No.

In the Supreme Court of the United States

DREW SAMUEL BATES, PETITIONER.
v.
UNITED STATES OF AMERICA, RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court that chooses to conduct a resentencing under § 404 of the First Step Act is prohibited from considering a defendant's current, legally correct Sentencing Guidelines range.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. Bates, 672 Fed. App'x. 883 (10th Cir. Jan. 11, 2017).

Bates v. United States, No. 6:10-cr-00003, ECF 247 (E.D. Ok. Nov. 16, 2018).

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JURISDICTION

The decision of the court of appeals was entered on September 10, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The First Step Act, Pub. L. 115-391, 132 Stat. 5194 (2018), states in relevant part:

> (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.

The Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010), states in relevant part:

> 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".

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,".

18 U.S.C. § 3553(a) states in relevant part:

(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.

(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.

INTRODUCTION

This case squarely presents an important issue of statutory interpretation that has deeply divided the federal courts of appeals: whether a district court that chooses to conduct a resentencing under § 404 of the First Step Act is prohibited from considering the defendant's current, legally correct Sentencing Guidelines range. The answer to that question will affect thousands of cases, each of which involves a defendant who was sentenced under a discriminatory sentencing regime that Congress has since disavowed. The question is ripe for this Court's review. At least seven courts of appeals have addressed the question and disagreed sharply about the answer. The conflict is active and current, with the most recent court of appeals decisions having been issued on September 15, 2020. And this case is an ideal vehicle: both the district court and the Tenth Circuit squarely addressed and decided the issue, which is cleanly presented.

The issue concerns a statute that was enacted to provide district courts discretion to remedy unwarranted sentencing disparities. That law, the First Step Act, was a direct response to concerns that federal courts were unduly constrained in fashioning appropriate, individualized punishments for drug offenses.

In 2010, Congress undertook to remedy the severe inequities caused by statutes that imposed upon an offender who dealt in crack cocaine the same mandatory minimum sentence applicable to an offender who dealt in one hundred times that amount of powder cocaine. The Fair Sentencing Act reduced the crack-to-powder cocaine disparity to 18-to-1 from

100-to-1 and eliminated the mandatory minimum sentence for simple possession of crack cocaine. That law did not, however, make these changes retroactive to offenders who had previously been sentenced.

In 2018, Congress passed the First Step Act. The provision of the Act at issue here, § 404, permits district courts to resentence drug offenders in light of the changes in the Fair Sentencing Act. Section 404(b) makes those changes retroactive and provides that "[a] court that imposed a sentence" for a covered drug offense "may . . . impose a reduced sentence as if" the relevant provisions of the Fair Sentencing Act "were in effect at the time the covered offense was committed." Section 404(c) sets forth only two limitations on the district court's discretion: the court cannot grant relief either if the defendant had already obtained relief under the Fair Sentencing Act or if the defendant had filed a previous First Step Act motion that was "denied after a complete review of the motion on the merits."

The First Step Act does not otherwise constrain how district courts may exercise their discretion to "impose a reduced sentence." In recent years, however, the Second, Fifth, Ninth, and Tenth Circuits have added a further limitation that is nowhere in the statutory text. Those courts have held that during a First Step Act resentencing, the district court may alter the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act. In those four circuits, a district court is prohibited from considering other legal developments, including changes to the Sentencing Guidelines, that may have occurred since the defendant's initial sentencing and that the court would otherwise consider relevant in fashioning an appropriate, individualized sentence.

The Third, Sixth, and Seventh Circuits have reached the opposite conclusion. Those three circuits have correctly concluded that, in deciding on whether and how to conduct a resentencing under the First Step Act, district courts may consider different statutory penalties, current Guidelines, post-sentencing conduct, and other relevant information about a defendant's history and characteristics.[1]

This case offers an ideal vehicle for the Court to resolve the circuit split. Both the district court and the Tenth Circuit considered and addressed the issue, and the question is cleanly presented here. Timely resolution of the conflict is particularly important because First Step Act resentencings are currently proceeding around the country. This Court should grant certiorari and reverse the decision below.

STATEMENT

1. Before 1984, federal criminal defendants were subject to an indeterminate sentencing regime that gave district courts almost unlimited discretion to fashion an appropriate sentence for each defendant. Although that regime allowed judges to tailor sentences to each offender, by the early 1980s it was heavily criticized for producing unwarranted sentencing disparities between similarly-situated defendants.

Congress responded by passing the Sentencing Reform Act of 1984, the principal aim of which was

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[1] The Eighth Circuit has also endorsed this approach in a case that did not squarely present the issue. *See United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020), *reh'g en banc denied* Aug. 3, 2020.

to eliminate sentencing disparities. 98 Stat. 1987. The Sentencing Reform Act created the U.S. Sentencing Commission and tasked it with drafting sentencing Guidelines that would lead to a more uniform and fair application of sentences. *See generally* 28 U.S.C. § 991. By statute, a sentencing judge determines a Guidelines range by finding the applicable offense level and offender category, and then consulting a table that lists proportionate sentencing ranges at the intersections of rows (offense levels) and columns (offender categories). *See Dorsey v. United States*, 567 U.S. 260, 265–66 (2012). Sentencing judges are instructed to consider the Guidelines range established for the relevant offense "that . . . [is] in effect on the date the defendant is sentenced," 18 U.S.C. § 3553(a)(4)(A)(ii), and to "impose a sentence sufficient, but not greater than necessary," to comply the sentencing purposes listed in 18 U.S.C. § 3553(a)(2).

The Guidelines determine most drug-crime offense levels by reference to a Drug Quantity Table that lists amounts of various drugs and associates different amounts with a Base Offense Level. In 1986, Congress enacted a more specific, drug-related sentencing statute, the Anti-Drug Abuse Act. Pub. L. 99-570. That statute sets forth certain mandatory minimum penalties, as opposed to sentencing Guidelines recommendations, applicable to an offender based on the kind and amount of drugs involved in the offense. *See* 21 U.S.C. § 841(b).

Cocaine and cocaine base are two of the drugs listed by the statute. The mandatory minimum sentence applicable to an offender convicted of possession with intent to distribute 500 grams or more of cocaine is 5 years, and for 5,000 or more grams the

minimum is 10 years. *See id.* § 841(b)(1)(A)(ii), (B)(ii) (2006 ed.). But the 1986 Drug Act treated crack cocaine far more harshly, applying the 5-year minimum to only 5 grams of crack and the 10-year minimum to only 10 grams of crack. *See id.* § 841(b)(1)(A)(iii), (B)(iii) (2006 ed.). The result was a "crack-to-powder" mandatory minimum ratio of 100-to-1.

"[T]he [Sentencing] 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. Critics noted that, among other flaws, this ratio prevented judges from issuing proportionate sentences across offenders and had a severe and unwarranted effect upon the Black community. *Id.* at 268–69.

In response, Congress enacted the Fair Sentencing Act of 2010 as a means to "restore fairness to Federal cocaine sentencing." Pub. L. 111-220. As relevant here, Section 2 decreased the crack-to-powder ratio by raising the crack amount thresholds for the 5- and 10-year minimums from 5 grams to 28 grams and from 50 grams to 280 grams, respectively. *Id.* Section 3 eliminated the mandatory minimum for simple possession of cocaine base under 21 U.S.C. § 844(a). *Id.* Congress declined, however, to make the Fair Sentencing Act retroactive, leaving in place the sentences imposed under the 1986 Drug Act.

In 2018, Congress passed the First Step Act, which, among other things, made Sections 2 and 3 of the Fair Sentencing Act of 2010 retroactive. Pub. L. 115-391, § 404(b). The goal of this measure was to "allow prisoners sentenced before the Fair Sentencing Act of 2010 reduced the 100-to-1 disparity in sen-

tencing between crack and powder cocaine to petition the court for an individualized review of their case." S. Comm. On the Judiciary, 115th Cong., The First Step Act of 2018 (S.3649), as introduced (Nov. 15, 2018), at 2 [hereinafter FSA Summary], https://www.judiciary.senate.gov/download/revised-first-step-act_-summary.

Section 404 of the First Step Act establishes eligibility for resentencing and provides district courts broad discretion to decide whether to impose a new sentence. Section 404(a) defines a "covered offense" for which a court may conduct a new sentencing 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." Section 404(b) then provides 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 of 2010 . . . were in effect at the time the covered offense was committed."

Section 404(c) sets forth two limitations on the resentencing discretion it provides district courts. First, "[n]o 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." Second, a defendant may not receive a reduced sentence if he filed a previous First Step Act motion that was "denied after a complete review of the motion on the merits."

2. On the morning of December 10, 2009, Oklahoma Highway Patrol Trooper Vern Roland stopped a car driven by Rodney Ledell Carter after observing the car change lanes without signaling. As he ap-

proached the car, Roland smelled marijuana. Neither Carter nor his passenger, Petitioner Drew Samuel Bates, produced a driver's license.

After placing Carter and Bates in the back seat of Roland's vehicle, Roland and another officer searched Carter's car. Behind the passenger seat of Carter's car the officers found a black duffel bag containing a laundry detergent box. Inside the box were Ziploc bags filled with over three kilograms of a substance that tested positive for cocaine. The officers also found loose marijuana and a marijuana cigar.

Carter and Bates were indicted in the Eastern District of Oklahoma for possessing with intent to distribute fifty grams or more of crack cocaine, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1), (b)(1)(A)(iii) (2006). Carter pleaded guilty; Bates was convicted after a jury trial of the single count in the indictment. Pet. App. 2a.

The probation department prepared a Presentence Report (PSR) recommending that Bates be held accountable for 3.084 kilograms of cocaine base. Based on an assigned base offense level of 36 and Category II criminal history, the PSR recommended a Guidelines range of 210–262 months. The district court imposed a term of 190 months of imprisonment and five years of supervised release, citing Bates's health, his minimal criminal history, and the need to avoid an unwarranted sentencing disparity between Bates and Carter. Bates appealed his conviction, and the Tenth Circuit affirmed.

In 2014, the Sentencing Commission issued Amendment 782, which provided for a two-level reduction for most of the quantities listed in USSG § 2D1.1. The probation department prepared a report concluding that Amendment 782 resulted in a

two-level reduction to Bates's total offense level, which produced a revised Guidelines range of 168–210 months. The district court granted Bates's motion for a sentence reduction pursuant to Amendment 782 and reduced his sentence to 168 months of imprisonment. Pet. App. 2a.

In 2019, after the First Step Act took effect, Bates moved the district court for resentencing. Bates sought a sentence reduction under the newly-retroactive Fair Sentencing Act, which reduced the mandatory minimum from 10 years to 5 years. Pet. App. 3a–4a.

Bates also asked that at his resentencing the district court apply the 2018 Guidelines Manual, which contained a revision to the mitigating role Guideline, U.S.S.G. § 3B1.2(b), that was not in force at the time of his original sentencing. Under the amended § 3B1.2(b), "a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity." *See* U.S.S.G. § 3B1.2 cmt. n.3(A). Amendment 794 defined the term "average participant" by stating "that, when determining mitigating role, the defendant is to be compared with the other participants 'in the criminal activity.'" *See* U.S.S.G. Supp. to App. C, Amend. 794, at 109, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/APPENDIX_C_Supplement.pdf; Pet App. 4a–6a.

The Government conceded that Bates was eligible for resentencing under the First Step Act but argued that a sentence reduction was not warranted because his base offense level and Guideline range remain unchanged. The Government further argued that the First Step Act did not authorize the district

court to consider the revision to U.S.S.G. § 3B1.2(b) in deciding whether to impose a reduced sentence.

The district court granted Bates's motion in part and denied it in part. Pet. App. 15a. The district court held that Bates qualified for a sentence reduction under the now-retroactive provisions of the Fair Sentencing Act. The court concluded, however, that it could not consider the changes to § 3B1.2 contained in the updated version of the Guidelines Manual because the First Step Act authorizes district courts to consider only "the changes mandated by the 2010 Fair Sentencing Act." Pet. App. 14a. The district court reasoned that because the mitigating-role-adjustment was not among those changes, the amendments to § 3B1.2 could not inform the district court's discretion about the appropriate reduced sentence. Pet. App. 13a. The district court declined to reduce Bates's term of incarceration but reduced his term of supervised release to 48 months from 60 months. Pet. App. 14a.

The Tenth Circuit affirmed. *See* Pet. App. 2a. The panel relied upon a decision published the day before by a different Tenth-Circuit panel, which concluded that the First Step Act "does not empower the sentencing court to rely on revised Guidelines instead of the Guidelines used at the original sentencing." Pet. App. 7a (quoting *United States v. Brown*, 974 F.3d 1137, 2020 WL 5384936, at *5 (10th Cir. 2020)). In support of its interpretation, the Tenth Circuit stated that § 404 "authorized only a limited change in the sentences of defendants who had not already benefitted from the Fair Sentencing Act." *Brown*, 974 F.3d, 2020 WL 5384936, at *5.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the circuit split concerning the district court's discretion to consider the current Guidelines at a First Step Act resentencing.

This case meets all of the Court's criteria for granting certiorari. First, the question presented concerns an intractable, acknowledged circuit split on a recurring federal question of statutory interpretation that only this Court can resolve. Second, the Tenth Circuit's conclusion that a district court cannot consider the revised sentencing Guidelines is incorrect. The Tenth Circuit—like the Second, Fifth, and Ninth Circuits—misread the text of § 404 of the First Step Act and ignored the clear purpose of that provision. Third, the question presented is important and will profoundly affect a large number of defendants who are serving sentences that current law would not support. Because First Step Act sentencings are proceeding on a regular basis, moreover, this Court's timely resolution is particularly important. Fourth, this case is an ideal vehicle.

A. The Question Presented Concerns an Intractable, Acknowledged Circuit Split on a Recurring Question Only This Court Can Resolve.

At least seven circuits have considered whether a district court may consider the current Guidelines at a First Step Act resentencing. Those decisions have produced an active 4-3 circuit split. This Court should grant review to resolve the conflict.

1. Four Circuit Courts Have Held District Courts Cannot Consider a Defendant's Current, Legally Correct Guidelines Range When Conducting a Resentencing Under § 404 of the First Step Act.

Four courts have held that a district court is prohibited from considering a defendant's current, legally correct Guidelines range at a First Step Act resentencing.

The Fifth Circuit was the first to address this issue. *See United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir. 2019). The defendant in that case had pleaded guilty in 2008 to possession with intent to distribute five grams or more of cocaine base. Based on a PSR finding that he was responsible for a total of 9.32 grams of cocaine base and subject to the career-offender enhancement in § 4B1.1 of the Guidelines, the district court imposed a 200-month sentence. In 2019, the defendant moved for resentencing under § 404 of the First Step Act, arguing that (1) the Fair Sentencing Act modified the statutory penalty for his crack offenses, and (2) he no longer qualified as a career offender under the Guidelines. The district court resentenced the defendant based on the Fair Sentencing Act but "left the career-offender enhancement in place, holding that it was 'going to resentence [the defendant] on the congressional change and that alone.'" *See Hegwood*, 934 F.3d at 415–16 (quoting district court hearing).

The Fifth Circuit affirmed. It rejected the defendant's argument that the district court had discretion not only to apply the reduction provided for

in the Fair Sentencing Act but also to take into account that the Guidelines no longer warranted his career-offender enhancement. The court reasoned that the "express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 – saying the new sentencing will be conducted 'as if' those two sections were in effect 'at the time the covered offense was committed' – supports that Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense." *Id.* at 418. At a First Step Act resentencing, the court explained, "[t]he district court decides on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act." *Id.*

The Ninth Circuit has adopted the same rule. *See United States v. Kelley*, 962 F.3d 470 (9th Cir. 2020). That court reasoned that "[b]ecause the First Step Act asks the court to consider a counterfactual situation where only a single variable is altered, it does not authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense." *Id.* at 475. Accordingly, the Ninth Circuit held, "the First Step Act permits the court to sentence 'as if' parts of the Fair Sentencing Act had been in place at the time the offense occurred, not 'as if' every subsequent judicial opinion had been rendered or every subsequent statute had been enacted." *Id.*

The Tenth Circuit's decision below joined the decisions of the Fifth and Ninth Circuits. Adopting the reasoning of a panel decision published the day before, the court "interpreted [§ 404(b)]'s language and concluded that 'plenary resentencing is not appropri-

ate under the First Step Act.'" *See* Pet. App. 7a (quoting *Brown*, 974 F.3d, 2020 WL 5384936, at *5); *see also Brown,* 974 F.3d, 2020 WL 5384936, at *5 ("Our review demonstrates that Congress, when passing § 404, authorized only a limited change in the sentences of defendants who had not already benefitted from the Fair Sentencing Act. . . . The court can only make the Fair Sentencing Act retroactive and cannot consider new law.").

Shortly after the decision below, the Second Circuit reached the same conclusion. *See United States v. Moore,* __ F.3d __, 2020 WL 5523205 at *5 (2d Cir. Sept. 15, 2020) (applying plain error review). It reasoned that § 404's "as if" clause "issues no directive to allow re-litigation of other Guidelines issues—whether factual or legal—which are unrelated to the retroactive application of the Fair Sentencing Act." *Id.* The court criticized the alternative approach as inviting defendants to relitigate "every aspect of a criminal sentence" but acknowledged "that other Circuits have split on this issue." *Id.* at *5–6, n. 30.

2. At Least Three Circuit Courts Have Held District Courts May Consider a Defendant's Current, Legally Correct Guidelines Range When Conducting a Resentencing Under § 404 of the First Step Act.

At least three circuits have reached the opposite conclusion and permit district courts to consider current Guidelines and other relevant changes at a First Step Act resentencing. The Sixth Circuit vacated a sentence imposed at a First Step Act resentencing, explaining that "at a minimum" such a resentencing

"includes an accurate calculation of the amended [G]uidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors." *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020). The Sixth Circuit observed that two points favored this approach. First, the court emphasized that § 404(c)'s reference to "a complete review of the motion on the merits . . . shows the dimensions of the resentencing inquiry Congress intended district courts to conduct: complete review of the resentencing motion on the merits." *Id.* A "resentencing predicated on an erroneous or expired [G]uideline calculation would seemingly run afoul of Congressional expectations." *Id.* Second, the "Sentencing Commission has acknowledged" that in a First Step Act resentencing, "courts should consider the [G]uidelines and policy statements, along with the other § 3553(a) factors, during the resentencing." *Id.*

The Seventh Circuit is aligned with the Sixth. *See United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020). That court concluded that "a district court may consider all relevant factors when determining whether an eligible defendant merits relief under the First Step Act," including "different statutory penalties, current [G]uidelines, post-sentencing conduct, and other relevant information about a defendant's history and characteristics." *Id.* at 611–12. It explained that this approach helps ensure that the sentence imposed is "sufficient, but not greater than necessary" to comply with the sentencing purposes set forth in § 3553(a)(2), and that nothing in the First Step Act prevents a district court from considering updated statutory benchmarks, current Guidelines, and post-sentencing conduct. *Id.* at 612. The

Seventh Circuit therefore reversed the judgment of the district court and remanded with instructions to consider whether the defendants' sentences should be reduced. *Id.* at 613.

The Third Circuit later adopted the same approach. *See United States v. Easter*, __ F.3d __, 2020 WL 5525395 at *3 (3d Cir. Sept. 15, 2020). In holding that district courts "must consider" all applicable § 3553(a) factors at a First Step Act resentencing, the court explicitly "join[ed] the Sixth Circuit, which has held 'the necessary [§ 404] review—at a minimum—includes an accurate calculation of the amended [G]uidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors.'" *See id.* at *6 (quoting *Boulding*, 960 F.3d at 784). In particular, the court observed that because Congress did not draft the First Step Act "on a blank slate, . . . the scope of the district court's discretion must be defined against the backdrop of existing sentencing statutes." *See id. at *4* (quoting *United States v. Rose*, 379 F. Supp. 3d 223, 233 (S.D.N.Y. 2019)). The court thus inferred that Congress "conceived of the district court's role as being the same when it imposes an initial sentence and when it imposes a sentence under the Fist Step Act." *Id.* at *5. [2]

[2] The Eighth Circuit also endorsed this position. In affirming a 24-month sentence reduction that appropriately exceeded the current guidelines range for such a defendant, the court observed that "the § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the *current* guidelines." *Harris*, 960 F.3d at 1106 (emphasis added).

3. The Circuit Conflict Will Not Resolve Without a Decision From This Court.

This split among the circuits is entrenched and unlikely to resolve without action by this Court. The Second, Third, Ninth, and Tenth Circuits have explicitly recognized the circuit split. While a petition for rehearing en banc is currently pending before the Ninth Circuit, the Eighth Circuit denied a petition for rehearing en banc. *See Harris*, No. 19-2031, ECF No. 9. There is no realistic prospect that the circuit conflict will resolve without the Court's intervention.

This issue need not percolate further. At least seven circuits have addressed the scope of a district court's authority at a First Step Act resentencing, and the arguments on both sides of the split have been fully aired. Even if the Ninth Circuit were to grant rehearing en banc and change its position, that would simply result in a different 4-3 split among the circuits.

Finally, this Court's review is especially necessary because the circuit split undermines Congress's important goal of reducing sentencing disparities and providing district courts with discretion to fashion appropriate reduced sentences. *See* U.S.S.G. § 1A1.3 ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."). Leaving this split unresolved will exacerbate the very problem the Guidelines were designed to correct and cause new and substantial sentencing disparities between similarly-situated defendants in different circuits.

B. The Decision Below is Incorrect.

The Tenth Circuit's holding that district courts cannot consider a defendant's current, legally correct Guidelines range when conducting a resentencing under § 404 of the First Step Act misreads the First Step Act and undermines Congress's goals in enacting that statute.

First, federal statutes authorizing a district court to "impose" sentence permit the court to consider all relevant factors in fashioning that sentence. *See, e.g.*, 18 U.S.C. § 3553(a) ("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."). By instructing the district court to "impose" sentence, Section § 404 of the First Step Act contemplates that district courts may, in their discretion, determine a reduced sentence in place of the original sentence based on the generally applicable sentencing considerations. *Cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give [identical] words a different meaning for each category would be to invent a statute rather than to interpret one."). And because a sentencing judge "shall consider . . . the sentencing range established . . . in the [G]uidelines," *see* 18 U.S.C. § 3553(a)(4), and "shall use the Guidelines Manual in effect on the date the defendant is sentenced," *see* U.S.S.G. § 1B1.11, it follows that a district court is authorized to apply the law actually in effect on the date of the First Step Act resentencing. *See also Gall v. United States*, 552 U.S. 38, 50 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."); *Pepper v. United States*, 562 U.S. 476, 492 (2011) (noting that a court's

"duty is always to sentence the defendant as he stands before the court on the day of sentencing") (quoting *United States v. Bryson*, 229 F.3d 425 (2d Cir. 2000)). Had Congress intended that the sentencing judge conduct a resentencing according to the law that was "in effect on the date of the previous sentencing," *see* 18 U.S.C. § 3742(g)(1), it would have expressly said so. That Congress did not, and instead instructed courts to "impose a reduced sentence," shows that it intended no such limitation here.

Second, the most natural reading of § 404's "as if" language is that it directs district courts to replace the pre-2010 statutory penalties with the Fair Sentencing act's lower penalties, and then to exercise their discretion on a case-by-case basis as they normally do. The exercise of this discretion plainly includes renewed consideration of the § 3553(a) factors at the time of the First Step Act resentencing. The statutory text contains no indication that the consideration of the updated § 3553(a) factors must be paired with analysis of outdated Guidelines. Importantly, unlike the restrictive provisions of § 3582(c)(2) and U.S.S.G. § 1B1.10, the "as if" clause does not instruct courts to "leave all other [G]uideline application decisions unaffected." *See* U.S.S.G. § 1B1.10(b)(1). Nor does it prohibit district courts from imposing a reduced sentence "that is less than the minimum of the amended [G]uideline range." *See* U.S.S.G. § 1B1.10(b)(2)(A).

The Third, Sixth, and Seventh Circuits' reading of the text is the only approach consistent with the First Step Act's goal of "allow[ing] prisoners sentenced before the Fair Sentencing Act of 2010 reduced the 100-to-1 disparity in sentencing be-

tween crack and powder cocaine to petition the court for an *individualized review of their case*." *See* FSA Summary, at 2, https://www.judiciary.senate.gov/download/revised-first-step-act_-summary; *see also* 164 Cong. Rec. S7745-01, S7748 (Dec. 18, 2018) (statement of Sen. Klobuchar) (emphasis added) ("[T]he bill simply allows people to petition courts . . . for an individualized review based on the particular facts of their case . . . . By giving . . . judges this discretion, we will give them the tools to better see that justice is done."); *id.* at S7756 (statement of Sen. Nelson) ("This legislation will allow judges to do the job that they were appointed to do-to use their discretion to craft an appropriate sentence to fit the crime."). By contrast, the Tenth Circuit's approach restricts a district court's discretion to fashion an appropriate sentence and thereby frustrates Congress's evident objective.

Third, § 404 is explicit about the limitations on the discretion that the statute affords. The law identifies two such restrictions: courts cannot conduct a resentencing if the defendant already obtained relief under the Fair Sentencing Act or if the defendant had previously filed a First Step Act motion that was "denied after a complete review of the motion on the merits." Pub. L. 115-391, § 404(b). The Tenth Circuit, however, inferred an implicit limitation that is nowhere found in the statutory text. That was error. *Cf. Dean v. United States*, 556 U.S. 568, 573 (2009) ("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.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Fourth, the Tenth Circuit's analysis conflicts with the language of the second limitation in § 404(c). As noted, that provision prevents a court from conducting a resentencing under the Act if the defendant filed a previous motion that was "denied after a complete review of the motion on the merits." This language "shows the dimensions of the resentencing inquiry Congress intended district courts to conduct: complete review of the resentencing motion on the merits." *Boulding*, 960 F.3d at 784. A "resentencing predicated on an erroneous or expired [G]uideline calculation would seemingly run afoul of Congressional expectations." *Id.*

Finally, the Sentencing Commission has called into question the approach of the Second, Fifth, Ninth, and Tenth Circuits. In contrast to the conclusion of those courts, the Sentencing Commission has stated that district courts are not limited solely to considering changes in the Fair Sentencing Act but instead "should consider the [G]uidelines and policy statements, along with the other § 3553(a) factors, during the resentencing." *See* ESP Insider Express Special Edition, First Step Act (Feb. 2019), https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf). The Sentencing Commission's recommendation reinforces the plain reading of the statute and supports the conclusion that sentencing judges may consider the current sentencing Guidelines and policy statements in fashioning a sentence that is sufficient, but not greater than necessary, to achieve Congress's sentencing objectives.

C. The Issue is Important and Recurring.

Whether a district court may consider a defendant's current, legally correct Guidelines range when conducting a resentencing under § 404 of the First Step Act is an important and recurring question of federal law. In May 2018, the Sentencing Commission calculated that 2,660 offenders were likely to be eligible for resentencing under § 404. U.S. Sentencing Commission, *Sentence and Prison Impact Estimate Summary S. 756, The First Step Act of 2018* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/December_2018_Impact_Analysis.pdf. In light of the objectives of the First Step and Fair Sentencing Acts, ensuring consistent, even-handed application of § 404 is particularly important. Congress recognized that previous laws had yielded deep racial disparities, and the Sentencing Commission has determined that over 89% of the 2,660 offenders likely eligible for resentencing were Black. *See id*.

Because of this circuit conflict, a large number of defendants eligible for resentencing will see their Guidelines range vary based solely on the location of the proceeding. Had Bates's motion been filed with a district court in the Third, Sixth, or Seventh Circuit, the district court would have been authorized to consider the revision to U.S.S.G. § 3B1.2.

This circuit split has profound real-world import. For example, the application of the updated Guidelines provision would have reduced Bates's Guidelines range to 135–168 months from 168–210, a difference of almost three years. In the Fifth Circuit case implicated in this split, application of the cur-

rent, legally correct Guidelines would have reduced the defendant's Guidelines range in half, to 77–96 months from 151–188 months. *See Hegwood*, 934 F.3d at 416. And in the Ninth Circuit case, the defendant's Guidelines range would have been reduced by a similarly large amount of time (from 180–262 months to 84–105 months). *See Kelley*, 962 F.3d at 474.

D. This Case Presents an Ideal Vehicle.

This case squarely and cleanly presents the issue that has divided the circuit courts. It is therefore an ideal vehicle for resolving the question presented.

Bates has raised the question presented throughout the proceedings below. He argued before the district court that he was entitled to a resentencing under the current Guidelines pursuant to his motion under the First Step Act, *see* Pet. App. 11a–12a, and the district court squarely decided the issue in the Government's favor, *see* Pet. App. 13a. Bates also raised the issue before the Tenth Circuit, which too squarely decided the issue in the Government's favor.

Because the district court concluded (and the Tenth Circuit affirmed) that it was prohibited from taking into account Bates's current Guidelines range, no court has ever addressed his argument that he is entitled to a minor-role adjustment. The Court's resolution of the decision in his favor would permit such consideration. The record in this case is well developed, moreover, and Bates has a strong argument that he is indeed entitled to the two-offense-level reduction for being a "minor participant" in the offense. *See* U.S.S.G. § 3B1.2(b). Under the revised

§ 3B1.2(b), a defendant who, like Bates, is convicted of a drug trafficking offense and whose participation in that offense was limited to transporting or storing drugs and who is accountable only for the quantity of drugs he personally transported "may receive an adjustment under this [G]uideline." *See* U.S.S.G. § 3B1.2, cmt. n.3(A). All of the non-exclusive factors relevant to determining whether to apply the adjustment set forth in Note 3(C) apply to Bates: there was no evidence at trial that Bates "understood the scope and structure of" the larger drug operation; there was no evidence that he "participated in planning or organizing the criminal activity" or that he "exercised" or "influenced the exercise of decision-making authority"; the "nature and extent of his involvement" in the criminal activity was limited to that of a minor courier; and Bates did not derive substantial proceeds from the criminal activity. Indeed, the Government has never attempted to argue that Bates would be ineligible for the minor participant reduction if the district court were to consider § 3B1.2 on the merits.

Timely resolution of the conflict is important. First Step Act resentencings are happening on a regular basis in district courts nationwide. While other petitions presenting this issue may be filed in the future, there is no reason for this Court to delay—and every reason for it to move swiftly—in resolving this circuit split. The longer this Court waits, the more judicial resources will be wasted if the Court rejects the Tenth Circuit's position. And defendants like Bates who had been resentenced under the erroneous regime and seek relief under the correct rule are likely to face opposition from the Government on the theory that § 404(c) prevents the district court

from granting another First Step Act motion and imposing an appropriate sentence.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2020

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 19-60464
(D.C. No. 6:10-CR-00003-RAW-2)
(E.D. Okla.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee

FILED
United States Court
of Appeals
Tenth Circuit
September 10, 2020
Christopher M.
Wolpert
Clerk of Court

v.

DREW SAMUEL BATES,

Defendant - Appellant

ORDER AND JUDGMENT[1]

Before **PHILLIPS, MURPHY,** and **McHUGH,** Circuit Judges.

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Seeking relief under the First Step Act of 2018, Drew Samuel Bates asserts that the district court erred by refusing to consider whether he qualifies for a mitigating-role adjustment and a reduced sentence based on the current version of the United States Sentencing Guidelines. But in this court's recent decision in *United States v. Brown*, ___ F.3d ___, No. 19-7039, 2020 WL 5384936, at *5 (10th Cir. Sept. 9, 2020), we concluded that, at a First Step Act resentencing, district courts may not substitute the current version of the Guidelines for the version of the Guidelines in effect at the time of the original sentencing. Because Brown refutes the sole basis for this appeal, we affirm.

BACKGROUND

In June 2010, a federal jury convicted Bates for knowingly and intentionally possessing 50 grams or more of cocaine base with intent to distribute, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1), (b)(1)(A)(iii) (2006). Applying the 2009 version of the United States Sentencing Guidelines, a United States Probation Officer calculated that Bates's advisory Guidelines range was 210 to 262 months' imprisonment. On May 17, 2011, the district court varied downward and sentenced Bates to 190 months' imprisonment. Later, on March 1, 2016, the district court granted Bates's motion for a sentence reduc-

tion, lowering his sentence to 168 months' imprisonment.[2]

About two years after Bates's 2016 sentence reduction, Congress passed the First Step Act of 2018. The First Step Act allows district courts to "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." First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (citation omitted). Thus, the First Step Act renders retroactive certain sentencing changes Congress had earlier enacted in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. Relevant here, the Fair Sentencing Act raised the quantity of cocaine base needed to trigger the mandatory-minimum sentences contained in § 841(b)(1)(A), (b)(1)(B). To receive a sentence of 10 years to life under § 841(b)(1)(A)(iii), Congress increased the threshold quantity of cocaine base from 50 grams to 280 grams; to receive a sentence of 5 years to 40 years under § 841(b)(1)(B)(iii), Congress increased the threshold quantity of cocaine base from 5 grams to 28 grams. 21 U.S.C. § 841 (2006), as modified by Fair Sentencing Act § 2(a)(1)–(2), 124 Stat. at 2372.

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[2] Bates's motion was based on "Amendment 782, [a 2014 amendment to the Guidelines], which provided for a retroactive, two-level decrease in the offense levels for certain drug offenses." *United States v. Bates*, 672 F. App'x 883, 884 (10th Cir. 2017) (unpublished) (citing U.S. Sentencing Guidelines Manual app. C, amend. 782 (U.S. Sentencing Comm'n 2014)). Amendment 782 thus reduced Bates's total offense level by two levels, resulting in "an amended advisory Guidelines sentencing range of 168 to 210 months." *Id.* Even though the district court sentenced Bates at the bottom of this range, he appealed his sentence. *See generally id.* We affirmed. *Id.* at 885.

Bates was convicted and sentenced under § 841(a)(1), (b)(1)(A)(iii), so he filed in the district court a motion seeking a sentence reduction under the First Step Act.[3] Because the jury had convicted him for possessing 50 grams or more of cocaine base, not 280 grams or more, he argued that § 841(b)(1)(A)(iii) "no longer fits"; instead, he claimed that § 841(b)(1)(B)(iii) "controls the sentence range for this case." R. vol. 1 at 39. That said, because in 2016 the district court had granted his motion for a sentence reduction, Bates did not argue that the First Step Act had further diminished his Guidelines range.

Rather, Bates argued that he was entitled to a resentencing under the current version of the Guide-

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[3] Section 404(c) of the First Step Act says that courts may not "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[.]" Though the district court sentenced Bates in 2011, the year after Congress passed the Fair Sentencing Act, the court here acknowledged that "he was not sentenced in accordance with the Fair Sentencing Act." R. vol. 1 at 78. And the government agreed that "Defendant was sentenced according to pre-[Fair Sentencing Act] law[.]" *Id.* at 67–68 & n.2. So though the Fair Sentencing Act should have applied at Bates's 2011 sentencing, *see Dorsey v. United States*, 567 U.S. 260, 270, 281 (2012) (concluding "that Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders" and noting that the Sentencing Commission had "promulgated conforming emergency Guidelines amendments that became effective on November 1, 2010" (citation omitted)), because Bates's sentence was not "previously imposed" in accordance with the Fair Sentencing Act, we agree with the district court and the government that Bates is eligible for relief under the First Step Act.

lines, through which he asserted that the district court could award him "a mitigating role adjustment[.]" *Id.* at 47; *see also* U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 3B1.2 (U.S. Sentencing Comm'n 2018) (decreasing a defendant's offense level if he or she was a minimal or minor participant in the criminal offense by four or two levels, respectively).[4] Specifically, Bates sought to invoke a 2015 Guidelines amendment—Amendment 794—which made various updates to § 3B1.2's commentary. U.S.S.G. supp. to app. C, amend. 794, at 116–18 (U.S. Sentencing Comm'n 2018). To take one example, U.S.S.G. § 3B1.2 applies to "a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity." U.S.S.G. § 3B1.2 cmt. n.3(A). Amendment 794 defined what it means to be an "average participant," stating "that, when determining mitigating role, the defendant is to be compared with *the other participants* 'in the criminal

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[4] In addition, Bates requested a variance, arguing (among other things) that his "rehabilitation efforts" warranted "consideration at resentencing." R. vol. 1 at 54 (citation omitted). After considering the 18 U.S.C. § 3553(a) sentencing factors, the district court rejected Bates's variance request, observing that Bates had received "two incident reports since incarceration." R. vol. 1 at 79. In *United States v. Mannie*, ___ F.3d ___, ___, No. 19-6102, 2020 WL 4810084, at *11 n.18 (10th Cir. Aug. 18, 2020), this court ruled that the § 3553(a) factors "are permissible, although not required, considerations when ruling on a 2018 [First Step Act] motion." Here, the district court considered the factors, and its refusal to vary is within its discretion. *See id.* at *7, *11 & n.18. And regardless, on appeal, Bates does not contest this ruling, instead challenging only whether the district court erred by denying "Mr. Bates's request to consider a mitigating role adjustment pursuant to the 2018 Guidelines Manual[.]" Appellant's Opening Br. 1; *see also id.* at 7, 24–25.

activity.'" U.S.S.G. supp. to app. C, amend. 794, at 117 (emphasis added). *But see United States v. Rodriguez-Padilla*, 439 F. App'x 754, 758 (10th Cir. 2011) (unpublished) (noting that "[t]he commentary to § 3B1.2" had not yet specified the relevant comparison and explaining that, at that time, we allowed comparisons both with "other participants in the specific criminal activity" and "with a typical offender committing this type of offense" (citation omitted)). Relying on this and other "substantial changes" resulting from the 2015 amendment, Bates argued that the district court should reconsider whether he was entitled to a mitigating-role adjustment, because he "is exactly the kind of defendant [whom] the Sentencing Commission drafted § 3B1.2 and Amendment 794 for." R. vol. 1 at 47–51.

The district court denied Bates's motion in part,[5] reasoning that the First Step Act does not give defendants a chance at "plenary resentencing." R. vol. 1 at 78. The district court ruled that it could not consider changes outside of "the changes mandated by the 2010 Fair Sentencing Act." R. vol. 1 at 79 (citation omitted). Because the mitigating-role-adjustment changes were not changes mandated by the Fair Sentencing Act, the district court concluded that it could not consider whether Bates was entitled to the adjustment. He now appeals, and we exercise appellate jurisdiction under 28 U.S.C. § 1291.

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[5] Bates also requested that the district court reduce his term of supervised release, and the district court granted this request and reduced his term of supervised release from 60 months to 48 months.

DISCUSSION

We review de novo the breadth of the district court's resentencing authority under the First Step Act. *See United States v. Rhodes*, 549 F.3d 833, 837 (10th Cir. 2008) (citing *United States v. Moore*, 541 F.3d 1323, 1326 (11th Cir. 2008)). How far that authority extends depends on the plain language of Section 404(b) of the First Step Act:

> (b) DEFENDANTS PREVIOUSLY SEN TENCED.—A court that imposed a sentence for a covered offense may, on motion of the defend ant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, im pose 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.

In a recent opinion, a panel of this court interpreted this language and concluded that "plenary resentencing is not appropriate under the First Step Act." *United States v. Brown*, ___ F.3d ___, ___ , No. 19-7039, 2020 WL 5384936, at *5 (10th Cir. Sept. 9, 2020). We also ruled that the First Step Act "does not empower the sentencing court to rely on revised Guidelines instead of the Guidelines used at the original sentencing." *Id.* at *5.

Bates argues that the district court erred by not resentencing him according to "the current edition of the guidelines." Appellant's Opening Br. 7 (capitalization removed). He relies specifically on Amendment 794, which became effective after Bates's 2011 sentencing. U.S.S.G. supp. to app. C, amend. 794, at

118 (stating that "[t]he effective date of this amendment is November 1, 2015" (emphasis removed)); *see also United States v. Diaz*, 884 F.3d 911, 913 n.1 (9th Cir. 2018) ("Amendment 794 to § 3B1.2 became effective on November 1, 2015."). In other words, and as Bates noted in the district court, he relies on "substantial changes" made to the mitigating-role adjustment "[s]ince Mr. Bates was sentenced[.]" R. vol. 1 at 47.

But under *Brown*, Bates is not entitled to a reduced sentence based on those changes. ___ F.3d at ___, 2020 WL 5384936, at *5 ("[T]he First Step Act also does not empower the sentencing court to rely on revised Guidelines instead of the Guidelines used at the original sentencing."). As a result, we reject Bates's argument that the district court erred by not applying the current version of the Guidelines.

CONCLUSION

The district court did not err by refusing to consider whether Bates qualifies for a mitigating-role adjustment based on Guidelines revisions that took effect after his original sentencing. Accordingly, we affirm the district court's dismissal in part of Bates's motion for a sentence reduction under the First Step Act.

Entered for the Court

Gregory A. Phillips
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

Criminal Case
No. CR-10-03-RAW

DREW SAMUEL BATES,

Defendant/Petitioner

ORDER

On February 19, 2019, Defendant Drew Samuel Bates ("Defendant") requested appointment of counsel to assist with the filing of a motion pursuant to Section 404 of the First Step Act of 2018. [Doc. 250]. On March 13, 2019, the court appointed the Office of Federal Public Defender to represent him. [Doc. 253]. Now before the court is "Defendant's Motion for Sentence Reduction under First Step Act and Brief in Support" filed on April 12, 2019. [Doc. 254]. The Government filed its response in opposition to D fendant's motion on May 29, 2019. [Doc. 259]. This matter is ripe for ruling.

On June 14, 2010, a jury found Defendant guilty of one count of Possession with Intent to Distribute

Cocaine Base, aka Crack Cocaine, a Schedule II Co trolled Substance in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), and 18 U.S.C. § 2. On May 17, 2011, the court sentenced Defendant to 190 months to be served in the custody of the Bureau of Prisons [Doc. 183]. The judgment was entered on May 24, 2011. Defendant's notice of appeal was filed on May 27, 2011. [Doc. 184]. On direct appeal, Defendant argued this court erred in denying his motion to suppress, that there was insufficient evidence to convict him, and that his trial counsel was ineffective. On January 5, 2012, the Tenth Circuit Court of Appeals affirmed Defendant's conviction in Appellate Case No. 11-7042. [Doc. 211]. *United States v. Bates*, 453 Fed.Appx. 839 (10th Cir. 2012).

Defendant next sought a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 782 to the United States Sentencing Guidelines. [Doc. 216]. On March 1, 2016, this court entered an order granting Defendant's 18 U.S.C. § 3582(c)(2) motion. [Doc. 219]. Defendant's sentence was reduced from 190 months to 168 months. Defendant disagreed with the extent of the reduction and filed an appeal. On January 11, 2017, the Circuit affirmed the sentence reduction in Appellate Case No. 16-7015. [Doc. 245].

During this time, Defendant also filed a motion for appointment of counsel [Doc. 228], a motion to provide court records and transcripts [Doc. 229], and a motion for ruling [Doc. 233] with this court. On August 1, 2016, Defendant's motion for appointment of counsel and the motion to provide court records and transcripts were denied, and Defendant's motion for ruling was deemed moot. [Doc. 234]. On August 22, 2016, Defendant filed another notice of appeal

[Doc. 236]. An order dismissing the appeal for lack of prosecution was filed on November 3, 2016, in Appellate Case No. 16-7065. [Doc. 242].

Then, on November 14, 2016, Defendant filed a motion under 28 U.S.C. § 2255. [Doc. 244]. In summary, he requested a reduction of sentence based upon Amendment 794 to the Sentencing Guidelines. The undersigned determined Defendant's § 2255 motion was filed outside of the one-year statute of limitations and that Amendment 794 did not retroactively apply on collateral review. [Doc. 247]. Defendant's motion was denied and dismissed on November 16, 2018. *Id.*

Defendant now claims the First Step Act of 2018 provides a basis for sentencing relief, arguing that the First Step Act "authorizes this Court to determine the appropriate sentence under current law, including sentencing factors in 18 U.S.C. § 3553(a), the current Sentencing Guidelines, and current case law." [Doc. 254 at 6]. In addition, Defendant claims that "under the current Guidelines, an offense level adjustment for mitigating role is applicable," and that "this reduces the Guideline range to 135-168 months." *Id.* He also contends that "a variance was granted at the original sentencing, but was lost when the sentence was modified under Amendment 782," and that "a variance is available now, providing this Court with the ability to restore the lost variance." *Id.* Lastly, Defendant argues that "the term of supervised [release] should be reduced to the new statutory minimum." *Id.* He is requesting a sentence of time served, or in the alternative, that his 168-month sentence be reduced. *Id.*

In response, the Government points out that, following the First Step Act and retroactive Fair Sentencing Act, Defendant's base offense level and guideline range "remain unchanged and continues to justify his current sentence of 168 months imprisonment." [Doc. 259 at 6]. The Government concedes that Defendant is entitled to a reduction of supervised release, but otherwise claims Defendant's remaining arguments are without merit. *Id.* According to the Government, "reconsideration of any other aspect of sentencing, including the granting of a variance, is prohibited since the First Step Act does not authorize a plenary resentencing," and that "Defendant's motion for a mitigating role adjustment and downward variance should be denied." *Id.* at 12.

The First Step Act of 2018 implements certain reforms to the criminal justice system. *See* First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194 (2018). Section 404 permits this court to reduce a sentence retroactively based on the reduced statutory penalties for crack cocaine offenses in the Fair Sentencing Act of 2010, Pub. L. 111-220; 124 Stat. 2372 (2010).[1] To be eligible for relief under Section 404 of the First Step Act, a defendant must have been convicted of a "covered offense" committed before August 3, 2010. 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. *See* First Step Act, § 404(a).

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[1] A district court has discretion, and is not required, to reduce a sentence pursuant to the First Step Act. See First Step Act, § 404(c).

This court has reviewed the First Step Act of 2018, the Fair Sentencing Act of 2010, and the statutory language of 18 U.S.C. § 3582(c). Here, consideration of a sentencing reduction is authorized by § 404 of the First Step Act and 18 U.S.C. § 3582(c)(1)(B). The Government correctly points out that Defendant is eligible for consideration, noting that his offense was committed before August 3, 2010, that his base offense level would have been affected by Section 2 of the Fair Sentencing Act, and that he was not sentenced in accordance with the Fair Sentencing Act. [Doc. 259 at 5-6].

Nevertheless, following the application of Amendment 782 to his sentence, Defendant's base offense level and guideline range remain unchanged, and despite Defendant's urging to the contrary, the First Step Act does not provide for a plenary resentencing. In *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019), the Fifth Circuit provided the following analysis:

> It is clear that the First Step Act grants a district judge limited authority to consider reducing a sentence previously imposed. The calculations that had earlier been made under the Sentencing Guidelines are adjusted "as if" the lower drug offense sentences were in effect at the time of the commission of the offense. That is the only explicit basis stated for a change in the sentencing. In statutory construction, the expression of one thing generally excludes another. *TRW Inc. v. Andrews*, 534 U.S. 19, 28-29, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001). The express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 — saying the

> new sentencing will be conducted "as if" those two sections were in effect "at the time the covered offense was committed" — supports that Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense.
>
> * * *
>
> The mechanics of First Step Act sentencing are these. The district court decides on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act. The district court's action is better understood as imposing, not modifying, a sentence, because the sentencing is being conducted as if all the conditions for the original sentencing were again in place with the one exception. The new sentence conceptually substitutes for the original sentence, as opposed to modifying that sentence.

United States v. Hegwood, 934 F.3d at 418-19. The out-of-circuit authority is persuasive.[2]

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[2] It appears that the Fifth Circuit is the only court of appeals to address whether a district court facing a motion under Section 404 may consider any intervening changes in the law other than those made by the Fair Sentencing Act of 2010. Numerous district courts across the country have concluded that the First Step Act does not provide for a plenary resentencing. *See United States v. Mason*, 2019 WL 2396568, at *3-5 (E.D. Wash. June 6, 2019) (collecting cases).

The United States Probation Office prepared a Report on Applicability of the First Step Act of 2018 and a copy was provided to the parties. [Doc. 263]. Based on a total offense level of 34 and a criminal history category of II, the advisory guideline imprisonment range is 168 to 210 months. *Id.* at 1. Defendant's term of imprisonment is at the bottom of that range. The applicability report also shows Defendant had two incident reports since incarceration. *Id.* at 2. The court has further considered the factors set forth in 18 U.S.C. § 3553(a). A reduction from the previously imposed sentence of 168 months is not warranted, and the court will exercise its discretion to deny Defendant's request for a reduction in sentence. The term of supervised release, however, should be reduced to 48 months.

For the reasons set forth above, Defendant's motion for sentence reduction [Doc. 254] is GRANTED in part and DENIED in part. [3] Specifically, the motion is GRANTED to the extent that Defendant's term of supervised release is REDUCED from 60 months to 48 months. In all other respects, Defendant's motion is DENIED. The United States Probation Office is respectfully directed to prepare an Amended Judgment in accordance with this order.

It is so ordered this 21st day of October, 2019.

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[3] Pursuant to Rule 43(b)(4) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3582(c), the court is not required to hold a hearing with the Defendant present.

/s/ Ronald A. White

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THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA