

No. 20-5264

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IN THE SUPREME COURT OF THE UNITED STATES

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LAKENTO BRIAN SMITH, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

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

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REPLY TO BRIEF IN OPPOSITION

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Dated: November 4, 2020

Kenneth P. Tableman P27890  
Kenneth P. Tableman, P.C.  
Attorney for Petitioner  
161 Ottawa Avenue, NW, Suite 404  
Grand Rapids, MI 49503-2701  
(616) 233-0455  
tablemank@sbcglobal.net

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## REPLY BRIEF FOR PETITIONER

The government agrees with petitioner that how the district courts are to respond to a motion for relief under Section 404 of the First Step Act<sup>1</sup> has produced “tension in the circuits.” (Br. In Opp’n, pp. 11–12).

The government acknowledges that petitioner’s request to appear in person to argue for a reduced sentence was preserved at each step of the proceedings below. (Id., p. 13). The Court should grant certiorari in order to rule that the shortened process accorded petitioner here—responding to a motion for relief from a mandatory life sentence with a two-page form order adapted from retroactive guideline amendment proceedings—was not appropriate.

The large number of affected defendants who seek relief under the First Step Act is another reason for the Court to grant the petition.

## ARGUMENT

### I. The government agrees the law is unsettled.

In *United States v. Kelley*, 962 F.3d 470, 475–76 (9th Cir. 2020), the Ninth Circuit identified a circuit split over the application of Section 404 of the First Step Act, with some circuits holding that the district court need only

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<sup>1</sup>Pub. L. No. 115-391, 132 Stat. 5194 (enacted December 21, 2019).

undertake a counterfactual analysis “as if” the Fair Sentencing Act of 2010<sup>2</sup> applied and one other circuit taking the view that the district court can consider changes in the law since the initial sentencing. (Id., citing *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020)).

Here, Smith’s right to an in-person plenary resentencing on his motion for relief derives from the language of the First Step Act which says that courts may “impose a reduced sentence.” When imposing a sentence under the Act a court does not simply adjust the statutory minimum; it must also recalculate the guidelines range and consider the familiar sentencing factors found at 18 U.S.C. § 3553(a). *United States v. Chambers*, 956 F.3d at 672–675.

In *Chambers*, the government conceded that the § 3553(a) sentencing factors apply at a Section 404(b) resentencing and that the district court has discretion in such a proceeding to vary from the Guidelines and consider the movant’s post-sentencing conduct. *United States v. Chambers*, 956 F.3d at 674–75. If a proceeding under Section 404(b) of the First Step Act is a resentencing, not just a reduction of a sentence, then it follows that a defendant should have the right to appear in person to plead his case.

The circuit split identified in *Kelley* deepened when the Sixth Circuit

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<sup>2</sup>Pub. L. No. 111-220, 124 Stat 2372 (2010).

joined Chambers in holding that the district court's review of a First Step Act motion requires "an accurate calculation of the amended guidelines range at the time of resentencing." *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020).

Under § 3553(a) the sentencing court must consider the kinds of sentences available, 18 U.S.C. § 3553(a)(3). That consideration "necessarily includes the statutory minimum and maximum ranges." *United States v. McCloud*, 730 F.3d 600, 610 (6th Cir. 2103) (Borman, J., concurring in part), "statutory minima and maxima have an obvious anchoring effect on the judge's determination of a reasonable sentence in the sense that they demarcate the range within the judge may impose a sentence." *United States v. Currie*, 739 F.3d 960, 988 (7th Cir. 2014).

Smith's case, in particular, warrants a full resentencing because he first was sentenced to a mandatory sentence of life in prison. That sentence overshadowed the proceedings. It would have been futile and a waste of judicial resources to litigate possible guidelines issues, including issues relating to other counts, when the law required the court to impose a life sentence.

- II. The Court should fill in the procedural gaps left by Congress when it enacted Section 404 of the First Step Act.

The First Step Act, itself, does not set out a procedural framework. But the Court can presume that when Congress passed the Act it was aware of the legal context in which it was legislating. *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006). The pertinent context here was the discretion that district courts exercise at sentencing and resentencing. *Booker v. United States*, 543 U.S. 220 (2005), *Pepper v. United States*, 572 U.S. 476, 490 (2011) (holding that the district court may consider all the sentencing factors listed in 18 U.S.C. § 3553(a) “at any subsequent resentencing.”) That discretion was invoked when Congress told the district courts they could “impose a reduced sentence” in section 404(b) of the First Step Act. And that discretion extends to examining the entire sentencing package.

The overwhelming impact of Smith’s mandatory life sentence on his original sentencing means that he never had sentencing at which the court could consider his history and characteristics, the nature of the offense, and the other sentencing factors and then select a sentence “sufficient, but not greater than necessary” as required by 18 U.S.C. § 3553(a).

The government cites a number of circuit courts that reason that a motion brought under Section 404(b) of the First Step Act is akin to a motion to reduce sentence based on a retroactive guidelines amendment, so that a full resentencing is not necessary. (Br. In Opp’n, p. 12).

This dog does not hunt. If Congress intended for district courts to treat a First Step Act motion like a retroactive guidelines amendment, it would have said so. But it did not. Smith’s motion invoked the First Step Act, not 18 U.S.C. § 3582(c)(2), which grants courts authority to change a sentence in response to retroactive changes to the Sentencing Guidelines. Smith’s sentence was changed by a statute—§ 404(b) of the First Step Act—not by a Guidelines amendment. So his motion brought into play 18 U.S.C. § 3582(c)(1)(B), which says that “the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute . . .”

In his pro se motion Smith asked for a time-served sentence for all his convictions, in essence seeking a resentencing. Later, he asked the court to order an updated report from the Bureau of Prisons to confirm his rehabilitation. (Mem. In Support of Mot., D. Ct. No. 101, Page ID # 91–92). In response the district court issued its two-page order using a form that district courts have used in response to motions for modification based on retroactive guideline changes under 18 U.S.C. § 3582(c)(2).

This procedure was inadequate. But that is not too surprising, The district court had no guidance from the higher courts. Its order appointing counsel was entered on March 27, 2019, just over three months after the enactment of the First Step Act. The order said “Defendant may, or may not,

be eligible for a reduce sentence under the First Step Act of 2018. The Court determines that Defendant should have counsel appointed to address the import, if any, of the Act on Defendant's sentence." (Order Appointing Counsel, R. 100, Page ID # 987).

Nothing in the order required or suggested that Smith must immediately factually support his request for a lower sentence, or make Guidelines arguments like the arguments he raised in the Court of Appeals. The question the court wanted answered was eligibility. The Court should not fault Smith for thinking this was to be a two-step inquiry: first to determine if he was eligible, and second, to develop the facts in order to determine what sentence was appropriate. In facts, after the Sixth Circuit's ruling in Boulding, that is the procedure the Western District of Michigan adopted. First the court determines eligibility for relief (after briefing from the parties), then it makes a guidelines calculation, and then it gives counsel a chance to respond. See e.g. Order Regarding First Step Act Motion, United States v. John Lee Bonds, W.D. Mich, Case No. 1:09-cr-185-GJQ, R. 245, Page ID # 1072).

The Court has said that the procedure to follow when sentencing anew is to give the defendant the chance to be heard and to consider how he has done since his first sentencing. Pepper v. United States, 562 U.S. at 490. That

did not happen here.

The Court should grant the petition in order to hold that petitioners like Smith whose initial sentencing required a mandatory life sentence should have a full resentencing hearing in response to a Section 404(b) motion.

III. This case is significant to the administration of criminal justice.

Smith's case is not unique. Many defendants serving mandatory sentences have moved for relief under Section 404 of the First Step Act. The procedure that should apply is not settled. The Court should take up this case in order to guide the lower courts.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Dated: November 4, 2020

Respectfully submitted,

Kenneth P. Tableman  
Kenneth P. Tableman, P.C.  
Attorney for Petitioner  
161 Ottawa Avenue, NW, Suite 404  
Grand Rapids, MI 49503-2701  
(616) 233-0455  
[tablemank@sbcglobal.net](mailto:tablemank@sbcglobal.net)