No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON KEITH HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2008, petitioner Shannon Keith Harris received mandatory life sentences for two federal drug trafficking convictions involving 1.26 grams of cocaine base (crack cocaine) and 102.1 grams of powder cocaine. Ten years later, Congress passed the First Step Act, in part to remedy the disparity between powder cocaine and crack cocaine sentences.

Under the First Step Act, Mr. Harris became eligible for discretionary resentencing with a new statutory range of ten years up to life in prison, instead of the original mandatory life sentences. The current Sentencing Guidelines now recommend that he receive a prison sentence of 120 months, which is less than the time he has already served. But the Fifth Circuit holds that the First Step Act requires district courts to apply the law as it existed at the original sentencing, without any intervening changes except for those changes mandated by the Fair Sentencing Act of 2010. So the district court was required to sentence Mr. Harris under the old Guideline range of 360 months to life in prison, instead of the current Guideline of 120 months in prison. Using the old Guideline range, the district court resentenced Mr. Harris to life in prison. The question presented is:

> When deciding whether to impose a reduced sentence under Section 404 of the First Step Act, are district courts required to apply the current, legally correct Sentencing Guideline range or the old Sentencing Guideline range that applied at the original sentencing?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

LIST OF DIRECTLY RELATED CASES

United States v. Harris, No. 19-40748, 815 F. App'x 793 (5th Cir. 2020) (unpublished), U.S. Court of Appeals for the Fifth Circuit. Judgment entered on August 11, 2020.

United States v. Harris, No. 3:03-CR-014-1, U.S. District Court for the Southern District of Texas. Judgment entered on August 29, 2019.

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MISCELLANEOUS

PRAYER

Petitioner Shannon Keith Harris prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on August 11, 2020

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit affirmed Mr. Harris's judgment of conviction and sentence. *See United States v. Harris*, 815 F. App'x 793 (5th Cir. 2020) (unpublished). That opinion is attached to this petition as Appendix A. The judgment of the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix B. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit's judgment was entered on August 11, 2020. *See* Appendix B. This petition is filed within 150 days after that entry of judgment. *See* Sup. Ct. R. 13.1; *see also* Miscellaneous Order Addressing the Extension of Filing Deadlines (Sup. Ct. Mar. 19, 2020). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

First Step Act of 2018, PL 115-391, 132 Stat 5194, § 404 (Dec. 21, 2018)

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(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.

* * * * *

Fair Sentencing Act of 2010, PL 111-220, 124 Stat 2372, §§ 2–3 (Aug. 3, 2010)

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".

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking “50 grams” and inserting “280 grams”; and

(2) in paragraph (2)(C), 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)

(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.

* * * * *

18 U.S.C. § 3582(a)–(c)

(a) Factors to be considered in imposing a term of imprisonment.—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, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

* * * * *

Tex. Health & Safety Code § 481.112(a)

Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.

* * * * *

USSG § 4B1.1(a)–(b)

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant

offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	Offense Level*
(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

* * * * *

USSG § 4B1.2(b)

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

INTRODUCTION

This case squarely presents an important issue of statutory interpretation that has divided the federal courts of appeals: whether district courts must calculate and apply the current, legally correct Sentencing Guideline range when deciding whether to impose a reduced sentence under Section 404 of the First Step Act. The answer could affect hundreds of defendants sentenced under a draconian, discriminatory sentencing scheme that Congress has since fixed.

This question is ripe for review. Most of the courts of appeals have weighed in and found themselves in disagreement with one another. This case presents an ideal vehicle because both lower courts squarely addressed and decided this question. The question turns on a law passed, in part, to provide district courts with discretion to remedy unjust, unwarranted sentencing disparities. That law, the First Step Act of 2018, resulted from concerns that federal courts were unduly constrained in selecting appropriate sentences for drug crimes.

In 2010, Congress began to remedy the severe disparities between sentencing for crack cocaine and powder cocaine offenses. It passed the Fair Sentencing Act, which reduced the disparity from a ratio of 100-to-1 down to 18-to-1 and eliminated the mandatory minimum sentence for simple possession of crack cocaine. But those changes were not retroactive.

In 2018, Congress passed the First Step Act, in part to make those changes retroactive. In that Act, Section 404(b) authorizes any district court that previously

imposed a sentence for a covered drug offense to "impose a reduced sentence as if" the relevant portions of the Fair Sentencing Act were in effect at the time of the original offense.

The courts of appeals have reached conflicting conclusions on whether, during that process of imposing a reduced sentence, district courts must apply the current, legally correct Sentencing Guideline ranges or the Guideline ranges that applied at the time of the initial sentencing. The Fourth and Tenth Circuits have held that, at least in some circumstances, those courts must calculate and apply the current Sentencing Guidelines.

Five circuits have disagreed and held that district courts must apply the law as it existed during the initial sentencing, adding only the changes required by sections 2 and 3 of the Fair Sentencing Act. So in those circuits, courts cannot apply the current, legally correct Guidelines. In so holding, the Ninth Circuit recognized, "In reaching this conclusion, we deepen a circuit split."

This case presents an ideal vehicle for the Court to resolve that split.

STATEMENT OF THE CASE

In 2008, a jury convicted petitioner Shannon Keith Harris of four crimes, including possession with intent to distribute 50 grams or more of cocaine base (crack cocaine), and conspiracy to do the same, under 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(iii). Those two convictions were based on only a $280 crack cocaine sale and possession of about 100 more grams of cocaine, but at the time they carried mandatory life sentences. Life sentences were required because the government had filed an enhancement under 21 U.S.C. § 851 based on Mr. Harris's two prior drug convictions for delivering less than 28 grams of cocaine and for possessing two rocks of crack cocaine.

Under the Sentencing Guidelines that applied at his initial sentencing, Mr. Harris would have been designated a career offender under USSG § 4B1.1, and his Guidelines would have been 360 months to life. Ultimately, however, that Guideline did not matter, because the § 851 enhancement mandated life imprisonment for the two drug convictions. So the district court imposed life in prison on those two counts.

The Fifth Circuit affirmed the conviction and sentence, and Mr. Harris's later *pro se* motions were all denied. Until 2018, Mr. Harris was never eligible for a sentence reduction because his life sentences were mandatory and the statutory modifications in the Fair Sentencing Act of 2010 were not retroactive.

But on December 21, 2018, the First Step Act became law, and it authorized district courts to grant relief from harsh drug sentences based on the old disparity between powder

and crack cocaine. Mr. Harris filed a motion for resentencing, explaining that the Act reduced the mandatory minimum for his drug sentences from life in prison to 10 years.

His motion also showed that the Sentencing Guidelines recommended a sentence at the new statutory minimum—120 months—because under the current, legally correct Guidelines, he would not be a career offender in light of *United States v. Tanksley*, 848 F.3d 347, 352, *supplemented*, 855 F.3d 284 (5th Cir. 2017). In *Tanksley*, the Fifth Circuit had reexamined a Texas drug statute and held that it was broader than the career offender definition of a "controlled substance offense," so convictions under that Texas statute are not valid career offender predicates. *Id.* One of Mr. Harris's prior convictions fell under that statute, so he no longer had enough qualifying convictions to be labeled a career offender. His modified, current Guidelines would recommend a sentence of 120 months,[1] which was the new statutory mandatory minimum.

The district court granted Mr. Harris's motion to hold a resentencing hearing, but before that hearing arrived, the Fifth Circuit decided *United States v. Hegwood*, 934 F.3d 414 (5th Cir.), *cert. denied*, 140 S. Ct. 285 (2019). In *Hegwood*, the Fifth Circuit interpreted Section 404 of the First Step Act as requiring a district court to place "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.* at 418. That decision barred district courts from applying other post-sentencing changes in the law and required the

[1] The current Guideline range would be 77 to 96 months, but the statutory mandatory minimum would raise that to 120 months. *See* USSG § 5G1.1(b) ("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.").

district court to sentence Mr. Harris as if he were still a career offender. His Guideline range thus was 360 months to life imprisonment, rather than the 120-month sentence dictated by the current Guidelines.

In the district court, Mr. Harris objected that the court should recalculate his Guidelines under current law. He pointed out that the First Step Act permits courts to "impose" a reduced sentence and that various statutes and case law require district courts to correctly calculate the Sentencing Guidelines when "imposing" a sentence. Mr. Harris thus argued that the district court should apply current Fifth Circuit precedent that would require a Guideline of 120 months, not 360 to life, but he acknowledged that *Hegwood* foreclosed his argument.

At the resentencing hearing, the district court overruled Mr. Harris's objection and resentenced him to life in prison. On appeal, Mr. Harris argued, among other things, that Congress's choice of "impose" in the First Step Act shows that a district court should calculate and apply the current, legally correct Sentencing Guidelines at a First Step Act resentencing. The Fifth Circuit rejected that argument and affirmed Mr. Harris's sentence, recognizing that its *Hegwood* decision foreclosed the argument. *United States v. Harris*, 815 F. App'x 793, 794 (5th Cir. 2020) (unpublished).

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction under 18 U.S.C. § 3231. The district court also had authority to resentence petitioner under the First Step Act of 2018, PL 115-391, 132 Stat 5194, § 404(b) (Dec. 21, 2018).

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari in this case to resolve an important question of federal statutory construction on which lower courts disagree and which has not been, but should be, settled by this Court.

First, this case concerns an acknowledged circuit split on a recurring question of statutory interpretation that only this Court can resolve. At least seven courts of appeals have addressed this question, and they have disagreed on the answer. Second, the Fifth Circuit's conclusion that a district court cannot apply current Sentencing Guidelines is incorrect. That holding flowed from a misreading of the text of the First Step Act, and it contradicts the clear purpose of the Act. Third, this issue significantly affects many defendants who are serving unduly long drug sentences they would not have received under current law. Fourth, this case presents an ideal vehicle because both lower courts squarely addressed this issue.

1. The question presented concerns an acknowledged circuit split on a recurring issue that only this Court can resolve.

Five circuit courts of appeals—the Second, Fifth, Sixth, Ninth, and Eleventh Circuits—have held that courts are not required to calculate the current, legally correct Guidelines in a First Step Act resentencing proceeding.[2] The Fifth Circuit came first with *Hegwood*, 934 F.3d at 415, discussed earlier. Much like Mr. Harris here, Hegwood received the career-offender enhancement at his original sentencing, but under intervening

2 The Eighth Circuit also endorsed this position but in a case where this issue was not argued. See *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020), reh'g en banc denied Aug. 3, 2020.

circuit precedent that enhancement would no longer apply. The Fifth Circuit rejected the argument that the district court should have applied the current Guidelines as changed by that intervening precedent. Instead, the Fifth Circuit ruled that "[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.* at 418.

The Sixth Circuit later reached the same conclusion, holding that the First Step Act does not authorize plenary resentencings, so defendants are not entitled to a new calculation of their Sentencing Guidelines. *United States v. Foreman*, 958 F.3d 506 (6th Cir. 2020).

The Ninth Circuit agreed, but it recognized that "[i]n reaching this conclusion, we deepen a circuit split." *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020). Like the Fifth Circuit, it held that the First Step Act requires courts to place themselves "in the counterfactual situation where all the applicable laws that existed at the time the covered offense was committed are in place, making only the changes required by sections 2 and 3 of the Fair Sentencing Act." *Id.* Since then, the Second and Eleventh Circuit have reached the same conclusion. *United States v. Moore*, 975 F.3d 84, 92 (2d Cir. 2020); *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020).

By contrast, two circuits have concluded that courts must, at least in some circumstances, calculate and apply the current Guidelines. The Tenth Circuit began by adopting the same conclusion as its sister circuits: the First Step Act does not ordinarily empower courts to rely on revised Guidelines or new law. *United States v. Brown*, 974

F.3d 1137, 1144–45 (10th Cir. 2020). But a defendant "would have a strong argument" in favor of applying revised Guidelines if the change was based on the court's clarification of what the law always was. *Id.* That is so because the original Guidelines would have been "premised on a legal conclusion that th[e] court has rejected." *Id.* The facts in *Brown* are like those in this case. Between the original sentencing and the First Step Act resentencing, the circuit court had issued an opinion holding that a state crime was not a valid predicate, and the defendant argued that opinion meant he should not be a career offender. *Id.* at 1145. The court wrote that "in imposing a First Step Act sentence, the district court is not required to ignore all decisional law subsequent to the initial sentencing." *Id.* In particular, the district court could have considered an intervening circuit decision exploring the meaning of the relevant state statute. *Id.* The Tenth Circuit therefore remanded the case with instructions that the district court should consider the defendant's challenge to his career offender status. *Id.* at 1146. As the dissent noted, the court reached its holding even though its intervening decision about the state statute was not squarely on point and had never been held to be retroactive. *Id.* at 1148–50 (Phillips, J., dissenting).

The Fourth Circuit reached a similar conclusion but limited it to only retroactive changes. It held that a district court considering a First Step Act motion must correct "[r]etroactive Guidelines errors based on intervening case law." *United States v. Chambers*, 956 F.3d 667, 668, 673–74 (4th Cir. 2020). That court had already held that defendants like Chambers would not be career offenders, and that decision applied retroactively. *Id.* at 669. "It would," the court wrote, "pervert Congress's intent to maintain

a career-offender designation that is as wrong today as it was [at the time of the original sentencing.]" *Id.* at 673. The court found the Fifth Circuit's *Hegwood* analysis unpersuasive on two grounds: First, that it did not involve a retroactive change to the law, and second, that it improperly compared the First Step Act to the stricter procedures for modifying sentences after Guideline amendments. *Id.*

In conclusion, a majority of circuits do not require district courts evaluating whether to impose First Step Act reduced sentences to apply current Guidelines, but two circuits disagree, at least in some circumstances.

Several of those courts have already recognized the circuit split, and the split likely won't resolve without action by this Court. This Court's review is necessary to maintain Congress's important goal of reducing sentencing disparities. *See* USSG § 1A1.3 ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."). The current circuit split causes new and substantial disparities between similarly-situated defendants depending only on the jurisdiction of their conviction and sentence.

2. The decision below is incorrect and based on a misinterpretation of the statutory text.

The Fifth Circuit's holding that district courts must apply an outdated Guideline range in First Step Act resentencing proceedings misreads the Act and undermines Congress's goals in enacting that law.

First, the statutory text reveals that courts must consider all relevant factors, including the current Sentencing Guideline range. The First Step Act authorizes district

courts to ***impose*** a reduced sentence in certain cases, and other federal laws require courts ***imposing*** sentence to correctly calculate the Sentencing Guidelines. For example, a court "in determining the particular sentence to be ***imposed*** shall consider . . . the sentencing range established . . . in the [G]uidelines," *see* 18 U.S.C. § 3553(a)(4), and "shall use the Guidelines Manual in effect on the date that the defendant is sentenced," *see* USSG § 1B1.11. So properly understood, a district court at a First Step Act resentencing must calculate the correct Sentencing Guideline under current law. Instead, the Fifth Circuit has held that a district court can only modify the prior sentence under 18 U.S.C. § 3582(c)(2) 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." *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir.), *cert. denied*, 140 S. Ct. 285 (2019).

The Fifth Circuit's interpretation errs by reading Congress's second use of the word "impose" out of the statute and effectively substituting the word "modify" in its place. But, "[i]f Congress had wanted to confine the reach of the [statute] in the way that [the Fifth Circuit] suggests, it would have been easy to do so." *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). Congress could have written § 404(b) of the First Step Act using the same language as in § 3582(c) to read that a "court may ***modify an imposed term of imprisonment***," *see* 18 U.S.C. § 3582(c)(1)(B), and "reduce[] [the] 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." *Compare* First Step Act § 404(b). Congress could also have written that the court conducting a resentencing must apply the law that was "in effect on the date of the previous

sentencing." *See* 18 U.S.C. § 3742(g)(1). Congress chose not to do so, however, and a court must give effect to the language as written. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

It is also significant that the First Step Act uses the word "impose" twice, once when referring to the original sentencing proceeding and again when referring to the resentencing proceeding authorized by the Act: "A court that ***imposed*** a sentence for a covered offense may, on motion . . . , ***impose*** a reduced sentence." First Step Act § 404(b) (emphasis added). This Court has made clear that, when the same word appears in the same statute more than once, it should not be given multiple meanings. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005). "To give these same words a different meaning for each category would be to invent a statute rather than to interpret one." *Id.* The rules of statutory construction require, therefore, that "imposing" a sentence under the First Step Act means the same thing as "imposing" a sentence initially.

In addition, even though interpretation does not require a search beyond the express language of the First Step Act, the Act's purpose supports giving the word "impose" its ordinary and its well-accepted legal meaning. Section 404 "allows prisoners sentenced before the Fair Sentencing Act of 2010 reduced the 100-to-1 disparity in sentencing between crack and powder cocaine to petition the court for an *individualized review of their case*." *See* FSA Summary at 2, https://www.judiciary.senate.gov/download/revised-first-step-act_-summary (emphasis added); *see also* 164 Cong. Rec. S7745-01, S7756 (Dec. 18, 2018) (statement of Sen. Nelson) ("This legislation will allow judges to do the job that they

were appointed to do-to use their discretion to craft an appropriate sentence to fit the crime."). By contrast, the Fifth Circuit's holding restricts discretion and binds courts to apply outdated, often unjust, Guidelines in deciding whether to impose a reduced sentence.

Finally, the United States Sentencing Commission has noted that, with regard to whether district courts conduct a plenary resentencing or a more limited resentencing, "the Act made no changes to 18 U.S.C. § 3553(a), so the courts should consider the [G]uidelines and policy statements . . . during the resentencing." *See* ESP Insider Express Special Edition, First Step Act at 8 (Feb. 2019), https://www.ussc.gov/sites/default/files/pdf/training/ newsletters/2019-special_FIRST-STEP-Act.pdf. That guidance echoes the plain reading of the Act: courts should consider the current, legally correct Sentencing Guidelines in deciding whether to impose a reduced sentence.

3. This issue is important and recurring.

The question presented here carries great weight and will recur for many federal defendants who are eligible for resentencing under § 404 of the First Step Act. The Sentencing Commission recently wrote that "courts have granted 2,387 reductions in sentence pursuant to section 404 of the Act," *see* U.S. Sentencing Commission, *The First Step Act of 2018, One Year of Implementation* (Aug. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf. It stands to reason that many more eligible defendants are yet to request

relief or have been denied relief in circuits with precedent that bars application of the current Sentencing Guidelines.

Because of the current circuit conflict, Guideline ranges for many eligible defendants will vary based solely on the location of their proceeding. That variance has a striking impact on outcomes. For example, in this case, the PSR and all parties agreed that under the current Sentencing Guidelines, the recommended sentence would be 120 months. But because the Fifth Circuit bars district courts from applying current Guidelines, Mr. Harris faced Guidelines that recommended 360 months up to life in prison. The current Guidelines would have recommended a time-served sentence, but instead Mr. Harris is now serving a re-imposed life sentence.

4. This case presents an ideal vehicle.

This case squarely presents the issue dividing the circuit courts, so it is an ideal vehicle for resolving the question presented. Mr. Harris raised this issue throughout the proceedings below. The district court concluded, and the Fifth Circuit affirmed, that courts must apply the Guidelines as they existed at the time of the initial sentencing instead of using the current Guidelines. As a result, the record on this point is well developed, and resolution in Mr. Harris's favor would permit the district court to consider Guidelines that recommend a time-served sentence instead of his current life sentence.

CONCLUSION

Petitioner Shannon Keith Harris prays that this Court grant certiorari to review the judgment of the Fifth Circuit.

Date: January 5, 2021

Respectfully submitted,

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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
August 11, 2020

Lyle W. Cayce
Clerk

No. 19-40748
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SHANNON KEITH HARRIS,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:03-CR-14-1

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:*

Shannon Harris appeals the life sentence imposed upon the grant of his motion for resentencing under the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Harris was originally sentenced to a mandatory term of life imprisonment for conspiracy to possess and possession of cocaine base

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

with intent to distribute. *See* 21 U.S.C. § 841(a)(1), (b)(1)(A)(iii); 21 U.S.C. § 846. After passage of the First Step Act and the Fair Sentencing Act of 2010, Harris was no longer subject to a mandatory life term. The district court declined to conduct a plenary resentencing and sentenced Harris within the guidelines range of 360 months to life.

A ruling on a motion to resentence under the First Step Act is generally reviewed for abuse of discretion. *United States v. Jackson*, 945 F.3d 315, 319 (5th Cir. 2019), *cert. denied*, 2020 WL 1906710 (U.S. Apr. 20, 2020) (No. 19-8036). A district court abuses its discretion if its decision is based on an error of law or a clearly erroneous assessment of the evidence. *United States v. Henderson*, 636 F.3d 713, 717 (5th Cir. 2011); *see United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir.), *cert. denied*, 140 S. Ct. 285 (2019).

First, Harris contends that the district court erred by failing to recalculate the guideline range and sentence him according to the current guidelines, but he concedes that that argument is foreclosed by *Hegwood*, 934 F.3d at 418–19. Next, he contends that his sentence is procedurally and substantively unreasonable. The government responds that reasonableness review does not apply because it does not apply in similar proceedings under 18 U.S.C. § 3582(c)(2). *See United States v. Evans*, 587 F.3d 667, 672 (5th Cir. 2009). We need not decide the extent to which reasonableness review is called for, because Harris cannot succeed even under the ordinary standard. *See United States v. Richardson*, 960 F.3d 761, 764 (6th Cir. 2020).

Harris maintains that the district court procedurally erred by miscalculating the guideline range and failing adequately to explain the sentence or address his arguments for a lower sentence. *See Gall v. United States*, 552 U.S. 38, 51 (2007). Harris posits that the career-offender enhancements under U.S.S.G. § 4B1.1 did not apply at the time of the original sentencing. This issue is subject to plain error review. *See Puckett v. United States*,

556 U.S. 129, 135 (2009); *United States v. Mason*, 722 F.3d 691, 693 (5th Cir. 2013). We have not decided whether, in a First Step Act proceeding, a district court must or may revisit an error made in the original sentencing hearing. Accordingly, Harris cannot demonstrate that the court plainly erred by failing to do so. *See United States v. Salinas*, 480 F.3d 750, 756 (5th Cir. 2007). Further, because the record shows that the district court considered the arguments, the evidence, and the 18 U.S.C. § 3553(a) factors, the court did not err by failing to explain the sentence or to respond to Harris's arguments. *See Rita v. United States*, 551 U.S. 338, 357 (2007); *United States v. Rodriguez*, 523 F.3d 519, 525–26 (5th Cir. 2008).

Finally, Harris asserts that his sentence does not account for factors that should have received significant weight and that the district court erred in balancing the sentencing factors. Harris's arguments that the district court should have given more consideration to his personal history and characteristics and the nature and circumstances of his offense amount to disagreements over how the factors "presented for the court's consideration should have been balanced," which is not sufficient to overcome the presumption of reasonableness applicable to his within-guidelines sentence. *See United States v. Alonzo*, 435 F.3d 551, 557 (5th Cir. 2006). Moreover, unwanted sentencing disparities among similarly situated defendants are not entitled to significant weight when the sentence falls within the guideline range. *See United States v. Diaz*, 637 F.3d 592, 604 (5th Cir. 2011).

The judgment of sentence is AFFIRMED.

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J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

Certified as a true copy and issued as the mandate on Sep 02, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX B