No. 20-535

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The government concedes that the courts of appeals have diverged on the question presented. And it does not deny that the answer affects a large number of offenders who were sentenced under laws that Congress has rejected as unfair and discriminatory. Instead, the government offers the same arguments—often verbatim—that this Court already rejected in granting certiorari in *United States* v. *Terry*, 592 U.S. ___ (2021) (No. 20-5904). Those arguments fail for the same reasons here.

As in *Terry*, the government asserts that the circuit split is "recent and shallow." Opp. 18. In fact, the conflict, now 5-4, is deeper than in *Terry*. That the disagreement has crystallized since passage of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, ("FSA") only underscores the urgent need for this Court's review. Four circuits have explicitly emphasized the conflict, and the government acknowledged it in recent briefing. Circuits on both sides have declined to revisit the issue en banc. Rarely is a conflict deeper and more entrenched.

The government recycles two failed vehicle arguments from its *Terry* opposition. Neither is any more compelling here. First, there is no doubt that the "court of appeals resolved the question petitioner seeks to present." *See* Opp. 18; Opp., *Terry*, No. 20-5904, 23. The explicit basis for the decision below was 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 (internal quotation marks omitted).

Second, the government speculates, as it did in *Terry*, that petitioner would not ultimately obtain a

sentence reduction even if he were to prevail in this Court. *See* Opp. at 23–25; Opp., *Terry*, No. 20-5904, at 28–29. The government's predictions are inaccurate and irrelevant. A favorable ruling here would provide petitioner meaningful relief: it would entitle him to a Section 404 proceeding where the district court understands it has authority to grant him a base-offense level adjustment under the revised guideline. No court has addressed the merits of petitioner's arguments, and petitioner is exactly the kind of offender for whom the guideline changes were intended. This is an ideal vehicle.

Not only does the grant in *Terry* support a grant here, but it also makes review of this case even more essential. The two cases present complementary and equally critical questions. *Terry* concerns who is eligible for a Section 404 sentencing. This case concerns how such sentencings are conducted—specifically, whether the court may apply current guidelines in calculating the sentencing range or instead must constrain itself to the law existing at the time of the original sentencing. By granting review here, the Court can resolve both key issues.

A. There Is a Deep and Entrenched Circuit Split on the Question Presented.

1. At least nine courts of appeals have squarely addressed and disagreed about whether district courts conducting a Section 404 resentencing may change the sentencing range based on intervening guideline revisions and other legal developments.

a. Five courts of appeals have correctly concluded that district courts may impose a new sentence premised on a recalculation of the sentencing range using the current guidelines. The Sixth Circuit has

reasoned that "a resentencing predicated on an erroneous or expired guideline calculation would seemingly run afoul of congressional expectations" of "complete review of the resentencing motion on the merits." *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020). That court therefore construed "the language of § 404" to mean that "the necessary review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing[.]" *Id.* The Third Circuit has "join[ed] the Sixth Circuit." *United States v. Easter*, 975 F.3d 318, 325 (3d Cir. 2020).

The Seventh and Eighth Circuits similarly recognize that, because "today's Guidelines may reflect updated views about the seriousness of a defendant's offense or criminal history," *United States v. Hudson*, 967 F.3d 605, 612 (7th Cir. 2020) (internal quotation marks omitted), courts may calculate "the defendant's advisory range under the current guidelines," *id.* (quoting *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020)). The D.C. Circuit has now joined these circuits, holding that in light of the "wide discretion" afforded to district courts and the FSA's "strong remedial" purpose, district courts may apply "current Guidelines" in a Section 404 sentencing. *United States v. White*, 984 F.3d 76, 90–91 (D.C. Cir. 2020) (quoting *Boulding*, 960 F.3d at 784; *Hudson*, 967 F.3d at 609).

b. At least four courts of appeals prohibit district courts from recalculating the applicable sentencing range using current guidelines. In *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019), the Fifth Circuit held 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. The district court is permitted to "alte[r] the relevant legal landscape *only* by the changes mandated by the 2010 Fair Sentencing Act"; sentencing must be conducted "as if *all* the conditions for the original sentencing were again in place with the one exception." *Id.* at 418–19 (emphases added).

The Ninth, Tenth, and Eleventh Circuits follow the same rule. *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020) ("Because 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."); *United States v. Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020) (Section 404 "does not empower the sentencing court to rely on revised Guidelines"); *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) (district court "is not free to change the defendant's original guidelines calculations that are unaffected by sections 2 and 3]").[1]

c. This is no mere "alleged conflict" reflecting "some tension" among the cases. *See* Opp. 18. The split is clear and intractable, as the courts of appeals themselves have repeatedly acknowledged. *See*, *e.g.*,

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[1] The Second Circuit has similarly concluded that the FSA "issues no directive to allow re-litigation of other Guidelines issues . . . unrelated to the retroactive application of the Fair Sentencing Act." United States v. Moore, 975 F.3d 84, 91 (2d Cir. 2020).

Moore, 975 F.3d at 90 n.30 ("other Circuits have split on the issue"); *Easter*, 975 F.3d at 323 ("[O]ur sister circuits are divided[.]"); *Brown*, 974 F.3d at 1142 ("Our sibling circuits have taken different positions."); *Kelley*, 962 F.3d at 475 ("we deepen a circuit split").[2]

The government itself has conceded the split. In a recent brief, it observed that district courts are "grappling [with] and arriving at different answers" in Section 404 proceedings, and "[t]he federal courts of appeals are likewise divided on the proper construction of the statute" concerning the permissibility of considering new law. Br. of Appellee at 32, *United States v. White*, 984 F.3d 76 (D.C. Cir. 2020) (No. 19-3058). Only this Court can resolve the disagreement.

2. The government also fails in its attempt to obscure the conflict by broadening the issue.

The government admits, as the cases make undeniable, that the circuits following *Hegwood* prohibit recalculation of the applicable range using revised guidelines. *See* Pet. App. 2a ("[D]istrict courts *may not* substitute the current version of the Guidelines for the [original] version[.]"). The government asserts, however, that some of those courts may not necessarily "foreclose the possibility" that the district court "might nonetheless consider" the fact of revised guidelines in some form if, after calculating the applicable range based on old guidelines, the court assesses whether a downward departure is warranted on the basis of the discretionary 3553(a) factors. Opp. 10, 23.

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[2] No circuit split existed when this Court denied certiorari in *Hegwood*. *See* Opp. 11.

The government's argument conflates two fundamentally different stages of the sentencing process. Correct calculation of the guidelines range in the first instance is critical because, as the government itself has emphasized, "the calculated range generally exerts a significant effect on the actual sentence." Br. of Resp't at 44, *Beckles v. United States*, 137 S. Ct. 886 (2017) (noting the "real and pervasive effect the Guidelines have on sentencing") (internal quotation marks omitted). "Perhaps most significantly, when a Guidelines range moves up or down, offenders' sentences tend to move with it." *Id.* (internal quotation marks and alterations omitted). The calculated range serves as such a powerful "numerical anchor" in the district court's decision-making that "the Guidelines are not only the starting point for most federal sentencing proceedings but also the lodestar." *Id.* (quoting *Rita v. United States*, 551 U.S. 338, 350–51 (2007)).

For that reason, the "possibility" of consideration at the second, Section 3553(a) stage of sentencing cannot obviate legal error in the first stage. There is a vast difference between asking the court to apply a current guideline provision and then *follow* the calculated range and asking a court to *depart* from an elevated range calculated with outdated guidelines.

In any event, there is no "consensus" on whether revised guidelines can even be "take[n] into consideration" in response to variance arguments. Opp. 23. The circuits have acknowledged disagreement about the role of Section 3553(a). *See Easter*, 975 F.3d at 324 ("declin[ing] to follow our sister circuits"). The case the government quotes as support for a unified approach actually notes the opposite. *See United States v. Robinson*, 980 F.3d

454, 465 (5th Cir. 2020) (concluding that "*most* circuits generally *permit*, but do not *require*," consideration of guidelines revisions under Section 3553(a)) (first emphasis added).[3] Underlying this disagreement are competing and irreconcilable conceptions of the nature of Section 404 proceedings. Some courts permit consideration of current guidelines because they view the FSA as a "strong remedial statute" intended to provide "the most complete relief possible." *White*, 984 F.3d at 89–90. In contrast, the rationale of the *Hegwood* cases is that, because Section 404 is a narrow remedy akin to Section 3582(c)(2) that "limit[s] courts . . . to considering a single changed variable," *Kelley*, 962 F.3d at 478, courts may not consider anything other than the Fair Sentencing Act changes—full stop.[4] In those circuits, the district court must "plac[e] itself in the time frame of the original sentencing, altering the relevant legal landscape *only* by" those changes. *Hegwood*, 934 F.3d at 418 (emphasis added). Even

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[3] In a similar diversion, the government notes general agreement that Section 404 does not require "plenary resentencing." Opp. 13. But courts use that term to refer to an in-person hearing, adherence to all aspects of Rule 32, and similar procedural trappings. That is not the issue in this case or the subject of the circuit split. *See* Opening Br. of Appellant at 22, *United States v. Bates*, 827 F. App'x 822 (10th Cir. 2020) (No. 19-7061).

[4] The government's reliance on the possibility of a discretionary departure under Section 3553(a) as mitigation for the *Hegwood* approach is particularly ironic. The government argues, Opp. at 11–13, that Section 404 proceedings are analogous to sentencing modifications under Section 3582(c) and therefore urges reliance on *Dillon v. United States*—the specific holding of which was that district courts are *not permitted* to depart downward from the calculated guidelines range when applying Section 3582(c). 560 U.S. 817, 828 (2010).

in the government's framing, therefore, the split remains.

B. This Case Is an Ideal Vehicle.

1. The government makes the same two meritless vehicle arguments it unsuccessfully advanced in *Terry*.

a. There is no question that the decision below resolved the question presented. In his Section 404 application, petitioner sought an adjustment to his base offense level and recalculation of his sentencing range relying on a revised guideline. Pet. 13. Following *Hegwood*, the district court refused to consider such an adjustment because it concluded it lacked authority to do so. Pet. App. 13a–15a. The Tenth Circuit affirmed, and it was explicit about the reason: "[t]he 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. 8a. There is no indication that either court considered—or believed the district court authorized to consider—reducing petitioner's sentence based on the revised guideline.

b. There is also no question that a favorable ruling in this Court would provide petitioner with meaningful relief. If this Court agrees with the five circuits that permit adjustment of a defendant's sentencing range based on application of revised guidelines, remand will be necessary for resentencing under the correct legal standard. *See*, *e.g.*, *Boulding*, 960 F.3d at 776 (remanding for "an accurate amended guideline calculation"). Petitioner will be entitled in that proceeding to present his arguments for a base-offense level adjustment to a court empowered to consider it.

While certiorari does not depend on the ultimate outcome of that resentencing, petitioner would have a strong prospect of obtaining sentencing relief on remand.

In his Section 404 application, petitioner asked the district court to apply the current version of U.S.S.G. § 3B1.2, which directs a two-level reduction if the defendant was a "minor participant." Pet. App. 11a. After petitioner's original sentencing, the Sentencing Commission substantially revised the Application Notes to that provision specifically to expand its availability for offenders just like petitioner.

The revisions resulted from a Commission study concluding that the minor-role reduction was being applied "inconsistently and more sparingly than the Commission intended," particularly for "low-level functions" such as "couriers and mules." U.S.S.G. Supp. to App. C. Amend. 794, at 108. The Commission removed language that had "discourage[d] courts from applying the adjustment" and prescribed a list of factors focused on how much the defendant understood, planned, directed, and stood to gain compared to the other participants in the criminal activity. *Id.* As revised, the guidelines instruct that "a defendant . . . whose participation in [the] offense was limited to transporting or storing drugs and who is accountable . . . only for the quantity of drugs the defendant personally transported or stored may receive an adjustment under this guideline." U.S.S.G. § 3B1.2, cmt. n.3(A). The commentary also added: "a defendant who does not have a proprietary interest in the criminal activity and who is simply being paid to perform certain tasks should be considered for an adjustment

under this guideline." U.S.S.G. Supp. to App. C. Amend. 794, at 110.

Petitioner qualifies under these revisions. He was a drug mule whose role was limited to helping transport drugs for others he never met, and he was held responsible only for what he transported. There was no evidence he understood the scope of the enterprise or even the quantity of drugs he was moving. Nor was there evidence that he had any proprietary interest in the enterprise; in fact, the evidence at trial suggested that petitioner's sole benefit was payment for expenses and gambling.[5]

Petitioner is thus eligible for a two-level reduction in his base offense level. That reduction would drop his guidelines range by nearly three years, placing his current sentence at the very top. The last time petitioner's guidelines range dropped, the court reduced his sentence to the bottom of that range.

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[5] The district court has never addressed how the current guideline applies to petitioner. The government refers to a *pro se* Section 2255 petition in which petitioner invoked Amendment 794. Opp. 23. While the court noted in resolving that petition that the government opposed relief under the guideline, the court specifically concluded that there was "no need" to "address the merits" because the petition failed purely for procedural reasons. *Bates v. United States*, No. 10-cr-3, ECF No. 247, at 3 (E.D. Ok. Nov. 16, 2018). The court's passing comment that the government's arguments appeared to be "supported by the record" in a *pro se* proceeding is not a determination on the merits. Opp. 24. Indeed, the government acknowledges here, as it did below, that the district court denied the petition solely on procedural grounds. Opp. 6. And in the decision below, the district court itself left no doubt that its dismissal was purely procedural: the court explained that it denied the petition because it concluded "that Defendants' § 2255 motion was filed outside of the one-year statute of limitations and that Amendment 794 did not retroactively apply on collateral review." Pet. App. 11a.

The first reason that the district court cited in denying petitioner sentencing relief under Section 404 was that his term of imprisonment is "at the bottom of [the] range." Pet. App. 3a. Given this history, a reduction in the guidelines range may well yield a reduction in sentence.

C. The Decision Below is Incorrect.

The government devotes much of its opposition to defending the decision below. There will be ample opportunity to address the underlying issues at the merits stage. Because the conflict is so well developed, numerous courts of appeal have explained why the reasoning adopted below conflicts with the text of the FSA, particularly in light of its purpose to provide district courts with wide discretion to remedy sentences imposed under a discriminatory regime. Those courts have also explained why the government's analogy to *Dillon* is inapt. For the reasons that were set forth in the petition and that will be fully articulated in petitioner's merits briefing, the decision below is incorrect and, in light of the squarely presented circuit conflict, warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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February 2021