NO._____

IN THE SUPREME COURT OF THE UNITED STATES

JONAIR TYREECE MOORE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court must consider the sentencing factors of 18 U.S.C. § 3553(a) when determining whether to impose a reduced sentence for a crack cocaine offense under Section 404 of the First Step Act of 2018.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Jonair Tyreece Moore, appellant below. Respondent is the United States of America, appellee below. Petitioner is not a corporation.

STATEMENT ON RELATED CASES

There are no cases directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Jonair Tyreece Moore respectfully petitions the Court for a writ of certiorari to review the opinion entered by the United States Court of Appeals for the Eight Circuit on June 24, 2020.

OPINIONS BELOW

The decision of the United States Court of Appeals affirming the denial of Moore's request for a reduction under the First Step Act can be found at *United States v. Moore*, 963 F.3d 725 (8th Cir. 2019). A copy of the opinion is appended to this Petition. (App. A) The district court's Memorandum and Order is unpublished but is also attached to this Petition.(App. B)

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on June 24, 2020. This Petition has been timely filed under the rules of the Supreme Court as revised by the Court's March 19, 2020, Order relating to COVID-19. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND GUIDELINE PROVISIONS INVOLVED

Section 404 of the First Step Act, Pub. L. 115-391, 132 Stat. 5194 (Dec. 2018), provides in relevant part:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute,

the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

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

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.--Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended-

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

18 U.S.C. § 3553(a) states:

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for–

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines–

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued

under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

"In the context of a new statute, and with little guidance, district courts are being asked to shape what a resentencing under the First Step Act looks like." *United*

States v. Chambers, 956 F.3d 667 (4th Cir. 2020). Their approaches have varied, and the differences have led to a split in the circuits over whether, in deciding whether to reduce the crack cocaine sentence of an eligible offender, the district court must consider the sentencing factors of 18 U.S.C. § 3553(a) as it would in any other sentencing proceeding. This case offers the court an opportunity for the Court to resolve that conflict and bring consistency and structure to proceedings affecting hundreds of crack cocaine offenders.

A. Moore is eligible for a sentence reduction under the First Step Act

First-time felon Jonair Moore was indicted in 2009 for conspiring to distribute and possession with intent to distribute 50 grams or more of crack cocaine. (Docket No. 1) At the time of his offense, that quantity carried a statutory penalty of ten years to life imprisonment.

Moore's case was a quintessential "dry conspiracy" case, in that no drugs were recovered and the evidence consisted solely of the testimony of cooperating witnesses looking to reduce their own sentences. Based on this testimony, the jury returned a guilty verdict. In a question on the verdict form, the jury found beyond a reasonable doubt that Moore's offense involved at least 50 grams of crack cocaine and a detectable amount of powder cocaine.

Notwithstanding the jury's verdict, and over Moore's objection, the district court at sentencing attributed to Moore a total of 1.2 kilograms of crack cocaine and

11.5 kilograms of powder cocaine. Its quantity finding contributed to a Sentencing Guidelines range of 292 to 365 months imprisonment. The court sentenced Moore to 292 months imprisonment. A later retroactive Guideline amendment led to the revised sentence of 235 months that Moore is currently serving.

These basic facts make Jonair Moore eligible for a reduction in sentence under the First Step Act of 2018. The First Step Act[1] gives retroactive effect to sections 2 and 3 of the Fair Sentencing Act of 2010,[2] which reduced minimum and maximum penalties for crack cocaine offenses. Under the First Step Act, sentencing courts "that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . .were in effect at the time the covered offense was committed." First Step Act, Pub. L. 115-391, 132 Stat. 5194 § 404(b). A "covered offense" is "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 . . ., that was committed before August 3, 2010." Moore has a "covered offense" because his crime was "committed before August 3, 2010," and statutory penalties for his offense of conviction were "modified by . . . the Fair Sentencing Act." Under the Fair Sentencing Act, Moore's statutory sentencing range is now 5 to

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[1]Pub. L. 115-391, 132 Stat. 5194 (2018).

[2]Pub. L. 111-220, 124 Stat. 2372 (2010).

40 years imprisonment.

B. The district court denies Moore's request for a First Step Act reduction without hearing evidence related to the 18 U.S.C. § 3553(a) sentencing factors.

In January of 2019, Moore wrote to ask the court to appoint counsel to help him file a motion for a reduction under the First Step Act. (Docket No. 199) Pursuant to a General Order in place in the District of Nebraska, the court appointed the Federal Public Defender's Office. (Docket No. 200) The General Order did not set out a standard procedure for resolving a motion under the newly-enacted law. Instead, it permitted individual judges to develop their own procedures. The order provided:

> Upon determining that a defendant may qualify for relief under § 404 of the First Step Act, the Federal Public Defender or CJA Panel Attorney shall promptly file a separate entry of appearance and a motion asserting that the matter is ready for progression. The Federal Public Defender or CJA Panel Attorney shall consult with the Supervising United States Probation Officer for presentence reports before filing any such motion. Upon the filing of such a motion, a progression order will be entered.

(Docket No. 200 ¶3)

On February 5, 2019, the United States Probation Office filed under seal a "First Step Act Retroactive Sentencing Worksheet." (Docket No. 202) The Worksheet for Moore contained no personal information about his post-sentencing activities or conduct within the Bureau of Prisons. (Id.) It merely set out the relevant guideline calculations and the Probation Officer's opinion that Moore was ineligible

for a reduction because the drug quantity attributed to him in the PSR would yield the same offense level even after adjusting for the Fair Sentencing Act's new statutory penalties.

In accordance with the General Order, Moore's attorney filed a motion for imposition of a reduced sentence on March 5, 2019. (Docket Nos. 204 &205) In an accompanying brief, Moore argued that his conviction met the definition of a "covered offense" under Section 404(a). He requested a hearing in which to present evidence relevant to the 18 U.S.C. § 3553(a) factors so that the court could impose an appropriate reduced sentence. Counsel did not set out any information with respect to those factors, as the General Order indicated that a progression order addressing procedure would be forthcoming.

The district court did not issue the progression order that was promised in the district's General Order. Nonetheless, the government filed a response opposing Moore's motion on March 25, 2019. (Docket No. 206) The government adopted the Probation Officer's position that the drug quantity involved in the offense made Moore ineligible for a sentence reduction. (Docket No. 206) The government further claimed that, assuming Moore was eligible, he would not be entitled to a plenary resentencing hearing. The government's brief did not discuss Moore's post-sentencing conduct or submit evidence related to the § 3553(a) sentencing factors, other than to mention sentencing disparities as a reason to deny Moore the "windfall"

of a reduction. (Docket No, 206 p. 8) It simply asked the court to use its discretion to deny Moore's motion. (Id.)

Moore's case was pending for nearly five months before the court acted on his motion. Rather than set a hearing to address the parties' arguments, however, it simply denied Moore's request for a reduction. (Docket No. 207) The court rejected the government's argument on eligibility and held that, because the statutory penalties for the statute under which Moore had been convicted had changed, he had a "covered offense" under the First Step Act. (Id.) Nonetheless, the judge declined to impose a reduced sentence or even solicit evidence regarding the 18 U.S.C. § 3553(a) factors, even though he had not been involved in the trial or initial sentencing hearing. The court explained:

> Having concluded that Moore is eligible for a sentence reduction under the First Step Act, the Court must decide whether he should receive one—and, concomitantly, what procedures should be employed in making that decision. Here, the Court parts ways with Moore: he argues that "t]he court is free to impose whatever sentence is appropriate within the statutory limits of the Fair Sentencing Act." Filing 205 at 7. So, he says, "[t]o determine that sentence, both Moore and the government should be allowed to present arguments that go beyond the sentencing range to address the factors of18 U.S.C. §3553(a). Absent a waiver, Moore should be present at the resentencing hearing." Filing 205 at 7. The Court disagrees. Moreover, § 404(c) is quite clear that nothing in § 404 "shall be construed to require a court to reduce any sentence pursuant to this section." In other words, under § 404, a defendant—even if eligible for a sentence reduction—isn't *entitled* to anything. And the Court's apparently unfettered discretion to deny relief implies the discretion to *condition* any relief it does afford.

(Docket No. 207 pp. 12-13)

After deciding that the constraints of 18 U.S.C. § 3553(a) did not apply in a § 404 proceeding, the court explained why it would not exercise its "unfettered" discretion to reduce Moore's sentence. All of its reasons had been addressed in Moore's first sentencing hearing and had factored into his original guideline calculation:

> There are several facts that lead the Court to that conclusion, beginning with the considerable quantity of drugs attributable to Moore: approximately 11 kg of cocaine and 1.2 kg of cocaine base. Filing 146 at 60. Moreover, the Court accepts Judge Urbom's conclusion, after presiding over the trial and sentencing, that Moore obstructed justice by perjuring himself at trial. Filing 146 at 43-44. And the Court accepts Judge Urbom's finding that the witnesses who reported Moore's use of a firearm in furtherance of drug trafficking were credible.
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> Those are facts that, even in a plenary resentencing, would compel a lengthy sentence. *See* § 3553(a). With those in mind, the Court concludes that even considering the changes made by the Fair Sentencing Act, Moore's present sentence of 235 months' imprisonment is entirely appropriate.

(ECF No. 207 pp. 13-14)

C. The Court of Appeals upholds the district court's decision, holding that a district court is not required to consider the factors of 18 U.S.C. § 3553(a) in exercising its discretion under the First Step Act.

Moore appealed the decision to the United States Court of Appeals for the Eighth Circuit, arguing that it had erred by failing to consider the § 3553(a) factors in determining whether to reduce Moore's sentence. First, however, Moore had to

demonstrate that those factors applied in a First Step Act proceeding.

Moore's argument began with the text of the First Step Act. It states that, if a defendant has a "covered offense," a district court may "*impose a reduced sentence*" as if the Fair Sentencing Act had been in place at the original sentencing hearing. First Step Act § 404(b) (emphasis added). Federal sentencing statutes use the verb "impose" to mean "sentence" after considering the factors of 18 U.S.C. § 3553(a). Since Congress does not legislate on a clean slate and a given term is presumed to mean the same thing throughout a statute, Moore argued that the use of the term "impose" required consideration of the § 3553(a) sentencing factors.

Moore found support for this interpretation in Section 404(c) of the First Step Act. Section 404(c) provides that a motion for a sentence reduction may not be denied absent a "complete review of the motion on the merits." First Step Act § 404(c). In an initial sentencing hearing, a "complete review" involves consideration of the § 3553(a) factors.

Moore claimed that the stated purpose of the First Step Act also bolstered his position. The Act aimed to "allow prisoners sentenced before the Fair Sentencing Act . . . to petition the court for an individualized review of their case" [3] in light of the Fair Sentencing Act's new penalties. In other sentencing contexts, an "individualized

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[3]Fact Sheet, Senate Comm. on the Judiciary, The First Step Act of 2018 (S. 3649)–as Introduced (Nov. 15, 2018).

review" would require weighing the § 3553(a) sentencing factors.

Finally, Moore demonstrated that the overwhelming majority of district courts were weighing the § 3553(a) factors in determining motions for reductions under the First Step Act.

In its brief to the Eighth Circuit, the government agreed that the factors of 18 U.S.C. § 3553(a) applied in a First Step Act proceeding. It disagreed, however, with Moore's assertion that the district court had not considered them. According to the government, the district court had "considered the pertinent §3553(a) factors, weighed them, and found certain factors especially compelling." (Brief of Appellee in *United States v. Moore*, No. 19-3187 in the United States Court of Appeals for the Eighth Circuit (Feb. 28, 2020), at p. 12) It therefore properly exercised its discretion under the First Step Act.

The Eighth Circuit did not accept the government's concession on the applicability of the § 3553(a) factors. Instead, it held that the district court's discretion in a First Step Act proceeding was not subject to § 3553(a)'s contraints. "When Congress intends to mandate consideration of the section 3553 factors, it says so," the court stated. *United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020). Congress did not mention the section 3553 factors in § 404 of the First Step Act. *Id.* *Id.*

The Court of Appeals was not convinced by Moore's argument that the term

"impose" required consideration of the § 3553(a) factors. While it acknowledged that other sentencing statutes containing the word "impose" require analysis of the § 3553(a) factors, the court said the word "impose" did not create the requirement. Those statutes provide that, in imposing a sentence, the court "shall consider" the § 3553(a) factors. According to the Court, "the words 'impose' and 'imposed' are coincidental with the mandate, not its cause." *Moore*, 963 F.3d at 728.

Finally, the court rejected Moore's claim that a "complete review of the motion on the merits" requires consideration of the § 3553 factors. Citing an earlier Eighth Circuit decision, the court said a "'complete review of the motion' means that a district court 'considered [petitioner's] arguments' in the motion and 'had a reasoned basis for its decision.'" *Moore*, 963 F.3d at 728 (citing *United States v. Williams*, 943 F.3d 841, 844 (8th Cir. 2019)). Although the district court had not yet heard Moore's particular arguments for a reduction and had no updated information on his post-sentencing activities, the Court of Appeals held that the district court had conducted a "complete review" in Moore's case. It therefore affirmed the district court's denial of Moore's motion for a reduced sentence.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals are divided over whether a district court must consider the sentencing factors of 18 U.S.C. § 3553(a) in exercising its discretion under Section 404 of the First Step Act.

A conflict has developed in the circuits over whether, in determining whether

to reduce a sentence under the First Step Act, a district court must weigh the § 3553(a) sentencing factors. The Eighth Circuit stands alone in holding that such consideration is permitted, but not required, although it finds superficial support in statements from other Courts of Appeals. The Third, Fourth, and Sixth Circuits have taken the opposite position.

After thorough briefing and analysis of the First Step Act's text, the Eighth Circuit has definitively held that courts are *not required* to consider the § 3553(a) factors in ruling on a defendant's request for a reduced sentence under the First Step Act. *Moore*, 963 F.3d at 727. At first glance, the Fifth, Seventh, Tenth, and Eleventh Circuits also appear to accept that proposition. In *United States v. Mannie*, 971 F.3d 1145, 1158 (10th Cir. 2020), the Tenth Circuit stated that "[n]otwithstanding the fact that neither the 2018 FSA nor § 3582(c)(1)(B) reference the 18 U.S.C. § 3553(a) factors, they are permissible, although not required, considerations when ruling on a 2018 FSA motion." The Seventh Circuit asserted in *United States v. Shaw*, 957 F.3d 734, 741 (7th Cir. 2020), that "[n]othing in the First Step Act precludes a court from utilizing § 3553(a)'s familiar framework when assessing a defendant's arguments; and doing so makes good sense." In *United States v. Jones*, 962 F.3d 1290, 1304 (11th Cir. 2020), the Eleventh Circuit observed that district courts have "wide latitude to determine whether and how to exercise their discretion in a [§ 404] context" and, in exercising that discretion, they "may consider . . . 18 U.S.C. § 3553(a)." Finally, in

United States v. Jackson, 945 F.3d 315, 322 n. 8 (5th Cir. 2019), the Fifth Circuit expressly declined to hold that "the court *must* decide the factors in § 3553(a)".

Upon closer examination, however, the question of whether the First Step Act mandates consideration of the § 3553(a) factors was not squarely presented in any of these other cases. None of the defendants in *Shaw*, *Mannie*, or *Jones* argued that a district court *must* consider the § 3553(a) factors. In *Shaw* and *Jones*, the defendants merely claimed it was unclear that the district court had considered their arguments for reduction. *Shaw*, 957 F.3d at 742; *Jones*, 962 F.3d at 1305. The defendant in *Mannie* argued that the court had improperly weighed the relevant sentencing factors, not that it had rejected the § 3553(a) framework. 971 F.3d at 1157. The statements by the Seventh Circuit in *Shaw*, the Tenth Circuit in *Mannie*, and the Eleventh Circuit in *Jones,* therefore, did not resolve the question of what is *required* in a First Step Act proceeding.

The defendant in *Jackson* did press the district court about the procedural requirements for resolving a motion under § 404. He claimed error because the district court had denied his motion without an updated PSR, a hearing, or an opportunity for Jackson to present evidence of his post-sentencing conduct. *Jackson*, 945 F.3d at 321. The Fifth Circuit disagreed that the First Step Act imposed "a kitchen sink of procedural requirements." *Id.* It then held that the court had given Jackson's request for a reduction adequate consideration. *Id.* Because of that holding,

the Fifth Circuit declined to outline the "baseline level" of procedure necessary to adjudicate a § 404 motion. *Id.* It "reserve[d] . . . for another day" the issue of whether "the court *must* consider the factors in 18 U.S.C. § 3553(a) in deciding whether to resentence under the FSA." *Id.* at 322 n. 8.

The circuits on the other side of the conflict, in contrast, have squarely addressed the question presented in this petition. They agree with Moore's interpretation of the First Step Act and find in it a requirement that the district court consider the 18 U.S.C. § 3553(a) factors when it decides whether to impose a reduced sentence for a "covered offense."

The Third Circuit's opinion in *United States v. Easter*, 975 F.3d 318 (3d Cir. 2020), provides several reasons for adopting this position. First, "§ 404(b) uses the verb 'impose' twice rather than 'reduce' or modify.'" *Id.* at 324. "Impose" is also the verb used in existing statutes which mandate consideration of the § 3553(a) factors. "'Congress is not legislating on a blank slate,'" the Third Circuit observed. *Id.* at 325 (internal citation omitted). Thus, the court presumed that "impose" means the same thing in § 404(b).

Second, "applying the § 3553(a) factors has considerable pragmatic advantages." *Id.* Applying them "(1) 'makes sentencing proceedings under the First Step Act more predictable to the parties,' (2) 'more straightforward for district courts,' and (3) 'more consistently reviewable on appeal.'" *Easter*, 975 F.3d at 325

(quoting *United States v. Rose*, 379 F. Supp.3d 223, 233 (S.D.N.Y. 2019)).

Third, not requiring consideration of the § 3553(a) factors would create disparate procedures for similarly-situated defendants. "[A] permissive regime means that sentencing courts may ignore the § 3553(a) factors entirely for some defendants and not others, inviting unnecessary sentencing disparities." *Id.* at 325. The purpose of the First Step Act is to rectify unwarranted disparities, not exacerbate them.

Finally, "nothing in § 404 indicates that § 3553(a) does not apply" at the discretionary stage of a First Step Act proceeding. *Id.* Lower courts have overwhelmingly embraced them as a necessary part of determining whether to reduce a defendant's sentence. *Id.*

The Fourth Circuit has also held that the 18 U.S.C. § 3553(a) factors apply in a First Step Act proceeding. *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020). Its reasoning is less detailed, however, because the government conceded the issue. *Id.* Like the court in *Easter*, the Fourth Circuit found Congress' use of the term "impose" significant, and held that the term mandated consideration of the § 3553(a) factors. *Id.*

The Sixth Circuit has joined the Third and Fourth Circuits in holding that a district court's discretion in a § 404 proceeding is cabined by the § 3553(a) factors. In *United States v. Boulding*, 960 F.3d 774 (6th Cir. 2020), the court noted that the "ceiling" of what to consider at resentencing is high: courts could consider "all relevant factors,

including post-sentencing conduct." 960 F.3d at 783. Its job in *Boulding* was to determine "[h]ow tall is the floor?" *Id.* The court looked first to the First Step Act itself, and noted that it "contemplated close review of resentencing motions." *Id.* at 784 (quoting § 404(c)). Meanwhile, the Sentencing Commission had informally advised courts to consider the § 3553(a) factors in exercising their discretion under § 404(b). *Id.* (*citing First Step Act,* ESP Insider Express (U.S. Sentencing Comm'n, Washington, D.C.) (Feb. 2019)). While a plenary resentencing may not be required, the court felt that a cursory review would not satisfy the directives from Congress and the Commission. It held that "the necessary review–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." *Id.*

There is no realistic prospect that this circuit conflict will resolve itself without the Court's intervention. Any future decisions from the remaining Courts of Appeals will simply choose whether to align with the Eighth Circuit or with the Third, Fourth, and Sixth Circuits and the conflict will persist. In the meantime, the circuit split will create disparities antithetical to Congress' intent in passing the First Step Act.

II. The Eighth Circuit's interpretation of what the First Step Act requires is incorrect.

The Eighth Circuit's conclusion that a district court need not consider the § 3553(a) factors in a First Step Act proceeding is in conflict with the text of the statute

and the purpose behind its enactment. This Court should not allow a misinterpretation with such broad application to go uncorrected.

Any question of statutory interpretation must begin with the statutory text. Section 404(b) provides that a "court that *imposed a sentence* for a covered offense may," on motion, "*impose a reduced sentence* as if sections 2 and 3 of the Fair Sentencing Act were in effect." First Step Act § 404(b) (emphasis added). This language must be read against the backdrop of existing sentencing statutes, which is presumed to inform Congress' choice of language. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

Federal sentencing statutes use the verb "impose" to mean "sentence" after consideration of the 18 U.S.C. § 3553(a) factors. See 18 U.S.C. § 3553(a)("The court *shall impose* a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and "in determining the particular sentence *to be imposed*, shall consider [the factors set forth in § 3553(a)(1)-(7)) (emphases added); 18 U.S.C. § 3582(a) ("The court, in determining whether to *impose* a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.") (emphasis added); 18 U.S.C. § 3661 ("[n]o limitation may be placed on the information concerning the background, character, and conduct of a person . . . which a court . . . may receive and consider

for the purpose of *imposing an appropriate sentence.*")(emphasis added). Bedrock principles of statutory construction provide that "identical words . . . are intended to have the same meaning." *Sorenson v. Secy. of Treasury*, 475 U.S.851, 860 (1986). Thus, when Congress employed the word "impose" in the First Step Act, a court should assume it meant to import the considerations that accompany that term.

The fact that Congress used the verb "impose" twice in the same sentence reinforces this construction. Under § 404(b), a court "that *imposed a sentence* for a covered offense" may "*impose a reduced sentence.*" Pub. L. No. 115-391, § 404(b) (emphasis added). In the first instance, "imposed" unquestionably refers to imposition of the original sentence, which would have occurred under the 18 U.S.C. § 3553(a) factors. "A word or phrase is presumed to bear the same meaning throughout a text," especially when those words appear in close proximity to one another. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 170 (West 2012); *Rose*, 379 F.Supp.3d at 234 (when identical words are used in close proximity, "the strength of the interpretative principle that 'identical words and phrases within the same statute should normally be given the same meaning' is at its zenith.") (quoting *FCC v. AT & T Inc.*, 562 U.S. 397, 408, (2011)). The second "impose" in Section 404(b) should therefore mean the same: to sentence in accordance with the § 3553(a) factors.

Further support for this reading can be found in the fact that § 404(b) does not

contain the word "reduce." Congress used the word "reduce" in § 3582(c)(2), and the Supreme Court interpreted that section as authorizing only a mechanical exercise in which one sentencing guideline is substituted for another. *Dillon v. United States*, 560 U.S. 817 (2010). Congress was fully aware of this interpretation by the time it drafted the First Step Act. By choosing "impose" rather than "reduce" in Section 404(b), it clearly intended a more expansive procedure than that in § 3582(c)(2). Consideration of the factors of § 3553(a) is the only other type of procedure that is currently in use in federal sentencing.

As the Third, Fourth, and Sixth Circuit explained, there are also practical advantages to incorporating § 3553(a)'s familiar framework into the First Step Act. That framework brings consistency to proceedings and aids reviewability on appeal. *Easter*, 975 F.3d at 324-25. That is probably why so many district courts have concluded that the § 3553(a) factors must apply when a court considers a defendant's motion for relief under the First Step Act. *See, e.g.*, *Rose*, 379 F.Supp.3d at 233 (interpreting the word "impose" as a mandate to consider the § 3553(a) factors and recognizing the "appropriate[ness]" of that instruction); *United States v. Powell,* 360 F.Supp.3d 134, 140 (N.D.N.Y. 2019)(stating in a First Act Proceeding that, "[a]s in every case," it had reviewed "the goals of sentencing outlined in 18 U.S.C. § 3553(a)"); *United States v. Brookins*, No. 08-166, 2019 WL 3450991, at *6 (W.D. Pa. July 31, 2019) ("A court must. . . consider the factors set forth in 18 U.S.C. § 3553(a)

when reducing a sentence; indeed, nothing in the First Step Act of § 3582(c)(1)(B) nullified the mandate in § 3553(a) that 't]he court, in determining the particular sentence to be imposed, shall consider' the § 3553(a) factors."); *United States v. Payton*, No. 07-20498, 2019 WL 2775530, at *4 (E.D. Mich. July 2, 2019) ("The Court agrees with Defendants that the only way to impose a reduced sentence is to consider the § 3553(a) factors and Guidelines, including the defendant's record in prison."); *United States v. Delaney*; Case No. 6:08-cr-00012, 2019 WL 861418, at *1 (W.D. Va. Feb. 22, 2019)(First Step Act requires a district court to first determine whether a defendant is eligible for a First Step Act reduction and then decide whether the reduction is warranted under the 18 U.S.C. § 3553(a) factors).

Indeed, even the government believes that the § 3553(a) factors are applicable in a First Step Act proceeding. As set forth above, the government's brief in this case repeatedly referred to § 3553(a) as the standard that the district court was required to use and *did use* in denying Moore's motion for a reduction. Not once did the government argue that the court *need not* be guided by the § 3553(a) factors in exercising its discretion.

Similarly, in *Chambers* and *Easter*, the government "conceded that the § 3553(a) sentencing factors apply in the § 404(b) resentencing context." *Chambers*, 956 F.3d 667 (4th Cir. 2020); *Easter*, 975 F.3d at 325; *see also United States v. Hedgwood*, 934 F.3d 414, 418 (5th Cir.), *cert denied*, 140 S. Ct. 285 (2019) ("The government . . . argues that

the ordinary Section 3553(a) considerations apply to determine whether to reduce the defendant's sentence.") A statutory interpretation that is both 1) contrary to the text of the statute and 2) at odds with the interpretation by the parties themselves is not one that should be permitted to stand.

III. The issue presented impacts a large number of crack cocaine offenders who have already been subject to a racially disparate sentencing scheme.

"Under the First Step Act, Congress authorized the courts to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme." *Chambers*, 956 F.3d at 674. It would be an unfortunate irony if the remedy itself was fraught with unwarranted disparities.

The Sentencing Commission reports that 3,363 defendants have received reductions in sentences under section 404 of the First Step Act. U.S. Sentencing Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* (Oct. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20201019-First-Step-Act-Retro.pdf. The Sentencing Commission does not track denials, however, nor does it know how many of those denied have pending appeals. *Id.* at Introduction n. 7 (noting that Sentencing Commission does not keep data on § 404 motions that are denied). The experience in the District of Nebraska can help shed light on those numbers. In addition to

Jonair Moore, at least five defendants from the District of Nebraska have appeals from the denial of a First Step Act motion pending in the Eighth Circuit.[4] With 94 active federal district courts in the country, and assuming Nebraska is a representative district, there are still hundreds of defendants that the question presented in this case could affect.

For defendants whose cases are pending, or eligible offenders who may not yet have filed for a reduction under the First Step Act, the difference in how their motion is adjudicated should not come down to geography. There is already too much arbitrariness in whose sentences have been reduced under the First Step Act and whose have not been changed. *See* Hailey Fuchs, *Law to Reduce Crack Cocaine Sentences Leaves Some Imprisoned*, The New York Times (Aug. 1, 2020), https://www.nytimes.com/2020/08/01/us/politics/law-to-reduce-crack-cocaine-sentences-leaves-some-imprisoned.html. (quoting legal experts who blame disparities in application of the First Step Act on which judge is assigned the case). This Court should not allow a second layer of disparity to persist when it can quickly resolve the question of § 3553(a)'s application by granting this Petition.

IV. Moore's case is an ideal vehicle for resolving the ongoing conflict.

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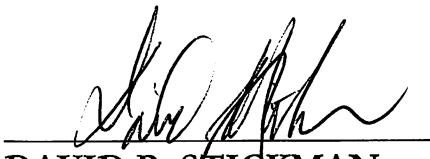
[4] *United States v. Butler,* No. 20-1864, *United States v. Milton*, No. 20-1916, *United States v. Shepard*, No. 20-1622, *United States v. Stallings*, No. 20-1916, and *United States v. Vaughn*, No. 20-1643.

This case squarely presents the issue that has divided the circuit courts. The Court of Appeal's decision that the 18 U.S.C. § 3553(a) factors do not apply in a First Step Act proceeding was based on the text of the statute after Moore fully briefed the issue. And notwithstanding the government's argument to the contrary, the district court *did not* consider the § 3553(a) factors as a factual matter. It could not have, as it had no updated information on those factors before it and provided no process for Moore or the government to provide it.

A prompt resolution of this conflict is important to the hundreds of defendants who are still waiting to receive the benefit that Congress intended in passing the First Step Act. Because this case is an appropriate vehicle to resolve this conflict, the Court should grant certiorari.

Conclusion

This case meets the Court's criteria for granting certiorari. A circuit split exists on an issue that affects a large number of defendants. The Eighth Circuit is on the wrong side of the conflict, and its poorly-reasoned decision threatens to deny hundreds of defendants the type of relief that Congress intended when it enacted the First Step Act. Jonair Moore's case is an ideal vehicle for resolving this conflict. The Court should therefore grant his Petition.



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