No. ____

October Term, 2020

IN THE
Supreme Court of the United States

MICKEY PUBIEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

What the district court may appropriately consider when imposing a reduced sentence pursuant to § 404 of the First Step Act of 2018 remains an unsettled question of law. The circuits are in conflict over the degree of discretion district courts have when resenting an otherwise eligible defendant pursuant to § 404 of the First Step Act. Specifically, whether § 404 precludes a district court from considering, and applying, the reduced penalties in § 401 of the First Step Act to both covered and non-covered offenses.

Four Circuits have adopted a narrow interpretation of the First Step Act, and have determined that otherwise eligible defendant may not avail themselves of legal developments that, if applied to them, would markedly reduce their sentences.

At least Three Circuits have adopted a broader interpretation of the First Step Act, and have determined that otherwise eligible defendants may avail themselves of legal developments that, if applied to them, would markedly reduce their sentences

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

United States v. Pubien, 805 Fed. App'x. 727 (11th Cir. Feb. 25, 2020).

United States v. Pubien, 349 Fed. App'x. 473, 478 (11th Cir. Oct. 19, 2009).

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Mickey Pubien respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-12078-EE in that court on February 25, 2020, *United States v. Pubien,* 805 Fed. App'x. 727 (11th Cir. Feb. 25, 2020), and denied a panel rehearing and rehearing en banc, on June 11, 2020, which affirmed the United States District Court for the Southern District of Florida's decision to grant in part and deny in part Pubien's motion to modify his sentence pursuant to § 404 of the First Step Act of 2018.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-3). A copy of the order of the United States Court of Appeals for the Eleventh Circuit, which denied the petitions for panel rehearing and rehearing en banc, is contained in the Appendix (A-4).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on February 25, 2020 and its order denying Mr. Pubien's petitions for a panel rehearing and rehearing en banc was entered on June 11, 2020. This petition is timely filed pursuant to Sup. Ct. R. 13.1, and the March 19, 2020 Order, issued by the Supreme Court of the United States, extending the deadline to file a petition for a writ of certiorari by 150 days from the date of the order denying the petition(s) for rehearing. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

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 commit- ted 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.

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

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

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

21 USCA § 802

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

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

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

21 USCA § 841

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

21 USCA § 841

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

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 pro- vide 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 com- mitted 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 guide- lines 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 defend- ant 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.

STATEMENT OF THE CASE

The Charges, Trial, and Sentencing

On December 7, 2006, a federal grand jury in the Southern District of Florida indicted Mickey Pubien ("Mr. Pubien")—at the time only 30 years old—in a multi-defendant indictment. Mr. Pubien was charged in six of the thirty-two counts in the indictment. Count One of the indictment charged Mr. Pubien with conspiracy to possess with intent to distribute "at least five kilograms" of cocaine in violation of 21 U.S.C. § 841(a). Count Three charged Mr. Pubien with possession with intent to distribute "at least 50 grams" of crack cocaine in violation of § 841(a). Counts Five, Nineteen, Twenty-Two, and Twenty-Five charged Mr. Pubien with distribution and possession with intent to distribute "at least 500 grams" of cocaine in violation of § 841(a). (DE 4). Prior to trial, the government filed a notice seeking a sentencing enhancement pursuant to 21 U.S.C. § 851 ("§ 851"). (DE 388).

On August 13, 2007, after an eight-day jury trial, Mr. Pubien was found guilty of all counts. (DE 399). Because of the § 851 enhancement, Mr. Pubien's statutory minimum and maximum sentences were drastically affected. Counts One and Three—which originally carried statutory sentencing ranges of twenty years to life in prison—now carried mandatory life sentences. Counts Five, Nineteen, Twenty-Two, and Twenty-Five—which originally carried statutory sentencing ranges of five to forty years in prison—now carried statutory sentencing ranges of ten years to life in prison. The U.S. Probation Office calculated that Mr. Pubien's guideline sentencing range was 292 to 365

months, but that U.S.S.G § 5G1.1(b)—which holds that where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence—operated to increase his guideline sentencing range to life imprisonment. Mr. Pubien's fate was clear; he was facing two mandatory life sentences and a guideline sentencing range of life imprisonment. (PSR ¶ 174-175).

On October 26, 2007, after a fifteen minute sentencing hearing, the district court sentenced Mr. Pubien to the only sentence it could impose at the time: six concurrent life sentences, followed by a ten-year term of supervised release as to Counts One and Three, and an eight-year term of supervised release as to Counts Five, Nineteen, Twenty-Two, and Twenty-Five, all to run concurrently to each other. (DE 502).

Mr. Pubien's Request for a Sentence Reduction pursuant to Section 404 of the First Step Act of 2018 at the District Court level

On February 12, 2019, Mr. Pubien filed a pro se request that the district court reduce his sentence pursuant to § 404 of the First Step Act of 2018 ("FSA 2018"). (DE 862). The district court appointed the Office of the Federal Public Defender to represent Mr. Pubien and ordered a response to the pro se request from the government and the Office of the Federal Public Defender. (DE 863, DE 871, DE 874). Undersigned counsel filed a supplemental motion requesting that the district court grant a sentence reduction pursuant to Section 404 of the FSA 2018. (DE 878). The government opposed the motion. (DE 871).

On April 9, 2019, the district court granted, in part, and denied, in part, the motion for a sentence reduction. The district court reduced Mr. Pubien's term of incarceration on Count Three—conspiracy to important crack cocaine—from life imprisonment to a term of 10 years in prison, but it found that it lacked authority to also reduce the sentences imposed on Counts Five, Nineteen, Twenty-Two, and Twenty-Five—the powder cocaine convictions. (DE 897:3-4).

On May 8, 2019, defense counsel filed a motion for reconsideration, and on May 16, 2019, he filed a Notice of Supplemental Authority. (DE 884, DE 885). On May 23, 2019, the district court issued an order denying the motion for reconsideration, holding that Mr. Pubien had failed to meet the standard for reconsideration, and noting that granting him a full resentencing would be unjust to other offenders. (DE 889). On May 28, 2019, Mr. Pubien filed a timely Notice of Appeal. (DE 890).

Mr. Pubien's appeal to the Eleventh Circuit Court of Appeals

In his Initial Brief—timely filed on August 8, 2019—Mr. Pubien argued that the district court erred as a matter of law when it held that although he was eligible for relief under the FSA 2018, he was not entitled to a full resentencing and that it lacked the authority to reduce his powder cocaine convictions. Specifically, he argued that the district court erred when it found that it was precluded considering recent developments in the law that drastically reduced the minimum and maximum statutory penalty ranges for

his powder cocaine convictions—most importantly, that the previously mandatory sentence of life imprisonment for Count Three was no longer applicable.

Mr. Pubien argued that § 404 of the FSA 2018 establishes a freestanding procedural vehicle for a district court to modify an otherwise final sentence, and that it authorizes a district court to reduce the sentences of federal defendants who were sentenced for crack cocaine offenses prior to August 3, 2010.

Mr. Pubien distinguished between the FSA 2018's requirement that a defendant have a conviction for a covered offense in order to be eligible for relief, and the FSA 2018's silence on whether once a district court deems a defendant eligible, it can address, and reduce, the sentences on non-covered offense. Once deemed eligible, Mr. Pubien argued, the district court could have, and should have, taken into account changes in the U.S. Sentencing Guidelines, changes in the applicable minimum and maximum statutory ranges, and the no-longer-applicable 21 U.S.C. § 851 sentencing enhancement—which all operated to drastically changes his mandatory sentencing ranges. Mr. Pubien also argued that because all counts of conviction are interdependent, the district court erred in concluding that the "Sentencing Package" doctrine was not implicated.

On September 16, 2019, the government filed its brief. It argued that § 404 of the FSA 2018 only authorized the district court to reduce Mr. Pubien's

sentence on the covered offense—the crack cocaine count—but not the five, non-covered, powder cocaine counts. The government contended that the district court must ignore all of the statutory and guideline changes that would apply to Mr. Pubien's powder cocaine convictions today.

Importantly, the government did not dispute that were Mr. Pubien sentenced today, none of the mandatory life sentences that applied in 2007 would apply. Similarly, it did not dispute that the prior drug convictions used to enhance Mr. Pubien's 2007 sentence, pursuant to 21 U.S.C. § 851, would not qualify to enhance his sentence today.

Instead, the government argued for a narrow reading of the FSA 2018, that divests district courts of their congressionally conferred discretion. It urged the circuit court to find that an otherwise eligible defendant may not avail himself of legal developments that, if applied to him, would markedly reduce his sentence—in this case eliminate five, no-longer-mandatory, life sentences.

The government also argued that the statutory penalties for Mr. Pubien's five powder cocaine convictions are unchanged. It reasoned that the new, higher threshold for triggering 21 U.S.C. § 841(b)(1)(B)'s statutory penalties under the Fair Sentencing Act's ("FSA 2010") amendments could not be applied to the powder cocaine convictions, because those convictions are not covered offenses under the FSA 2018.

Finally, the government argued that the sentencing package doctrine does not apply to Mr. Pubien's case because at his original sentencing the district court did not "craft an overall sentence" reflecting interdependent guideline and sentencing considerations. Therefore, the inputs that resulted in his statutory and guideline life terms, the government reasoned, remain unchanged.

On November 21, 2019, Mr. Pubien replied to the government's initial brief. He explained that the government's contention that the inputs that resulted in his statutory and guideline life terms remain unchanged is inaccurate. He posited a scenario in which the district court—before partially granting his FSA 2018 motion and imposing a reduced term of incarceration on Count Three—ordered the U.S. Probation Office to prepare a Presentence Investigation Report. The report, even after applying a § 851 enhancement, would necessarily contain an Offense Level Computation much lower than the one in the 2007 report. Similarly, U.S.S.G § 5G1.1(b) would not convert the guideline sentencing range to life imprisonment.

In fact, he argued, by re-imposing life sentences on Counts One, Five, Nineteen, twenty-two, and twenty-five, the district court upward departed, and violated § 5K2.0(e) of the U.S.S.G—which requires the district court to state, pursuant to 18 U.S.C. 3553(c), its specific reasons for departure in open court, at the time of sentencing, and in the statement of reasons form.

The court also erred by treating the life sentences previously imposed on Counts One, Five, Nineteen, twenty-two, and twenty-five as a mandatory floor, even though "[t]he only limits found in the FSA 2018 are the statutory minimums of the Fair Sentencing Act's new thresholds," *United States v. Valentine*, 2019 WL 2754489, at *5 (W.D. Mich. July 2, 2019).

Mr. Pubien also warned that the government's attempt to limit his resentencing to the covered offense minimizes the benefit of the FSA 2018 and conflicts with the Sentencing Guidelines. Importantly, it also weakens a sentencing court's authority. A sentencing court must sentence the *defendant*, not the crime, and it must craft a sentence that is "'sufficient but not greater than necessary' to fulfill the purposes of sentencing." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (quoting 18 U.S.C. § 3553(a)). When a statute permits resentencing, allowing a court to look only at the covered offense, and not the entirety of the circumstances, undermines the great responsibility a sentencing court undertakes—to impose a fair sentence upon the defendant. At every sentencing, the court must consider the totality of the circumstances or it runs the risk of imposing a sentence that is greater than necessary to serve the purposes of sentencing. Interpreting the FSA 2018 so narrowly would also constrain the judicial discretion expressly authorized by the Act itself. Further, a limited application of the FSA 2018 would weaken the intent of the Act and would undermine the consistent understanding that ambiguities should be resolved in favor of the defendant.

Although the court in *United States v. Rose*, 379 F. Supp. 3d 223, 230 (S.D.N.Y. 2019) expressly declined to determine whether a plenary resentencing was available, it noted that "[t]he text of the First Step Act, read in conjunction with other sentencing statutes, requires [the court] to consider all relevant facts, including developments since the original sentence." *Rose*, 379 F. Supp. 3d at 233. Constraining the First Step Act would, in effect, "preclude [Pubien] from seeking relief" based on considerations, such as the length of sentence on Counts Five, Nineteen, twenty-two, and twenty-five, that had little significance at the time of the original sentencing, *see* U.S.S.G. § 5G1.2(b) and (c), which is expressly contrary to the purpose of the First Step Act. *Rose*, 379 F. Supp. 3d at 229-30.

Mr. Pubien reminded the circuit court that § 404 of the FSA 2018 does not say that the court may *only* impose a reduced sentence on the covered offense. Section 404(b) provides, in relevant part: "A 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 of 2010 ... were in effect at the time the covered offense was committed." FSA 2018 § 404(b). A fair reading of the statute requires only that the court, in imposing a reduced sentence, apply sections 2 and 3 as though they were in effect at the time of the covered offense. Congress did not say "impose a reduced sentence *on the covered offense* as if sections 2 and 3 were in effect." It could have done so but did not.

Moreover, the FSA 2018 places only two limitations on the district court's authority to resentence: (1) when "the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act"; and (2) when "a previous motion made under [§404] to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits." FSA 2018 § 404(c). "Nothing else in § 404 limits the Court's authority to reduce a sentence." *United States v. Mitchell*, 2019 WL 2647571, at *4 (D.D.C. June 27, 2019).

Finally, in response to the government's argument that the sentencing package doctrine did not apply, Mr. Pubien highlighted that the statutory and guideline sentencing scheme in place at the original sentencing, clearly affected the district court's original intent. In 2007, the district court was without discretion—the § 851 enhancement affected all of Mr. Pubien's counts of conviction: they were grouped together under the guidelines, and § 5G1.1(b) converted the guideline sentencing range to mandatory life imprisonment.

The FSA 2018, however, revised the § 851 enhancement by redefining "serious drug felony," as a drug distribution offense "for which the offender served a term of imprisonment of more than 12 months," and the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense. *See* 18 U.S.C. § 924(e)(2), FSA 2018, § 401(a)(1), 21 U.S.C. § 802(57).

The FSA 2018 states that this revision of § 924 only applies to cases where the Court has not imposed a sentence. FSA 2018, § 401(c), 132 Stat. 5194. Here, the district court was imposing a new sentence on Mr. Pubien. Therefore, it was as if Mr. Pubien had not been sentenced. Because "a sentence is not merely the sum of its parts," and district courts impose "sentence[s] by considering all of the relevant factors as a whole," when a new sentence is imposed, a whole sentence on all counts should be imposed. *United States v. Hadden*, 475 F.3d 652, 669 (4th Cir. 2007). Since Mr. Pubien is eligible for relief under the FSA 2018, the Court may impose a new sentence on the remaining counts as well or else risk "unbundl[ing] the entire sentence package." *Id.* The district court therefore, should have recalculated Mr. Pubien's guideline sentencing range, and found that the FSA 2018's revision to the § 851enhancement applies.

On February 25, 2020, the Eleventh Circuit Court of Appeals affirmed the district court's decision to grant, in part, and deny in part, Mr. Pubien's motion for sentence reduction pursuant to the FSA 2018.

First, the circuit court found that § 404 of the FSA 2018 does not grant the district court statutory authority to modify the sentences Mr. Pubien's powder cocaine convictions because the sentences imposed for those convictions were not modified by sections 2 or 3 of the FSA 2010.

Second, the circuit court held that the FSA 2018 § 401 changes to the § 851 prior-conviction requirement, and to the mandatory minimum sentence

for defendants who have had two or more such prior convictions could not be applied retroactively.

Third, the circuit court found that the original sentence was not a package of interconnected sanctions, and thus the sentencing package doctrine was inapplicable. It noted that at the original sentencing, Counts One and Three independently required the imposition of a life sentence, yet it ignored that the reason why each of those counts required life sentences was because the no-longer-applicable § 851 enhancement was the common thread that permeated the entire sentencing and affected the minimum and mandatory statutory penalties for all counts.

On May 1, 2020, defense counsel filed a timely petition for rehearing and rehearing en banc. He argued that the panel's opinion erred as a matter of law when it held that, despite being otherwise eligible for relief under the First Step Act of 2018, the district court lacked jurisdiction to reduce Mr. Pubien's powder cocaine sentences, that the "sentencing package" doctrine was not implicated, and that the First Step Act § 401 amendments did not apply to Mr. Pubien's convictions. On June 11, 2020, the Eleventh Circuit Court of Appeals denied Mr. Pubien's petition for rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

On October 26, 2007, Mickey Pubien shuffled into United States District Judge James Cohn's courtroom in Fort Lauderdale, Florida. He sat next to his lawyer and waited for his sentencing hearing to begin. He knew, however, well before that day, what his sentence would be; he was facing two mandatory life sentences. Three prior felony drug convictions were used to enhance his statutory minimum sentences pursuant to 21 U.S.C. § 851. Judge Cohn was without discretion. The law required that Mickey Pubien be sentenced to life in prison. Understandably, the hearing lasted only fifteen minutes.

In February of 2019, Mr. Pubien filed a motion for a sentence reduction pursuant to the First Step Act of 2018. Judge Cohn granted the motion, in part, and denied it in part. He reduced the sentence on the cocaine base conviction, but believed he was—again—without discretion to reduce the powder cocaine convictions.

Mr. Pubien appealed and, despite Judge Cohn's clear lack of sentencing discretion in 2007, on February 25, 2020, the Eleventh Circuit Court of Appeals characterized Judge Cohn's actions that day as having been intentional. The Eleventh Circuit reasoned that because there "is no risk" that the district court's original "sentencing intent" may have been undermined by the sentence reduction of the cocaine base conviction, the sentencing package doctrine did not apply and Mr. Pubien's was not entitled to consideration of a sentence reduction on those counts.

In denying Mr. Pubien's appeal, the Eleventh Circuit argued that the sentencing package doctrine was inapplicable because at the original sentencing, Counts One and Three independently required the imposition of a life sentence. The court, however, ignored the bright red elephant in the room; that the reason why each of those counts mandated the imposition of life sentences was because the no longer applicable § 851 enhancement was the common thread that permeated the entire sentencing and affected the minimum and mandatory statutory penalties for all counts.

The court further narrowed its interpretation of the First Step Act of 2018 by finding that it did not authorize district courts to reduce sentences on non-covered offenses—in this case, the powder cocaine convictions.

Regardless of what sentence Judge Cohn believed Mickey Pubien *deserved*, and irrespective of whether he believed the sentence was appropriate, fair, or necessary and sufficient, Judge Cohn had no say in the matter. Characterizing his actions as *intentional*, therefore, is quite a stretch. In fact, to this day, there is no record of what Judge Cohn believes would have been an appropriate sentence for Mickey Pubien; he has never been asked for his input.

A. What the district court may appropriately consider when imposing a reduced sentence pursuant to § 404 of the First Step Act of 2018 remains an unsettled question of law. The circuits are in conflict over the degree of discretion district courts have when resenting an otherwise eligible defendant pursuant to § 404 of the First Step Act. Specifically, whether § 404 precludes a district court from considering, and applying, the reduced penalties in § 401 of the First Step Act to both covered and non-covered offenses.

While the First Step Act of 2018 has benefited thousands of defendants, it fails to clearly explain what district court may appropriately consider when imposing a reduced sentence pursuant to § 404. The Supreme Court of the United States should resolve this unsettled question of law. The circuits are in conflict over the degree of discretion district courts have when resenting an otherwise eligible defendant pursuant to § 404 of the First Step Act. Specifically, whether § 404 precludes a district court from considering, and applying, the reduced penalties in § 401 of the First Step Act to both covered and non-covered offenses.

1. At least five Circuits have adopted a narrow interpretation of the First Step Act, and have determined that otherwise eligible defendant may not avail themselves of legal developments that, if applied to them, would markedly reduce their sentences.

Science and reason notwithstanding, the Eleventh Circuit, along with four other circuit courts, has endorsed a narrow interpretation of the FSA 2018 that allows district courts to ignore changes to statutory penalties and Guideline amendments aimed at redressing our society's prejudicial treatment of African Americans and other minority communities. It is understandable that many of these judges find it difficult to admit that they are part of a

system that disproportionately targets these communities. Instead of facing this reality with courage and leadership, however, they have chosen to continue to side with sentencing schemes that congress, social scientists, and legal experts throughout the country have determined were based on inaccurate premises, faulty science, and racial stigmas and biases.

The Second Circuit, for example, has held that when recalculating a defendant's Sentencing Guidelines range, district courts are limited to only incorporating changes that flow from the FSA 2010. *See United States v. Moore,* 975 F.3d 84 (2d Cir. 2020). 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.

Similarly, the Fifth Circuit addressed this issue in the context of the career offender guidelines. *See United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir. 2019), *cert. denied*, ––– U.S. ––––, 140 S. Ct. 285, 205 L.Ed.2d 195 (2019). Mr. Hegwood pled 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, Mr. Hegwood moved for a sentence reduction pursuant to § 404 of the First Step Act. He argued 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 rejected Mr. Hegwoood's argument that the district court had discretion not only to apply the reduction provided for in the FSA 2010, but also to recognize and redress the fact that he was no longer a career offender. Instead, the Fifth Circuit chose to side with our troubling history. It 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.*

Later, in *United States v. Stewart,* 964 F.3d 433, 435-36, 438 (5th Cir. 2020), the Fifth Circuit affirmed its decision to interpret the FSA 2018 narrowly. In 2002, Mr. Stewart pled guilty to conspiracy to distribute more than 50 grams of cocaine base (crack cocaine), which, at the time, subjected him to a statutory penalty range of 10 years to life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A) (2001). Using the 2001 Sentencing Guidelines, the presentence report held him responsible for 731.12 grams of crack cocaine and 102 grams of powder cocaine, which converted to 14,642.8 kilograms of marijuana equivalency and resulted in a base offense level of 36. However, Stewart had three prior felony drug convictions, making him a "career offender." U.S.S.G. § 4B1.1 (2001). Because the statutory maximum for his offense of conviction was, at the time, life imprisonment, Stewart's offense level was increased to 37 and his criminal history category was increased to VI under the career offender provisions of section 4B1.1 (2001), yielding a guidelines range of 360 months to life. The district court imposed a low-end sentence of 360 months imprisonment to be followed by a 5-year term of supervised release.

In 2019, Mr. Stewart moved for a sentence reduction pursuant to the FSA 2018. The district court agreed that he was eligible for relief under the FSA 2018, but held that it was constrained to applying the Sentencing Guidelines in effect at the time of his conviction. i.e., the 2001 Sentencing Guidelines. The district court then declined to reduce Mr. Stewart's sentence

on the grounds that his existing 360-month sentence was in the middle of the revised guidelines range, he had absconded before sentencing, the amount of drugs involved in the offense "was enough to warrant the second highest base offense level under the Guidelines at that time," and it "likely would have sentenced Stewart to a similar term of imprisonment in 2002 under his new Guideline range." *Id.* at 435.

Mr. Stewart appealed, and argued that the district court erred in applying the 2001 Guidelines instead of 2018 Guidelines, resulting in a base offense level of 36 instead of 34. He maintained the FSA was enacted "to provide courts with authority to reduce unduly harsh sentences for pre-2010 crack cocaine offenses," and that using the 2001 Guidelines denied him any FSA 2018 or FSA 2010 relief.

The Fifth Circuit agreed with Mr. Stewart, and vacated, and remanded his case to the district court. It held that district court erred by constraining itself to the 2001 Sentencing Guidelines when calculating Stewart's new sentencing range under the FSA, thereby denying him the benefit of Amendment 750's change to the marijuana equivalency calculation for crack cocaine—a change compelled by FAIR. *Id.* at 437. Of relevance here, however, the Fifth Circuit doubled down on its holding in *Hedgwood*, and noted that that case "primarily stands for the proposition that defendants seeking relief under section 404(b) of the FSA cannot take advantage of changes in the law that have nothing to do with FAIR [The FSA 2010]." *Id.* at 438. The Fifth

Circuit's characterization of defendants requesting resentencing based on changes in statutory penalties and guidelines amendments as attempts to "take advantage" of changes in the law, reveals its continued unwillingness to deal with our complicated past.

The Ninth Circuit has adopted the same narrow interpretation of the FSA 2018. *See United States v. Kelley*, 962 F.3d 470 (9th Cir. 2020). That court reasoned, "[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. The Ninth Circuit then 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 in *United States v. Bates* joined the decisions of the Fifth and Ninth Circuits. *See Bates* No. 19-7061, 2020 WL 5422410 (10th Cir. Sept. 10, 2020). The Tenth Circuit "interpreted [§ 404(b)]'s language and concluded that 'plenary resentencing is not appropriate under the First Step Act.'" *See Id.* at 3 (quoting *United States v. Brown*, 974 F.3d 1137 (10th Cir. 2020)). *See also Brown,* 974 F.3d at 1144 ("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.").

Like in the decision below, the Eleventh Circuit in *United States v. Denson,* 963 F.3d 1080, 1089 (11th Cir. 2020), held that in the context of FSA 2018 motions, district courts are not free to reduce sentences on covered offenses based on changes in the law beyond those mandated by sections 2 and 3 of the FSA 2010. *Id.* at 1089.

2. At least Four Circuits have adopted a broader interpretation of the First Step Act, and have determined that otherwise eligible defendants may avail themselves of legal developments that, if applied to them, would markedly reduce their sentences

The Third Circuit, for example, has endorsed a broader interpretation of the FSA 2018. In *United States v. Easter*, 975 F.3d 318 (3d Cir. 2020), the Third Circuit held that district courts "must consider" all applicable § 3553(a) factors at a First Step Act resentencing. The court explicitly joined the Sixth Circuit in holding that in the context of a FSA 2018 motion, the district court must—at a minimum—accurately calculate the amended Guidelines range at the time of resentencing and a thorough renewed consideration of § 3553(a) factors. *Id.* at 325-26.

Similarly, the Fourth Circuit has held that when resentencing a defendant in the context of a FSA 2018 motion, the district court is required to not only recalculate a defendant's sentencing guideline range using the Sentencing Guidelines applicable at the time of resentencing, but it is also

required to not apply a since inapplicable career offender enhancement. *See United States v. Chambers,* 956 F.3d 667 (4th Cir. 2020).

The court in *Chambers re*cognized that § 404 satisfies § 3582(c)(1)(B)'s "expressly permitted" requirement; and § 404's "as if" reference to the retroactive application of § 2 or § 3 of the Fair Sentencing Act does not limit the Court's consideration to those statutory changes. 956 F.3d at 671-72. Thus, just as there is under § 404 "no limiting language to preclude the court from applying intervening case law," *Id.* at 672, there is no limiting language to preclude the application of intervening legislative changes from which a defendant can benefit.

The Sixth Circuit has also endorsed a broader interpretation of the FSA 2018. In *United States v. Boulding*, for example, it held that when resentencing defendants pursuant to a FSA 2018 motion, district courts are required to calculate the amended guideline range at the time of resentencing *and* to allow defendant's to present objections to previously applied sentencing enhancements. The court reasoned that this was, "a baseline of process that must include an accurate amended guideline calculation and renewed consideration of the 18 U.S.C. § 3553(a) factors." *See Boulding*, 960 F.3d 774, 784 (6th Cir. 2020).

The Seventh Circuit in *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020) has squarely held that a district court most definitely has the authority under the plain language of Section 404(b) to reduce a defendant's sentence on

a grouped, non-covered, concurrently-sentenced count. According to the Seventh Circuit, the district court "faltered" in finding that the First Step Act did not permit it to reduce Hudson's concurrent sentence on his ACCA count, because it erroneously "collaps[ed] the eligibility and discretionary inquires" under Section 404. *Id.* at 610. The court held that district courts are not limited under the text of the FSA 2018 to reducing a sentence solely for a covered offense. Instead, a defendant's conviction for a covered offense is a threshold requirement of *eligibility* for resentencing on an aggregate penalty. Once past that threshold, a court may consider a defendant's request for a reduced sentence, including for non-covered offenses that are grouped with covered offenses to produce the aggregate sentence. *Id.* 611.

B. This is an Important and Recurring issue and the Circuit conflict will not resolve without a decision from this Court. This Case presents an ideal vehicle to do just that.

At the time of Mr. Pubien's original sentence the district court was without discretion to consider any sentence outside of mandatory life imprisonment. Pursuant to U.S.S.G. § 5G1.1(b), the mandatory life sentences applicable to Counts One and Three—because of the § 851 prior drug conviction enhancement—converted the guideline sentencing range for all counts to life imprisonment without release. (DE 862 ¶ ¶ 174, 175). Therefore, the guidelines—through mandatory life sentences—drove the sentencing hearing.

Accordingly, because the district court grouped Mr. Pubien's offenses, his sentence on Counts One and Three were related to his sentence on Counts

Five, Nineteen, Twenty-Two and Twenty-Five, and because Mr. Pubien's sentence on Counts One and Three was not independent of his sentence on Counts Five, Nineteen, Twenty-Two and Twenty-Five, a situation analogous to § 2255 is created. Section 404 opened the door for the district court to reconsider Mr. Pubien's sentence—he received one sentence, not six.

In addition to grouping under the Sentencing Guidelines, courts have noted other indicia of interdependence. In *Davis*, the court held that "when a defendant is found guilty on a multicount indictment, there is a strong likelihood that the district court will craft a disposition in which the sentences on the various counts form part of an overall plan." *Id.* at 122.

In *United States v. Pisani,* 787 F.2d 71, (2d Cir.1986) the Second Circuit articulated its interpretation of the "sentencing package" doctrine, as applied to 18 U.S.C. § 924(c) vacaturs and resentencings. In *Pisani,* the Second Circuit reasoned that, where a sentencing judge feels bound by Section 924(c) to impose a mandatory consecutive sentence, the judge's sentence on other counts is impacted by his knowledge that the defendant will also have a mandatory sentence imposed under Section 924(c). 787 F.2d at 73; *see also United States v. Diaz,* 778 F.2d 86 (2d Cir.1985). Here, the mandatory life sentences necessarily bound the Court and affected all of the other counts.

Under current law, Mr. Pubien would not face mandatory life sentences on Counts One and Three. The district court would not be bound the way it was in 2007 and would have the discretion to tailor a sentence proportional to

Mr. Pubien's crimes and specific characteristics. The vast gap in punishment options cannot be overstated.

Even more jarring, is the fact that the sentences on all of the counts were dependent on a since-inapplicable 21 U.S.C. § 851 enhancement. (DE 388). Mr. Pubien's prior drug convictions would no longer qualify to enhance their minimum mandatory sentences under 21 U.S.C. § 851.

Section 401 of the First Step Act now requires that the prior drug conviction be a "serious drug felony," defined in the act as an offense described in 18 U.S.C. § 924(e)(2), "for which the offender served a term of imprisonment of more than 12 months," and the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense. *See* FSA 2018, § 401(a)(1), 21 U.S.C. § 802(57). Because Mr. Pubien never served more than 90 days in jail for any of the predicate convictions used to enhance his 2007 sentence, none of those convictions would operate to enhance sentence today. (DE 862).

Prior Conviction	**Charge**	**Case No.**	**Date of Conviction**	**Sentence**	**Serious Drug Felony pursuant to 21 U.S.C. § 802(57)**
1	Cocaine possession w/intent to distribute	95-18673CF10A	12-5-95	**90 days jail (DE 862)**	**NO**
2	Possession of Cocaine	96-16106CF10A	10-2-96	**90 days jail (DE 862)**	**NO**
3	Cocaine possession w/intent to distribute	99-1976CF10B	8-9-99	**1 year probation (DE 862)**	**NO**

Importantly, even if Mr. Pubien' s prior drug convictions did qualify to enhance his mandatory minimum sentences, under current law he would still not face any mandatory minimum life sentences. His aggregate sentence, therefore, has been undermined and is no longer in conformity with the law.

Many district courts have now held that the language of § 404(b) or the "sentencing package" doctrine – or both – permit a court to resentence on non-covered as well as covered counts where the crack count demonstrably drove the aggregate sentence imposed on the non-covered counts.[1]

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[1] *See United States v. Clarke*, Case No. 92-cr-4013-WS-CAS-7, 2019 WL 7499892, at *1-2 (N.D. Fla. Oct. 24, 2019) (Stafford, J.) (government ***conceded*** that *if* defendant were eligible for a sentence reduction on the crack offenses, the court had the authority to reduce his concurrent life sentences on a non-covered count for malicious destruction of property; after finding that the defendant was indeed eligible for a reduction on the crack counts, agreeing with the reasoning in *Biggs* that "where – as here – a defendant's crack offenses drove the entire sentencing package, a district court has the authority under the First Step Act to reduce sentences on all counts" including his crack offenses; reducing life sentence on all counts to time served); *United States v. Hill*, ___ F. Supp. 3d ___, 2020 WL 891009 at *4, (D. Md. Feb. 24, 2020) (applying sentencing package doctrine to counts grouped under the Guidelines at sentencing; holding: "when a district court reconsiders a sentence for one count, it can reconsider sentences for other counts;" citing cases); *United States v. Jones*, 2019 WL 6907304, at *8 (D. Conn. Dec. 19, 2019) ("The RICO, RICO Conspiracy, and heroin violations . . . were all addressed together, with the crack cocaine violation, as part of a single sentencing package, and these offenses are inextricably related. The Court, therefore, has the authority to reduce Mr. Jones' entire sentence under the First Step Act;" citing *United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999) (Sotomayor, J.)); *United States v. Washington*, 2019 WL 4750575, at *3 (C.D. Ill. Sept. 30, 2019) (when enacting § 404(b), Congress gave courts the authority to reduce "aggregate" sentences involving both covered and non-covered offenses); *United States v. Anderson*, No. 0:04-353 (CMC), 2019 WL 4440088, at *4 n. 2 (D. S.C. Sept. 17, 2019) (recognizing that where a defendant is eligible for a reduction on a covered offense, and "the court originally fashioned a sentence as a whole for both counts," the court "has the authority and discretion to unbundle the

Here, Mr. Pubien was eligible for a sentence reduction under the First Step Act because the statutory penalties for his crack-cocaine offense had been modified by the FSA 2010. His eligibility "to have a court consider whether to reduce the previously imposed term of imprisonment," covers the powder cocaine offenses, because those offenses were grouped with his covered offense for sentencing, and the resulting aggregate sentence included the powder cocaine and cocaine base offenses.

This conclusion aligns with the text of the First Step Act, which says: a court that "imposed a sentence for a covered offense" may "impose a reduced sentence as if" the Fair Sentencing Act "were in effect at the time the covered offense was committed. § 404(b). That language does not bar a court from reducing a non-covered offense. The district court agreed that Hudson's crack offenses were covered offenses; and the text of the First Step Act requires no more for a court to consider whether it should exercise its discretion to reduce a single, aggregate sentence that includes covered and non-covered offenses.

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sentence and impose a reduced sentence on both [covered and non-covered] counts"); *United States v. Medina*, No. 3:05-CR-58 (SRU), 2019 WL 3769598, *6 (D. Conn. July 17, 2019) (Underhill, C.J.) ("Limiting resentencing to only the covered offense not only minimizes the benefit of the First Step Act, it also conflicts with the Sentencing Guidelines and weakens a sentencing court's authority. . . . Medina should get the full benefit of the First Step Act's remedial purpose."), *motion for reconsideration denied*, 2019 WL 3766392 (D. Conn. Aug. 9, 2019) (Underhill, C.J.); *United States v. Foreman*, 2019 WL 3050670, at *2 n.3, 7 (W.D. Mich. July 12, 2019) (imposing reduced sentence on both crack and powder counts).

Excluding non-covered offenses from the ambit of First Step Act consideration would, in effect, impose an extra-textual limitation on the Act's applicability. In Section 404(c) the FSA 2018 sets forth two express limitations on its applicability. If Congress intended the FSA 2018 not to apply when a covered offense is grouped with a non-covered offense, it could have included that language. It did not.

In addition, a court's consideration of the term of imprisonment for a non-covered offense comports with the manner in which sentences are imposed. Sentences for covered offenses are not imposed in a vacuum, hermetically sealed off from sentences imposed for non-covered offenses. Multiple terms of imprisonment are treated under federal law as a single, aggregate term of imprisonment, 18 U.S.C. § 3584(c), and courts have recognized that a criminal sentence is a package composed of several parts. Indeed, the Guidelines *require* a court to group similar offenses, U.S.S.G. § 3D1.2, and to assign a combined offense level for all counts. Sometimes, as Mr. Pubien's case demonstrates, a higher statutory minimum sentence for one count grouped with other offenses directly increases penalties for other counts. Here, the FSA 2018 changes to the § 851 prior conviction enhancement eliminates five life sentences.

A court is not limited under the text of the FSA 2018 to reducing a sentence solely for a covered offense. Instead, a defendant's conviction for a covered offense is a threshold requirement of *eligibility* for resentencing on an

aggregate penalty. Once past that threshold, a court may consider a defendant's request for a reduced sentence, including for non-covered offenses that are grouped with covered offenses to produce the aggregate sentence.

Section 401 is not self-executing; it confers no right to be resentenced based on its reduced penalties. Instead, a defendant must find some other statute, if one exists, that confers the right to be resentenced with the benefit of those reduced penalties. For Mr. Pubien, that statute is § 404; and its authorization to apply the reduced penalties in § 401 at a resentencing issues out of the nature of the resentencing that occurs under § 404.

Here, the mandatory minimum and maximum sentences for all of Mr. Pubien's counts of conviction have been altered by the FSA 2018 and this should have been considered when the district court resentenced him. The district court cannot simply ignore current law and that he is serving illegal life imprisonment sentences on Counts, Five, Nineteen, Twenty-Two, and Twenty-Five, and a no-longer-mandatory life sentence on Count One.

Count	**Violation**	**Applicable Statutory Sentencing Ranges October 26, 2007**	**Applicable Statutory Sentencing Ranges TODAY**
1	Conspiracy 5 KG cocaine 21 U.S.C. §§ 846 and 851	Mandatory Life 21 U.S.C. § 841(b)(1)(A)	**10 years to life in prison** 21 U.S.C. § 841(b)(1)(A)
5	Poss./w/Intent/Distribute 500 grams of cocaine 21 U.S.C. §§ 841(a)(1) and 851	10 to Life 21 U.S.C. § 841(b)(1)(B)	**5 to 40 years in prison** 21 U.S.C. § 841(b)(1)(B)
19	Poss./w/Intent/Distribute 500 grams of cocaine 21 U.S.C. §§ 841(a)(1) and 851	10 to Life 21 U.S.C. § 841(b)(1)(B)	**5 to 40 years in prison** 21 U.S.C. § 841(b)(1)(B)

22	Poss./w/Intent/Distribute 500 grams of cocaine 21 U.S.C. §§ 841(a)(1) and 851	10 to Life 21 U.S.C. § 841(b)(1)(B)	**5 to 40 years in prison** 21 U.S.C. § 841(b)(1)(B)
25	Poss./w/Intent/Distribute 500 grams of cocaine 21 U.S.C. §§ 841(a)(1) and 851	10 to Life 21 U.S.C. § 841(b)(1)(B)	**5 to 40 years in prison** 21 U.S.C. § 841(b)(1)(B)

CONCLUSION

Mr. Pubien has spent the last twelve years improving himself in prison, and now, thanks to the FSA 2018—and for the first time since 2007—the district court has the discretion to sentence him to a term of imprisonment that is proportional and commensurate to the crime he committed, and akin to sentences received by similarly situated defendants.

The district court is, unquestionably, in a better position now—than it has ever been—to sentence Mr. Pubien. It is now equipped with better and more scientifically sound data concerning crack cocaine, its effects on its users, and the relative danger its use poses to the community.

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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