(requiring a district court to apply that same intervening case law in the context of a Section 404 motion).

That result makes little sense, and the statutory scheme should not be construed to require it. To the contrary, the detailed restrictions on the scope of collateral attacks under Section 2255 both "illustrate that Congress does not idly manufacture" mandatory "post-conviction remedies" and undermine the notion that Congress would use "the silence of the First Step Act" to require broad relief under Section 404. *Chambers*, 956 F.3d at 677 (Rushing, J., dissenting).

C. Section 404 Permits Consideration of Postsentencing Developments In The District Court's Discretion

Although Section 404 does not *require* a district court to consider postsentencing changes unrelated to the Fair Sentencing Act, it also does not *prohibit* a court from doing so. Petitioner's arguments for a permissive approach (*e.g.*, Br. 21-27, 30-33, 37-39) embrace the approach that the government has long advocated, including in this case. See, *e.g.*, Br. in Opp. 18-22; Gov't C.A. Br. 17-20; D. Ct. Doc. 78, at 7. Consideration of postsentencing developments unrelated to the Fair Sentencing Act, whether or not through the lens of the Section 3353(a) factors, is discretionary.

1. The expressly discretionary language of Section 404 makes clear that a district court has the ability to consider intervening legal and factual developments, such as revisions to the Guidelines. Section 404(b) requires the court to perform an inquiry in which it recalculates the applicable penalty range "as if" Sections 2 and 3 of the Fair Sentencing Act had been in effect at the time of the covered offense. First Step Act § 404(b), 132 Stat. 5222. But the choice of whether to reduce the offender's sentence, and the choice of an appropriate

reduction point within that range, is entirely discretionary.

Section 404 provides that a court "may * * * impose a reduced sentence." First Step Act § 404(b), 132 Stat. 5222. The "word 'may' clearly connotes discretion." *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 103 (2016) (citations omitted); see *Kingdomware Techs., Inc.* v. *United States*, 579 U.S. 162, 172 (2016) (observing that "the word 'may,' when used in a statute, usually implies some degree of discretion") (brackets and citation omitted). And just as "[n]othing" in Section 404 "shall be construed to require a court to reduce any sentence," § 404(c), 132 Stat. 5222, nothing in Section 404 constrains the choice of a reduction within the applicable, recalculated statutory range. Section 404 thus leaves to the sound discretion of the district court the choice of which factors to consider in evaluating the propriety of a sentence reduction in a particular case.[*]

2. In accord with the permissive language of the statute, many courts, often at the government's urging,

---

[*] Correspondingly, a reduced sentence for an offender originally sentenced before *United States* v. *Booker*, 543 U.S. 220 (2005), need not adhere to the pre-*Booker* view of the Sentencing Guidelines as binding. Neither Section 3582(c)(1)(B) nor Section 404 contains language analogous to Section 3582(c)(2)'s directive to give controlling weight to Sentencing Commission guidance. See 18 U.S.C. 3582(c)(2) (requiring a sentence reduction to be "consistent with applicable policy statements issued by the Sentencing Commission"). Particularly because the Fair Sentencing Act postdated *Booker*, and also itself required post-*Booker* changes to the Guidelines, see Fair Sentencing Act § 8, 124 Stat. 2374, Congress presumably expected courts to treat the Guidelines as advisory in the Section 404 context. Similarly, Congress would not have expected a district court adjudicating a Section 404 motion to be bound by prior judicial findings inconsistent with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and its progeny.

have looked to the factors set forth in Section 3553(a) to guide the decisionmaking process. "[C]ourts 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). A court evaluating a motion for a Section 404 sentence reduction will often want to consider, *inter alia*, the "nature and circumstances of the offense and the history and characteristics of the defendant," as well as "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); see *United States* v. *Moyhernandez*, 5 F.4th 195, 205 (2d Cir. 2021) (observing that the Section 3553(a) factors "may often prove useful" in Section 404 proceedings), petition for cert. pending, No. 21-6009 (filed Oct. 15, 2021); cf. *United States* v. *Mannie*, 971 F.3d 1145, 1158 n.18 (10th Cir. 2020) (emphasizing that nothing in Section 404 "precludes application of common sense, regardless of whether a common-sense consideration also happens to be codified in § 3553") (citation omitted).

District courts may accordingly decide, and frequently will decide, to take account of a Section 404 movant's postsentencing conduct. See, *e.g.*, *Hudson*, 967 F.3d at 613; *Shaw*, 957 F.3d at 741-742; *United States* v. *Allen*, 956 F.3d 355, 357-358 (6th Cir. 2020). The government argued here, for example, that no sentence reduction was warranted in part because petitioner "committed seven disciplinary infractions while serving his sentence in this case, four for possessing drugs or alcohol (in 2016, 2017, and 2018), one for fighting (in 2017), one for interfering with staff (in 2012), and one for possession of a weapon in 2009." D. Ct. Doc. 78, at 7. Nothing in the First Step Act prohibits a court from

considering that sort of postsentencing conduct in deciding whether to grant a sentence reduction, just as nothing in the Act prohibits a court from considering any countervailing evidence that an offender may wish to offer. Cf. D. Ct. Doc. 82, at 10-11 (petitioner's reply).

The same is true of legal changes, which could inform—in a non-binding fashion—the district court's assessment of what an appropriate sentence might be. Under Section 404, the choice of whether to consider factual and legal developments, and how much weight to give them, lies with the district court in the first instance. Of course, "discretion has limits," *Moyhernandez*, 5 F.4th at 205, and a reviewing court might conclude in an exceptional case that the district court's choices went too far. But those cases should be uncommon, given the deferential "abuse-of-discretion standard of review [that] applies to appellate review of all sentencing decisions." *Gall*, 552 U.S. at 49.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED

Applying Section 404 to this case is straightforward. Because Section 404(b) does not require a district court to consider intervening legal and factual developments unrelated to the Fair Sentencing Act, the district court did not abuse its discretion when it declined to grant petitioner's sentence-reduction motion without first determining whether petitioner would remain subject to the career-offender enhancement under the current version of the Guidelines.

The district court in this case correctly performed the assessment required by Section 404(b). After recognizing that petitioner's violation of 21 U.S.C. 841(a) and (b)(1)(B)(iii) (2006) was a covered offense, the court determined that petitioner's statutory penalty range would have been zero to 30 years, and his Guidelines

range would have been 188 to 235 months, had Section 2 of the Fair Sentencing Act been in effect at the time he committed that offense. Pet. App. 70a; see First Step Act § 404(b), 132 Stat. 5222. The court then declined to exercise its discretion to reduce petitioner's sentence, emphasizing that his 228-month sentence was "fair and just" at the time and "remains so today." Pet. App. 72a; see *id.* at 70a-72a.

Petitioner focuses much of his criticism on the court of appeals' decision, rather than the district court's. *E.g.*, Pet. Br. 5, 34-37, 40-45, 47. The court of appeals' decision, unlike the district court's, ostensibly limits the factors that may inform a threshold determination of whether to grant a reduction, as opposed to the factors that may inform the extent of any reduction. Pet. App. 18a-20a. But none of the judges below attached much practical significance to that limitation. See *id.* at 23a (majority opinion); *id.* at 63a (Barron, J., dissenting). Consideration of whether to grant a reduction is, in practice, difficult to disentangle from consideration of the extent of any reduction, and Section 404's text does not meaningfully separate them. But regardless of whether the court of appeals may have drawn an unwarranted theoretical distinction, this Court "reviews judgments, not statements in opinions." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (citation omitted). The operative inquiry is whether the district court, whose judgment the court of appeals affirmed, took a permissible approach. As discussed above, it did.

Contrary to petitioner's contention (Br. 45-47), the district court did not abuse its discretion by not expressly updating its assessment of the Section 3553(a) factors to incorporate intervening legal and factual developments. Because those intervening changes are

unrelated to the Fair Sentencing Act, the court was not required to consider them. And petitioner errs in suggesting (Br. 45) that the court's exercise of discretion rested on "the mistaken view that it lacked the authority to consider current facts and law." Cf. Pet. Br. 12 (asserting that the "court held that it could not consider any intervening developments").

As the court of appeals correctly observed, the district court carefully considered petitioner's arguments about "the amended career offender guideline," accurately "noted that the Sentencing Commission had declined to make [the amendment] retroactive," and permissibly "decided not to pantomime [the amendment] as a matter of discretion." Pet. App. 24a. Although the district court stated that it was "not clear" under circuit law whether the nonretroactive Guidelines amendment invoked by petitioner would be "a permissible ground for resentencing under the First Step Act," *id.* at 75a, the court went on to discuss the amendment extensively—explaining, in particular, that petitioner would not be eligible for any relief on the basis of the amendment under Section 3582(c)(2) or under circuit precedent addressing nonretroactive Guidelines amendments promulgated while a case is pending on direct appeal, see *id.* at 75a-78a. The court additionally explained that reclassifying petitioner's prior convictions under the amended guideline would be "complex," and it "decline[d]" to undertake that burdensome inquiry in a context in which it had determined that the existing sentence remained "fair and just." *Id.* at 72a, 77a-78a; see *id.* at 77a n.1.

The parties also agreed in the district court that postsentencing factual developments—including the seven disciplinary infractions petitioner committed

while in prison—could be considered in resolving petitioner's Section 404 motion. See pp. 12-13, *supra*. Those developments were accordingly presented to the district court. D. Ct. Doc. 78, at 7; D. Ct. Doc. 82, at 10-11. The district court was not obligated to discuss, or consider, those developments, and nothing in its order suggests that the court mistakenly believed that it was prohibited from taking them into account. Petitioner is not entitled to a second proceeding at which the court would once again be presented with the same arguments, when it could—and presumably would—treat them the same way.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KENNETH A. POLITE, JR.
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
MATTHEW GUARNIERI
Assistant to the Solicitor General
JOEL S. JOHNSON
Attorney

DECEMBER 2021

APPENDIX

1. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, provides:

An Act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Sentencing Act of 2010".

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

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

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

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

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

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

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

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

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

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPENSE.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in subparagraph (A), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in subparagraph (B), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting"$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in paragraph (2), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if—

(1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;

(2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856); or

(3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant—

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant—

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that—

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant—

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall—

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under

part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797-u et seq.).

(b) CONTENTS.—The report submitted under subsection (a) shall—

(1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;

(2) address the effect of drug courts on recidivism and substance abuse rates;

(3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;

(4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and

(5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the

changes in Federal sentencing law under this Act and the amendments made by this Act.

Approved Aug. 3, 2010.

2. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, provides in pertinent part:

SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

"(58) The term 'serious violent felony' means—

"(A) an offense described in section 3559(c)(2) of title 18, United States Code, for which the offender served a term of imprisonment of more than 12 months; and

"(B) any offense that would be a felony violation of section 113 of title 18, United States Code,

if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months."; and

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—

(A) in subparagraph (A), in the matter following clause (viii)—

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"; and

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final" and inserting the following: "If any person commits

such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

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

(1) in paragraph (1), in the matter following subparagraph (H), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years" and inserting "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(2) in paragraph (2), in the matter following subparagraph (H), by striking "felony drug offense" and inserting "serious drug felony or serious violent felony".

(c) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

* * * * *

SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

(a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

(b) APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

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

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

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the

sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

* * * * *

3. 18 U.S.C. 3553 provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

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

(2) the need for the sentence imposed—

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement—

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

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

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

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

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the

---

[1] So in original. The period probably should be a semicolon.

court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) CHILD CRIMES AND SEXUAL OFFENSES.—

(A)[2] Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

---

[2] So in original. No subpar. (B) has been enacted.

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the

court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of

judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a

[3] So in original.

minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) LIMITATION ON APPLICABILITY OF STATUTORY MINIMUMS IN CERTAIN CASES.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have—

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

4. 18 U.S.C. 3582 provides:

Imposition of a sentence of imprisonment

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

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

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

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

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

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

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

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

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

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

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

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

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

(d) NOTIFICATION REQUIREMENTS.—

(1) TERMINAL ILLNESS DEFINED.—In this subsection, the term "terminal illness" means a disease or condition with an end-of-life trajectory.

(2) NOTIFICATION.—The Bureau of Prisons shall, subject to any applicable confidentiality requirements—

(A) in the case of a defendant diagnosed with a terminal illness—

(i) not later than 72 hours after the diagnosis notify the defendant's attorney, partner, and family members of the defendant's condition and inform the defendant's attorney, partner, and family members that they may pre-

pare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) not later than 7 days after the date of the diagnosis, provide the defendant's partner and family members (including extended family) with an opportunity to visit the defendant in person;

(iii) upon request from the defendant or his attorney, partner, or a family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(iv) not later than 14 days of receipt of a request for a sentence reduction submitted on the defendant's behalf by the defendant or the defendant's attorney, partner, or family member, process the request;

(B) in the case of a defendant who is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)—

(i) inform the defendant's attorney, partner, and family members that they may prepare and submit on the defendant's behalf a request for a sentence reduction pursuant to subsection (c)(1)(A);

(ii) accept and process a request for sentence reduction that has been prepared and

submitted on the defendant's behalf by the defendant's attorney, partner, or family member under clause (i); and

(iii) upon request from the defendant or his attorney, partner, or family member, ensure that Bureau of Prisons employees assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction pursuant to subsection (c)(1)(A); and

(C) ensure that all Bureau of Prisons facilities regularly and visibly post, including in prisoner handbooks, staff training materials, and facility law libraries and medical and hospice facilities, and make available to prisoners upon demand, notice of—

(i) a defendant's ability to request a sentence reduction pursuant to subsection (c)(1)(A);

(ii) the procedures and timelines for initiating and resolving requests described in clause (i); and

(iii) the right to appeal a denial of a request described in clause (i) after all administrative rights to appeal within the Bureau of Prisons have been exhausted.

(3) ANNUAL REPORT.—Not later than 1 year after December 21, 2018, and once every year thereafter, the Director of the Bureau of Prisons shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of

Representatives a report on requests for sentence reductions pursuant to subsection (c)(1)(A), which shall include a description of, for the previous year—

(A) the number of prisoners granted and denied sentence reductions, categorized by the criteria relied on as the grounds for a reduction in sentence;

(B) the number of requests initiated by or on behalf of prisoners, categorized by the criteria relied on as the grounds for a reduction in sentence;

(C) the number of requests that Bureau of Prisons employees assisted prisoners in drafting, preparing, or submitting, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(D) the number of requests that attorneys, partners, or family members submitted on a defendant's behalf, categorized by the criteria relied on as the grounds for a reduction in sentence, and the final decision made in each request;

(E) the number of requests approved by the Director of the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(F) the number of requests denied by the Director of the Bureau of Prisons and the reasons given for each denial, categorized by the criteria relied on as the grounds for a reduction in sentence;

(G) for each request, the time elapsed between the date the request was received by the

warden and the final decision, categorized by the criteria relied on as the grounds for a reduction in sentence;

(H) for each request, the number of prisoners who died while their request was pending and, for each, the amount of time that had elapsed between the date the request was received by the Bureau of Prisons, categorized by the criteria relied on as the grounds for a reduction in sentence;

(I) the number of Bureau of Prisons notifications to attorneys, partners, and family members of their right to visit a terminally ill defendant as required under paragraph (2)(A)(ii) and, for each, whether a visit occurred and how much time elapsed between the notification and the visit;

(J) the number of visits to terminally ill prisoners that were denied by the Bureau of Prisons due to security or other concerns, and the reasons given for each denial; and

(K) the number of motions filed by defendants with the court after all administrative rights to appeal a denial of a sentence reduction had been exhausted, the outcome of each motion, and the time that had elapsed between the date the request was first received by the Bureau of Prisons and the date the defendant filed the motion with the court.

(e) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a

felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.