No. 20-535

In the Supreme Court of the United States

DREW SAMUEL BATES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to apply a post-sentencing, non-retroactive guidelines amendment unrelated to the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, when calculating petitioner's guidelines range in connection with his motion for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

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

Bates v. *United States*, No. 16-cv-498 (Nov. 16, 2018) (denying motion under 28 U.S.C. 2255)

United States Court of Appeals (10th Cir.):

United States v. *Bates*, No. 11-7042 (Jan 5, 2012) (affirming on direct appeal)

United States v. *Bates*, No. 16-7065 (Nov. 3, 2016) (dismissing appeal from order denying motions for appointment of counsel and access to sentencing transcript)

United States v. *Bates*, No. 19-7061 (Sept. 10, 2020) (affirming in First Step Act proceedings)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the Federal Reporter but is reprinted at 827 Fed. Appx. 822. The order of the district court (Pet. App. 9a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2020. The petition for a writ of certiorari was filed on October 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted of possessing 50 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)(A)(iii) (2006) and

18 U.S.C. 2. Pet. App. 2a; Judgment 1. He was sentenced to 190 months of imprisonment, to be followed by five years of supervised release. Pet. App. 2a; Judgment 2-3. The court of appeals affirmed. 453 Fed. Appx. 839.

The district court subsequently granted petitioner's motion for a sentence reduction under 18 U.S.C. 3582(c)(2) and reduced his term of imprisonment to 168 months. The court of appeals affirmed. 672 Fed. Appx. 883. Petitioner later filed a motion seeking vacatur of his sentence under 28 U.S.C. 2255, which the district court denied. D. Ct. Doc. 247 (Nov. 16, 2018). Petitioner did not appeal.

After the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a reduction of sentence under Section 404 of that Act. See Pet. App. 3a-4a. The district court granted the motion in part, reducing petitioner's term of supervised release to four years but declining to reduce petitioner's term of imprisonment. *Id.* at 6a & n.5. The court of appeals affirmed. *Id.* at 1a-8a.

1. In 2009, petitioner was caught with more than three kilograms of crack cocaine during a routine traffic stop. Presentence Investigation Report (PSR) ¶¶ 12-15. Oklahoma Highway Patrol troopers observed the car in which petitioner was a passenger failing to signal lane changes. 453 Fed. Appx. at 840-841. When they approached the car, officers noticed the smell of marijuana coming from it. *Ibid.*; PSR ¶¶ 12-13. Neither the driver nor petitioner produced a driver's license. 453 Fed. Appx. at 840. After a drug-detecting dog alerted at the car, officers searched it and found marijuana throughout the interior. *Id.* at 841; PSR ¶¶ 13-14. Behind the front seat, officers found a bag containing scented dryer

sheets and a resealed box of laundry detergent. PSR ¶ 14. Inside the box, officers discovered several plastic bags containing crack cocaine hidden in the detergent. *Ibid.*

In 2010, a grand jury in the Eastern District of Oklahoma returned a superseding indictment charging petitioner with possessing 50 grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2006) and 18 U.S.C. 2. Superseding Indictment 1. Following a jury trial, petitioner was convicted on that charge. Pet. App. 2a. The Probation Office determined that petitioner was responsible for 3.084 kilograms of crack cocaine, resulting in a base offense level of 36 and an advisory guidelines range of 210 to 262 months of imprisonment. PSR ¶¶ 22-23, 52.

At sentencing, the district court adopted the Probation Office's findings and calculations. See Statement of Reasons 1. The court denied petitioner's request for a mitigating-role adjustment under Sentencing Guidelines § 3B1.2, finding that petitioner was not "substantially less culpable than the average participant." *Id.* at 3. Nevertheless, the court varied downward and sentenced petitioner to 190 months of imprisonment, to be followed by five years of supervised release. Pet. App. 2a; Judgment 2-3. The court also stated that it would have imposed the same sentence "if given the broadest possible discretion" and "notwithstanding any judicial fact-finding occurring by adoption of the Presentence Report or at the sentencing hearing." Statement of Reasons 4. The court of appeals affirmed. 453 Fed. Appx. 839.

2. a. In the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, Congress altered the statutory

penalties for certain crack-cocaine offenses. Before those amendments, a defendant convicted of trafficking 50 grams or more of crack cocaine faced a minimum term of imprisonment of ten years, a maximum term of imprisonment of life, and a minimum term of supervised release of five years (absent any other statutory enhancements). 21 U.S.C. 841(b)(1)(A)(iii) (2006). A defendant convicted of trafficking five grams or more of crack cocaine faced a minimum term of imprisonment of five years, a maximum term of imprisonment of 40 years, and a minimum term of supervised release of four years (absent any other statutory enhancements). 21 U.S.C. 841(b)(1)(B)(iii) (2006). For powder-cocaine offenses, Congress had set the threshold amounts necessary to trigger the same penalties significantly higher. 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii) (2006).

The Fair Sentencing Act reduced that disparity in the treatment of crack and powder cocaine by increasing the amount of crack cocaine necessary to trigger the penalties described above. Specifically, Section 2(a) of the Fair Sentencing Act increased the threshold quantities of crack cocaine necessary to trigger the statutory penalties set forth in 21 U.S.C. 841(b)(1)(A) from 50 grams to 280 grams, and in 21 U.S.C. 841(b)(1)(B) from five grams to 28 grams. § 2(a), 124 Stat. 2372. Those changes applied only to offenses for which a defendant was sentenced after the Fair Sentencing Act's effective date (August 3, 2010). See *Dorsey* v. *United States*, 567 U.S. 260, 273 (2012).

b. Under the Sentencing Guidelines, the base offense level for controlled-substance offenses varies depending on the type and amount of substance involved. In 2014, the Sentencing Commission promulgated Amendment 782, which retroactively reduced the base

offense level for most drug quantities. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014); see *id.* Amend. 788. In 2015, petitioner filed a motion to reduce his sentence under Section 3582(c)(2), which permits a district court to reduce a previously imposed term of imprisonment if the term was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see 672 Fed. Appx. at 884. In light of Amendment 782, petitioner faced an amended advisory guidelines range of 168 to 210 months of imprisonment. 672 Fed. Appx. at 884. In 2016, the district court granted petitioner's motion and reduced his term of imprisonment to 168 months. *Ibid.* Petitioner appealed to challenge the extent of the reduction, and the court of appeals affirmed. *Id.* at 884-885.

c. In 2015, the Sentencing Commission promulgated Amendment 794, which prospectively amended the Guidelines commentary to Section 3B1.2—the mitigating-role guideline, which the district court had declined to apply at petitioner's sentencing. See Sentencing Guidelines App. C Supp., Amend. 794 (Nov. 1, 2015). The 2015 amendment clarified that a defendant's relative culpability for purposes of a mitigating-role adjustment should be determined by comparison to the average participant in the same criminal activity, rather than to a broader universe of individuals participating in similar crimes. See *ibid.* (Reason for Amendment); see also Sentencing Guidelines § 3B1.2, comment. (n.3(A)) ("This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant in the criminal activity."); Sentencing Guidelines § 3B1.2, comment. (n.5) (defining a "Minor

Participant" as a defendant "who is less culpable than most other participants in the criminal activity") (emphasis omitted). The 2015 amendment also added to the commentary a non-exhaustive list of factors for courts to consider in deciding whether to grant a mitigating-role adjustment: (1) "the degree to which the defendant understood the scope and structure of the criminal activity"; (2) "the degree to which the defendant participated in planning or organizing the criminal activity"; (3) "the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority"; (4) "the nature and extent of the defendant's participation in the commission of the criminal activity"; and (5) "the degree to which the defendant stood to benefit from the criminal activity." Sentencing Guidelines App. C Supp., Amend. 794 (Nov.1, 2015); see Sentencing Guidelines § 3B1.2, comment. (n.3(C)).

In 2016, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255, seeking retroactive application of Amendment 794. D. Ct. Doc. 244, at 5 (Nov. 14, 2016). The district court denied the motion as untimely under 28 U.S.C. 2255(f), which generally requires that any Section 2255 motion be filed within one year of final judgment. D. Ct. Doc. 247, at 2-4. The court also determined that petitioner would not have been entitled to relief even if the motion had been timely because "Amendment 794 [was] not retroactively applicable on collateral review." *Id.* at 3. The court added that, if the motion were construed as a request for a sentence reduction under Section 3582(c)(2), petitioner still "would not be entitled to relief" because the Sentencing Commission did not make Amendment 794 retroactive. *Ibid.* Finally, the court observed that the government's

argument that petitioner would not be entitled to a mitigating-role adjustment even under Amendment 794 was "supported by the record," but unnecessary to address. *Ibid.* The court declined to issue a certificate of appealability, *id.* at 4, and petitioner did not appeal.

3. In 2018, Congress enacted Section 404 of the First Step Act to create a mechanism for certain defendants sentenced before the effective date of the Fair Sentencing Act to seek sentence reductions based on that Act's changes. The mechanism is available only if a defendant was sentenced for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." § 404(a), 132 Stat. 5222. Under Section 404(b), a district court that "imposed a sentence for a covered offense may, on motion of the defendant * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222. Section 404(c) provides that Section 404 "shall [not] be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222. It also states that a court may not reduce a sentence under Section 404 "if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act * * * or if a previous motion made under [Section 404] to reduce the sentence was, after the date of enactment of [the First Step Act], denied after a complete review of the motion on the merits." *Ibid.*

In 2019, petitioner moved for a reduction of sentence under Section 404 of the First Step Act. See D. Ct. Doc. 254, at 1 (Apr. 12, 2019). Petitioner contended that his

conviction was a "covered offense" because he was convicted of possessing at least 50 grams of crack cocaine in violation of Section 841(b)(1)(A)(iii), and the Fair Sentencing Act modified the penalties for that offense by increasing the amount of crack cocaine necessary to trigger it from 50 grams to 280 grams, thus making a 50-gram offense subject only to the lesser penalties in Section 841(b)(1)(B)(iii). *Id.* at 3-4. He also urged the district court to apply the then-current edition of the Sentencing Guidelines Manual—including the amended commentary to Section 3B1.2, under which he once again sought a two-level mitigating-role adjustment. *Id.* at 6-9, 12-17. He further urged the court to consider the sentencing factors in 18 U.S.C. 3553(a) and to vary downward from the applicable guidelines range, in part to account for his role in the offense. D. Ct. Doc. 254, at 6-12, 18-19.

The government agreed that petitioner was eligible for a sentence reduction; that the district court should consider the Section 3553(a) factors; and that a reduction in petitioner's term of supervised release would be warranted. D. Ct. Doc. 259, at 5-6 & n.2, 9-10 (May 29, 2019). But the government contended that Section 404 does not authorize a plenary resentencing at which a defendant may challenge guidelines determinations unrelated to the Fair Sentencing Act. *Id.* at 6-9. Because the Fair Sentencing Act had no effect on petitioner's guidelines range, and because petitioner's sentence (as reduced in 2016, see p. 5, *supra*) remained at the bottom of the amended guidelines range, the government urged the court to exercise its discretion to deny petitioner's request for a further reduction in his term of imprisonment. D. Ct. Doc. 259, at 6, 10.

The district court granted in part and denied in part petitioner's motion. Pet. App. 9a-16a. The court found that petitioner had been sentenced for a "covered offense" and was therefore eligible for a sentence reduction under Section 404 of the First Step Act. *Id.* at 13a-14a. The court explained, however, that Section 404 does not "provide for a plenary resentencing" at which petitioner would be entitled to rely on Sentencing Guidelines commentary that postdated his original sentencing and that lacked retroactive application. *Id.* at 13a. The court reasoned that Section 404 expressly permits a court to reduce a sentence "'as if'" the changes made by Sections 2 and 3 of the Fair Sentencing Act had been in effect at the time of the offense, and that the "express back-dating only of Sections 2 and 3" supports an inference 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 13a-14a (quoting *United States* v. *Hegwood*, 934 F.3d 414, 418 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019)). The court accordingly observed that petitioner's 168-month term of imprisonment remained at the bottom of the applicable guidelines range. *Id.* at 15a. And after noting that petitioner had two "incident reports" in his disciplinary record and "consider[ing] the factors set forth in" Section 3553(a), the court reduced petitioner's term of supervised release to four years, while "exercis[ing] its discretion to deny [petitioner's] request" for a reduced term of imprisonment. *Ibid.*

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-8a. The court agreed that petitioner was eligible for a sentence reduction and found that the district court's decision not to vary downward was "within its discretion." *Id.* at 4a n.3, 5a n.4. The

court of appeals rejected petitioner's argument that the district court was required to consider "the current edition of the guidelines" and, in particular, Amendment 794's changes to the commentary to the mitigating-role guideline. *Id.* at 7a (citation omitted). Citing "the plain language of Section 404(b)," the court of appeals explained that it had recently concluded that a "'plenary resentencing is not appropriate under the First Step Act.'" *Ibid.* (quoting *United States* v. *Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020)); see *Brown*, 974 F.3d at 1144 (explaining that Section 404 "authorize[s] only a limited change in the sentences of defendants who had not already benefitted from the Fair Sentencing Act"). Accordingly, the court determined that petitioner was "not entitled to a reduced sentence based on" amendments to Section 3B1.2's commentary postdating his sentencing. Pet. App. 8a.

ARGUMENT

Petitioner contends that the court of appeals erred in concluding that a district court considering a motion under Section 404 "cannot consider a defendant's current, legally correct Guidelines range." Pet. 22; see Pet. 22-25. But in the unpublished decision below, the court determined only that petitioner was not "entitled" to have his advisory guidelines range recalculated to take account of unrelated and non-retroactive guidelines amendments postdating his original sentencing, and that the district court therefore did not commit reversible error in declining to "apply[] the current version of the Guidelines." Pet. App. 8a. The decision below does not foreclose the possibility that a sentencing court might nonetheless consider such changes as an exercise of its discretion in choosing whether to grant a sentence

reduction under Section 404. Petitioner further contends (Pet. 15-21) that the courts of appeals are divided on the question presented, but he overstates the scope and practical effect of any disagreement. This Court has previously denied a petition for a writ of certiorari presenting a similar question, *Hegwood* v. *United States*, 140 S. Ct. 285 (2019) (No. 19-5743), and the same result is warranted here.

1. The court of appeals correctly determined that the district court did not commit reversible error in declining to consider the current version of the commentary to Sentencing Guidelines § 3B1.2 when calculating petitioner's advisory guidelines range before granting in part his Section 404 motion. Pet. App. 7a-8a.

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

previously imposed term of imprisonment may be modified only "to the extent otherwise expressly permitted." 18 U.S.C. 3582(c)(1)(B). Accordingly, Section 404 does not permit a plenary resentencing.

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

The same logic applies to Section 404. Analogously to *Dillon*, Section 404(b) permits a district court to impose a "reduced sentence," and only for prisoners serving a sentence for a "covered offense" who are not excluded by Section 404(c). § 404(b), 132 Stat. 5222. Analogously to *Dillon*, the district court may exercise discretion to reduce a sentence "only at the second step of [a] circumscribed inquiry," 560 U.S. at 827, in which it first determines eligibility for a reduction and thereafter the extent (if any) of such a reduction, see First Step Act § 404(b) and (c), 132 Stat. 5222. And analogously to *Dillon*, Section 404(b) limits the scope of relief available, authorizing a reduction only "as if sections 2 and 3

of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." 132 Stat. 5222.

Accordingly, every court of appeals to consider the question has agreed that Section 404 does not create any entitlement to a plenary resentencing. See *United States* v. *Easter*, 975 F.3d 318, 326 (3d Cir. 2020); *United States* v. *Moore*, 975 F.3d 84, 90 (2d Cir. 2020); *United States* v. *Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020); *United States* v. *Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020); *United States* v. *Kelley*, 962 F.3d 470, 475-476 (9th Cir. 2020); *United States* v. *Smith*, 958 F.3d 494, 498 (6th Cir.), cert. denied, No. 20-5264 (Dec. 7, 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); see also *United States* v. *Scoggins*, 823 Fed. Appx. 452, 453 (8th Cir. 2020) (per curiam). As those courts have explained, "[b]y its express terms, [Section 404] does not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing." *Moore*, 975 F.3d at 90. It does not, in other words, entitle movants to relitigate each and every legal issue that may have affected their original statutory and guidelines ranges. Instead, "[t]hrough its 'as if' clause, all that § 404(b) instructs a district court to do is to determine the impact of Sections 2 and 3 of the Fair Sentencing Act." *Id.* at 91 (citation omitted). The "as if" clause requires the district court to place itself in a "counterfactual legal regime," assessing how "the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape * * * would affect the defendant's sentence," before deciding whether to reduce the sentence to one "consistent with

that change." *Kelley*, 962 F.3d at 475; see *Hegwood*, 934 F.3d at 418 ("The express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 * * * 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.").

In requiring the district court to place itself in that "counterfactual legal regime," *Kelley*, 962 F.3d at 475, Section 404's "as if" clause does not authorize the court to recalculate the applicable guidelines range based on a non-retroactive guidelines amendment unrelated to the Fair Sentencing Act. See *Brown*, 974 F.3d at 1144 (recognizing that, because Section 404 authorizes a sentencing court only to "make the Fair Sentencing Act retroactive," it "does not empower the sentencing court to rely on revised Guidelines instead of the Guidelines used at the original sentencing"). Rather, "[t]he 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." *Hegwood*, 934 F.3d at 418.

Petitioner is therefore incorrect (Pet. 24) that the court of appeals "inferred an implicit limitation that is nowhere found in the statutory text." The "as if" clause —the "only explicit basis stated for a change in the sentencing," *Hegwood*, 934 F.3d at 418—is explicitly cabined to only the "limited counterfactual inquiry" involving a specific statutory amendment. *Kelley*, 962 F.3d at 476. And in any event, congressional silence in connection with sentence-modification proceedings would not help petitioner. As noted above, see p. 11, *supra*, a defendant's sentence "may not be modified by a district court except in limited circumstances," *Dillon*, 560 U.S. at 824, and Section 3582(c)(1)(B) authorizes a reduction

in a term of imprisonment only to the extent "expressly" permitted by statute, 18 U.S.C. 3582(c)(1)(B).

Petitioner also errs (Pet. 22-23) in relying on the term "impose" as used in Section 404(b). See 132 Stat. 5222 (court "may * * * impose a reduced sentence"). A district court that grants a motion under Section 404 does not "impose a new sentence in the usual sense," but instead—because the "impos[ition]" is limited by the "as if" clause, among other things—effects "a limited adjustment to an otherwise final sentence." *Dillon*, 560 U.S. at 826-827 (discussing Section 3582(c)(2) sentence reductions); see *Moore*, 975 F.3d at 91 ("[T]he First Step Act does not simply authorize a district court to 'impose a sentence,' period."); *Kelley*, 962 F.3d at 477 (rejecting argument that the word "'impose'" in the "resentencing context" signals Congress's intent to "authorize a plenary resentencing"). Because the "as if" clause directs the court to consider the appropriate sentence "at the time the covered offense was committed," subject to the now-retroactive change to the sentencing scheme, § 404(b), 132 Stat. 5222, the requirement in Section 3553(a)(4)(A)(ii) and Sentencing Guidelines § 1B1.11(a) to use the Guidelines Manual "in effect on the date that the defendant is sentenced" continues to refer to the original plenary sentencing proceedings. Section 404's requirement to consider the Section 3553(a) factors "at the second [discretionary] step of [a] circumscribed inquiry," thus does not "transform the proceedings under [Section 404] into plenary resentencing proceedings." *Dillon*, 560 U.S. at 827.

Petitioner contends (Pet. 23-24) that the court of appeals' interpretation of Section 404(b) "frustrates Congress's evident objective" by "restrict[ing] a district court's discretion to fashion an appropriate sentence."

But this Court "ordinarily assume[s], absent a clearly expressed legislative intention to the contrary, that the legislative purpose is expressed by the ordinary meaning of the words used." *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (citation and internal quotation marks omitted). Here, "the language of the First Step Act * * * plainly indicates that Congress intended to limit courts engaging in resentencing to considering a single changed variable"—namely, the changes made by Sections 2 and 3 of the Fair Sentencing Act. *Kelley*, 962 F.3d at 478; see, *e.g.*, 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) ("[Section 404] makes retroactive the application of the Fair Sentencing Act, in which Congress addressed the crack-powder sentencing disparity[,] and allows individuals affected by this disparity to petition for sentence reductions.").

To effectuate that purpose—and to provide "individualized review," Pet. 23-24 (citation omitted)—district courts need not allow defendants to benefit from non-retroactive guidelines amendments unrelated to the Fair Sentencing Act. On the contrary, where, as here, a guidelines amendment would not apply retroactively on collateral review or under Section 3582(c)(2), see p. 6, *supra*, providing that benefit through Section 404 would afford eligible crack-cocaine offenders a "windfall" unavailable to other, similarly situated offenders. *Kelley*, 962 F.3d at 478; accord *Moore*, 975 F.3d at 92 n.35. Indeed, the precise goal of the First Step Act is to allow courts to harmonize the sentences of offenders sentenced before the enactment of the Fair Sentencing Act with the sentences of offenders sentenced thereafter —who would not be entitled to benefit from later, non-retroactive Guidelines amendments. See First Step Act

§ 404(c), 132 Stat. 5222 (precluding Section 404 sentence reductions for defendants already sentenced pursuant to the Fair Sentencing Act).

Petitioner further contends (Pet. 25) that applying the original Sentencing Guidelines Manual after adjusting for Sections 2 and 3 of the Fair Sentencing Act conflicts with Section 404(c) of the First Step Act, which precludes a sentence reduction if a previous Section 404 motion was "denied after a complete review of the motion on the merits." § 404(c), 132 Stat. 5222. But that language merely "bars repetitive litigation" and does not describe what "'a complete review'" entails. *Moore*, 975 F.3d at 91 (citation omitted). Accordingly, it "does not require that any particular procedures be followed during that review, much less that the review entail a full-blown opportunity to relitigate Guidelines issues, whether legal or factual." *Ibid.* Instead, the relevant procedures are circumscribed by the "as if" clause in Section 404(b), which does not contemplate plenary resentencing or the reopening of unrelated disputes about non-retroactive changes to the advisory guidelines.

Finally, petitioner also cites a newsletter issued by the Sentencing Commission's Office of Education and Sentencing Practice stating that district courts addressing motions under Section 404 "should consider the Guidelines and policy statements, along with the other § 3553(a) factors." Pet. 25 (brackets and citation omitted). The newsletter, which does not purport to state an official view of the Sentencing Commission itself, does not address which version of the Sentencing Guidelines Manual a court should consult.

2. Petitioner argues (Pet. 15-21) that further review is warranted because the courts of appeals are divided

on the question presented. The alleged conflict is recent and shallow. And although some tension exists in the circuits regarding the precise manner in which a Section 404 sentence reduction may be informed by legal developments since the original sentencing, petitioner overstates the scope and practical effect of any disagreement.

a. As an initial matter, it is not clear that the court of appeals resolved the question that petitioner seeks to present. Petitioner asserts (Pet. 22) that the court held that "district courts cannot consider a defendant's current, legally correct Guidelines range when conducting a resentencing under § 404 of the First Step Act." Although language in the unpublished decision below could potentially be read to support that result, the panel ultimately merely "reject[ed] [petitioner's] argument that the district court erred by not applying the current version of the Guidelines." Pet. App. 8a. Similarly, while language in the court of appeals' earlier decision in *Brown*, on which the court relied here, see *ibid.*, might likewise be so construed, the court made clear in *Brown* that "[n]othing in this opinion prevents a sentencing court from exercising its discretion to vary from the Guideline range." 974 F.3d at 1144 n.3; see *id.* at 1145 ("[T]he district court is not required to ignore all decisional law subsequent to the initial sentencing."); *id.* at 1146 ("[W]e decline to read Congress's intent as directing a district court to impose a sentence possibly predicated on a legal error."). And *Brown* did not squarely address whether—after properly calculating the applicable guidelines range under the Sentencing Guidelines Manual in effect at the time of the defendant's original sentencing and accounting for Sections 2 and 3 of the Fair Sentencing Act—a district court might consider, in

determining whether such a variance is warranted, the effect of any intervening guidelines amendments. Cf. *id.* at 1145-1146 (recognizing that application of original Guidelines Manual may incorporate more recent case law that would logically affect such application).

Similarly, although petitioner contends (Pet. 16-18) that the Second, Fifth, and Ninth Circuits "have held that a district court is prohibited from considering a defendant's current, legally correct Guidelines range" in a Section 404 proceeding, the decisions he cites addressed a narrower question: whether a district court must recalculate a movant's guidelines range to account for intervening circuit precedent under which the movant might no longer qualify as a career offender for purposes of Sentencing Guidelines § 4B1.1. See *Moore*, 975 F.3d at 89-92; *Hegwood*, 934 F.3d at 417-419; *Kelley*, 962 F.3d at 475-476. Like *Brown*, those decisions contain some language suggesting that a district court should apply a guidelines range that accounts only for changes flowing from Sections 2 and 3 of the Fair Sentencing Act. See *Moore*, 975 F.3d at 91 ("[Section] 404(b) 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."); *Hegwood*, 934 F.3d at 418 ("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."); *Kelley*, 962 F.3d at 475 ("[Section 404] does not authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense."). But none squarely addresses whether an intervening, retroactive Guidelines amend-

ment should be taken into account in Section 404 proceedings. Indeed, the Fifth Circuit recently reserved the question whether a district court "must apply all retroactive amendments to the Sentencing Guidelines" in a Section 404 proceeding, notwithstanding *Hegwood*. *United States* v. *Stewart*, 964 F.3d 433, 439 (2020) (emphasis omitted).

The Second and Fifth Circuits have also indicated that although district courts should not apply the current Sentencing Guidelines Manual wholesale, they nevertheless may consider intervening legal developments in the exercise of their discretion. In *Moore*, the Second Circuit explained that "a district court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence," and emphasized that the court's discretion "is not limited by the applicable Guidelines range." *Moore*, 975 F.3d at 92 n.36; see *United States* v. *Ortiz*, No. 19-3073, 2020 WL 6280878, at *2 (2d Cir. Oct. 27, 2020) (per curiam) (explaining that although *Moore* states that a district court is not required to "perform '*de novo* Guidelines calculations'" or "consider 'new Guidelines provisions,'" "that does not mean that a district court *cannot* consider additional factors" in its discretion) (quoting *Moore*, 975 F.3d at 90, 92). And in *United States* v. *Robinson*, 980 F.3d 454 (2020), the Fifth Circuit explained that while a district court is not *required* to apply the current Sentencing Guidelines Manual, it "may consider, as a § 3553(a) sentencing factor, that a defendant originally sentenced as a career offender, for purposes of U.S.S.G. § 4B1.1, would not hold that status if originally sentenced, for the same crime, today." *Id.* at 465 (emphases omitted).

b. As petitioner notes (Pet. 19-20 & n.2), the Seventh and Eighth Circuits explicitly permit district courts, in the exercise of their discretion, to consider a movant's guidelines range under the current Sentencing Guidelines Manual. In *United States* v. *Hudson*, 967 F.3d 605, petition for cert. pending, No. 20-6870 (filed Dec. 31, 2020), the Seventh Circuit concluded that "nothing in the First Step Act precludes a court from looking at § 3553(a) factors with an eye toward current Guidelines." *Id.* at 612 (citing *United States* v. *Shaw*, 957 F.3d 734, 741 (7th Cir. 2020)). And in *United States* v. *Harris*, 960 F.3d 1103 (2020), the Eighth Circuit similarly concluded that "the § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines." *Id.* at 1106. Neither court, however, explicitly held that a district court proceeding under Section 404 *must* calculate the defendant's applicable guidelines range by reference to intervening, non-retroactive guidelines amendments unrelated to the Fair Sentencing Act.[*]

[*] The D.C. and Eleventh Circuits appear to apply a similar approach. In *United States* v. *White*, No. 19-3058, 2020 WL 7702705 (Dec. 29, 2020), the D.C. Circuit agreed with the Seventh Circuit that Section 404 "authorizes a court to consider a range of factors" under Section 3553(a), including "current Guidelines." *Id.* at *10 (quoting *Hudson*, 967 F.3d at 609). In *Denson*, the Eleventh Circuit stated that a district court "is not free to change the defendant's original guidelines calculations that are unaffected by sections 2 and 3." 963 F.3d at 1089. But in *United States* v. *Sims*, 824 Fed. Appx. 739 (11th Cir. 2020) (per curiam), the court assumed without deciding that district courts "may consider the current guideline range when 'determining whether and how to exercise their discretion,'" even under *Denson*. *Id.* at 744 (brackets and citation omitted).

The Third and Sixth Circuits, for their part, appear at least to contemplate that a district court could consider both the Guidelines at the time of the original sentencing and the Guidelines at the time of the Section 404 motion. In *United States* v. *Boulding*, 960 F.3d 774 (2020), the Sixth Circuit considered, as relevant here, whether Section 404 guarantees a defendant the opportunity to present objections to a district court's calculation of the applicable guidelines range. *Id.* at 784. In concluding that it does, the Sixth Circuit observed in passing that "the necessary review [under Section 404]—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors." *Ibid.*; see *ibid.* ("While [Section 404] does not authorize plenary resentencing, a resentencing predicated on an erroneous or expired guideline calculation would seemingly run afoul of Congressional expectations."). The Third Circuit later quoted that language in holding that Section 404 requires district courts to consider the Section 3553(a) factors. *Easter*, 975 F.3d at 325-326.

But neither *Boulding* nor *Easter* expressly held that Section 404 requires a district court to apply the current Sentencing Guidelines Manual in its entirety to determine the defendant's guidelines range. Indeed, other Sixth Circuit decisions appear not to reflect such a requirement. See *United States* v. *Flowers*, 963 F.3d 492, 499-500 (6th Cir. 2020) (affirming the district court's decision to consider, in its discretion, the effect of a nonretroactive change in state law that allegedly affected the defendant's status as a career offender); *United States* v. *Foreman*, 958 F.3d 506, 515 (6th Cir. 2020) (observing that the district court "properly considered

what [the defendant's] Guidelines range would have been had the Fair Sentencing Act been in effect when [he] was originally sentenced," notwithstanding the defendant's argument that he "no longer qualifie[d] as a career offender under current law").

In short, "[a]lthough the case law is still evolving, it appears that most circuits generally *permit*, but [do] not *require*, some consideration of current guideline ranges, in evaluating a First Step Act motion, insofar as the information relates to § 3553(a) factors." *Robinson*, 980 F.3d at 465 (collecting cases from six courts of appeals); see *United States* v. *Smith*, 954 F.3d 446, 452 & n.8 (1st Cir. 2020) (reserving decision on whether the current Sentencing Guidelines Manual applies at a Section 404 proceeding, but noting that, even if it does not, "the district court could still take into consideration [an] insight from the updated manual in deciding whether a downward variance is appropriate"). Accordingly, given the emerging consensus in the courts of appeals, this Court's intervention is unnecessary at this time.

3. Even if the question presented otherwise warranted review, this case would be an unsuitable vehicle in which to address it because adopting petitioner's preferred view of the statute would be unlikely to alter the outcome here. Petitioner fails to demonstrate that the district court would have granted him a mitigating-role adjustment or further reduced his sentence had it applied the amended commentary to Sentencing Guidelines § 3B1.2.

When petitioner filed a motion under Section 2255 seeking retroactive application of Amendment 794, the government explained at length why petitioner would not have been entitled to a mitigating-role adjustment even under the amended commentary. See 16-cv-498

Gov't Response in Opp. 10-11. The evidence elicited at trial showed that petitioner well understood the "scope and structure of the criminal activity," Sentencing Guidelines § 3B1.2, comment. (n.3(C)(i)), as he accompanied his co-defendant on several drug-trafficking trips and was captured in a police audio recording "discussing * * * his role concealing the narcotics' smell," 453 Fed. Appx. 839, 843. He also "participated in planning or organizing the criminal activity," Sentencing Guidelines § 3B1.2, comment. (n.3(C)(ii)), by renting hotel rooms for drug-trafficking trips, by placing the detergent box containing more than three kilograms of crack cocaine inside a duffel bag, and by placing that bag in the car, 453 Fed. Appx. at 843; see Trial Tr. 66-67, 109, 147. He participated fully in the scheme, see Sentencing Guidelines § 3B1.2, comment. (n.3(C)(iv)), including by using scented dryer sheets to mask the smell of drugs, 453 Fed. Appx. at 843. And he "stood to benefit from the criminal activity," Sentencing Guidelines § 3B1.2, comment. (n.3(C)(v)), as he was found with nearly $1200 in cash, 453 Fed. Appx. at 843, and his co-defendant testified that petitioner "wanted to be there" because "it was beneficial to him," Trial Tr. 72.

In denying petitioner's Section 2255 motion, the district court observed that the government's argument on the merits—that petitioner was not a minor or minimal participant—was "supported by the record." D. Ct. Doc. 247, at 3. Petitioner renewed the same arguments in his Section 404 motion, see D. Ct. Doc. 254, at 13-19, and the court apparently did not view them as justifying a reduced term of imprisonment. The court determined, in the "exercise [of] its discretion," after "consider[ing] the factors set forth in 18 U.S.C. § 3553(a),"

that a further reduction in petitioner's term of imprisonment was "not warranted." Pet. App. 15a. Thus, petitioner offers no sound reason to believe that the court would find petitioner eligible for a mitigating-role adjustment or would further reduce his sentence even if the court were required to consider the amended commentary to Section 3B1.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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