No. 20-6832

IN THE SUPREME COURT OF THE UNITED STATES

SHANNON KEITH HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to reevaluate petitioner's career-offender designation based on intervening circuit precedent unrelated to the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, in connection with his motion for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEEDINGS

United States District Court (S.D. Tex.):

United States v. Harris, No. 03-cr-14 (Jan. 31, 2008)

Harris v. United States, No. 11-cv-126 (Nov. 16, 2011)

Harris v. Quintana, No. 15-cv-3416 (Jan. 22, 2016)

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

Harris v. Holland, No. 13-cv-73 (Sept. 13, 2013)

Harris v. Holland, No. 13-cv-223 (Feb. 14, 2014)

Harris v. Quintana, No 16-cv-441 (Aug. 21, 2017)

Harris v. Brazoria Cnty., No. 18-cv-423 (Oct. 26, 2018)

United States Court of Appeals (5th Cir.):

United States v. Harris, No. 08-40137 (Apr. 21, 2009)

Harris v. Quintana, No. 16-20130 (June 2, 2016)

United States Court of Appeals (6th Cir.):

Harris v. Holland, No. 13-6257 (Jan. 6, 2014)

Harris v. Holland, No. 14-5204 (Sept. 12, 2014)

Harris v. Quintana, No. 17-6445 (Apr. 6, 2018)

Supreme Court of the United States:

Harris v. United States, No. 09-7385 (Mar. 1, 2010)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3)* is not published in the Federal Reporter but it is reprinted at 815 Fed. Appx. 793.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on August 11, 2020. The petition for a writ of certiorari

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* The appendix to the petition for a writ of certiorari is not separately paginated. This brief treats the appendix as if it were separately paginated, with the first page of the appendix as page 1.

was filed on January 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); conspiring to possess with intent to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A)(iii) (2000), and 21 U.S.C. 846; and possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A)(iii) (2000). 2/13/08 Judgment 1-2. The district court sentenced petitioner to concurrent mandatory life sentences on the drug-trafficking offenses, to be served concurrently with a 120-month sentence on the felon-in-possession offense and to be followed by a 60-month sentence on Section 924(c) offense. Id. at 3. The court further sentenced petitioner to ten years of supervised release. Id. at 4. The court of appeals affirmed, 566 F.3d 422, and this Court denied a writ of certiorari, 559 U.S. 975.

After enactment of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a

reduction of sentence under Section 404 of that Act. Pet. App. A2. The district court reduced petitioner's term of supervised release to eight years but declined to reduce his term of imprisonment. Ibid. The court of appeals affirmed. Id. at A1-A3.

1. a. Petitioner and his wife sold crack cocaine in Brazoria County, Texas. 566 F.3d at 426-427. On two occasions in May and July 2003, petitioner's wife delivered crack cocaine to an undercover informant. Id. at 426. Police officers subsequently obtained a warrant to search petitioner's house and his auto detail shop. Ibid. When officers arrived at the shop to execute the warrant, petitioner led them on a brief chase in his pickup truck, speeding and running several stop signs. Id. at 427. Eventually, petitioner was detained and taken to his home, where the officers discovered crack and powder cocaine, other drugs, drug paraphernalia, a firearm, and marked money from a garage behind petitioner's house. Ibid. The officers also found and seized two loaded pistols in petitioner's truck and an SUV that he owned. Ibid.

A grand jury in the Southern District of Texas returned a second superseding indictment charging petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A);

conspiring to possess with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A)(iii) (2000), and 21 U.S.C. 846; and possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A)(iii) (2000). Second Superseding Indictment 1-4. Before trial, the government filed an information pursuant to 21 U.S.C. 851, stating that petitioner had been previously convicted of felony possession of a controlled substance and felony delivery of a controlled substance under Texas law and was therefore subject to enhanced penalties. 03-cr-14 D. Ct. Doc. (D. Ct. Doc.) 161 (Jan. 18, 2007). Following a jury trial, petitioner was convicted on all counts. 2/13/08 Judgment 1-2. The jury found that the total amount of crack cocaine involved in the drug-trafficking offenses was 50 or more grams. Jury Verdict 1-2.

b. The Probation Office's presentence report determined that petitioner was specifically responsible for 94.16 grams of crack cocaine and 9.2153 grams of powder cocaine, resulting in a base offense level of 32. Presentence Investigation Report (PSR) ¶¶ 22, 32. And it calculated a criminal history score of nine, resulting in a criminal history category of IV. PSR ¶ 63; see PSR ¶¶ 43-61.

The Probation Office further determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1

(2006). PSR ¶¶ 31, 39. Section 4B1.1(a) enhances the advisory sentencing range for defendants with at least two prior felony convictions for a crime of violence or a controlled substance offense under state or federal law. Sentencing Guidelines § 4B1.1(a) (2006). The Probation Office found that petitioner qualified as a career offender based on his 1994 Texas conviction for delivery of a controlled substance and 1997 Texas conviction for attempted robbery. PSR ¶¶ 39, 59, 61. Petitioner's career-offender classification increased his offense level to 37 and his criminal history category to VI. PSR ¶¶ 39, 63.

Finally, the Probation Office determined that, based on the Section 851 information, the statutory penalty for each drug-trafficking conviction was mandatory life imprisonment without release. PSR ¶ 76. It also determined that the statutory penalty for the Section 924(c)(1)(A) offense was a mandatory consecutive term of five years of imprisonment. Ibid. As a result, the Office found that petitioner's guidelines sentencing range was life followed by a mandatory consecutive term of 60 months of imprisonment. PSR ¶ 77.

c. At sentencing, the district court adopted the Probation Office's findings and calculations. Sent. Tr. 7. Petitioner did not dispute the prior convictions underlying the Section 851 enhancement were valid and that he faced a statutory sentence of mandatory life imprisonment. Id. at 17. The court sentenced

petitioner to concurrent mandatory life sentences on the drug-trafficking offenses, a concurrent 120-month sentence on the felon-in-possession offense, and a consecutive 60-month sentence on the Section 924(c) offense, to be followed by ten years of supervised release. Id. at 17-18. The court of appeals affirmed, 566 F.3d 422, and this Court denied a writ of certiorari, 559 U.S. 975.

2. In the Fair Sentencing Act of 2010 (Fair Sentencing Act), Pub. L. No. 111-220, 124 Stat. 2372, Congress altered the statutory penalties for certain crack-cocaine offenses. Before those amendments, a non-recidivist defendant convicted of trafficking 50 grams or more of crack cocaine faced a minimum term of imprisonment of ten years, a maximum term of imprisonment of life, and a minimum term of supervised release of five years. 21 U.S.C. 841(b)(1)(A)(iii) (2006). If a Section 841(b)(1)(A) defendant had committed the offense after two or more prior convictions for a felony drug offense, the statute required a mandatory term of life imprisonment without release and a minimum term of supervised release of ten years. Ibid. A non-recidivist defendant convicted of trafficking five grams or more of crack cocaine faced a minimum term of imprisonment of five years, a maximum term of imprisonment of 40 years, and a minimum term of supervised release of four years. 21 U.S.C. 841(b)(1)(B)(iii) (2006). If a Section 841(b)(1)(B) defendant had committed the offense after a prior

conviction for a felony drug offense, the defendant faced a minimum term of imprisonment of ten years, a maximum term of imprisonment of life, and a minimum term of supervised release of eight years. Ibid. For powder-cocaine offenses, Congress had set the threshold amounts necessary to trigger the same penalties significantly higher. 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii) (2006).

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

In 2011, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence. D. C. Doc. 259 (Mar. 1, 2011); see Gov't C.A. Br. 9-11. He argued that, after the First Sentencing Act, his convictions for distributing 50 or more grams of crack cocaine and conspiring to do so were no longer subject to a mandatory life sentence. D. Ct. Doc. 259, at 7; see Gov't C.A. Br. 9-10. He also argued that he was no longer a career offender,

because his Texas conviction for delivery of a controlled substance no longer qualified as a controlled substance offense under Fifth Circuit precedent, and his counsel had rendered ineffective assistance in failing to challenge his career-offender designation. D. Ct. Doc. 259, at 8; see Gov't C.A. Br. 10. The district court denied the motion, explaining that the Fair Sentencing Act was not retroactive and that the Fifth Circuit precedent concerning the career-offender guideline was inapposite. D. Ct. Doc. 283 (Nov. 16, 2011); see Gov't C.A. Br. 10. The court subsequently denied a COA. D. Ct. Doc. 296 (June 27, 2012); see Gov't C.A. Br. 11.

3. In 2018, Congress enacted Section 404 of the First Step Act to create a mechanism for certain defendants sentenced before the effective date of the Fair Sentencing Act to seek sentence reductions based on that Act's changes. The mechanism is available only if a defendant was sentenced for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222. Under Section 404(b), a district court that "imposed a sentence for a covered offense may, on motion of the defendant, * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered

offense was committed." § 404(b), 132 Stat. 5222. Section 404(c) provides that Section 404 "shall [not] be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222. It also states that a court may not reduce a sentence under Section 404 "if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act * * * or if a previous motion made under [Section 404] to reduce the sentence was, after the date of enactment of [the First Step Act], denied after a complete review of the motion on the merits." Ibid.

In 2019, petitioner moved for a reduction of sentence under Section 404 of the First Step Act. D. Ct. Doc. 325 (May 7, 2019). Petitioner contended he was sentenced for "'covered offenses'" because he was convicted of both conspiring to possess and possessing 50 or more grams of crack cocaine in violation of Section 841(b)(1)(A)(iii); the Fair Sentencing Act modified the penalties for those offenses by increasing the amount of crack cocaine necessary to trigger them from 50 grams to 280 grams; and after the Fair Sentencing Act, his "100-gram offense[s]" following a prior conviction for a serious drug felony would be subject to a sentencing range under Section 841(b)(1)(B)(iii) of only ten years to life imprisonment and a minimum term of supervised release of eight years. Id. at 5-6 (citation omitted).

Petitioner also argued that the district court should reduce his sentence because, under intervening Fifth Circuit precedent, his Texas conviction for delivery of a controlled substance could no longer serve as a predicate for classifying him as a career offender under Sentencing Guideline § 4B1.1(b)(A). D. Ct. Doc. 325, at 7 (citing United States v. Tanksley, 848 F.3d 347, supplemented, 854 F.3d 284 (5th Cir. 2017) (en banc)). He further argued that under recent changes to the Sentencing Guidelines, the sentencing court's drug-quantity finding would equate to a base offense level of 24, rather than 32. Id. at 9. With those adjustments, petitioner argued that his guidelines range would be 77-96 months, although a statutory-minimum sentence still applicable to his drug-trafficking offenses, in combination with the statutory-minimum consecutive sentence for his Section 924(c) offense, would be 180 months. Id. at 10.

The government agreed that petitioner was eligible for a sentence reduction under Section 404 of the First Step Act and that, after the Fair Sentencing Act, his drug-trafficking offenses would have been subject to a statutory sentencing range of ten years to life imprisonment. D. Ct. Doc. 336, at 1, 4-5 (Aug. 23, 2019). But the government maintained that Section 404 does not authorize a plenary resentencing at which a defendant may challenge guidelines determinations unrelated to the Fair Sentencing Act, such as petitioner's career-offender designation. Id. at 5-6.

The government thus applied an unchanged total offense level and criminal history category under Sentencing Guidelines § 4B1.1 (2006) to calculate a guidelines range of 360 months to life, followed by a mandatory consecutive term of 60 months for the Section 924(c) offense. D. Ct. Doc. 336, at 5. And it urged the district court to exercise its discretion not to reduce petitioner's sentence below a life sentence followed by a consecutive 60 months of imprisonment. Id. at 7-8.

The district court granted in part and denied in part petitioner's motion. The court granted petitioner's request for a hearing to consider his motion under Section 404 of the First Step Act, D. Ct. Doc. 325-2, and at the hearing, the court recognized that, under the Fair Sentencing Act, petitioner's offense would have been subject to a statutory sentencing range of ten years to life imprisonment, rather than mandatory life imprisonment, D. Ct. Doc. 345, at 3 (Oct. 27, 2019). The court observed, however, that petitioner's argument that it was required to reconsider his career-offender designation under the advisory Guidelines was foreclosed by United States v. Hegwood, 934 F.3d 414, 417-418 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019). D. Ct. Doc. 345, at 19-20. In Hegwood, the Fifth Circuit had explained that Section 404 requires a district court to "plac[e] 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." 934 F.3d at 418. Under that approach and considering the 18 U.S.C. 3553(a) factors -- particularly petitioner's extensive criminal history -- the court determined that the appropriate sentence continued to be life imprisonment, followed by 60 months for the Section 924(c) offense. D. Ct. Doc. 345, at 17, 20. The court did, however, reduce petitioner's term of supervised release to eight years. Id. at 18.

4. The court of appeals affirmed in a per curiam, unpublished opinion. Pet. App. A1-A3. Petitioner argued, as relevant here, that the district court had been required to reconsider his career-offender designation from his original sentencing based on current Fifth Circuit precedent. Pet. C.A. Br. 16-19. But petitioner acknowledged that his argument was foreclosed by the court of appeals' decision in Hegwood. Id. at 16.

ARGUMENT

Petitioner contends (Pet. 14-21) that the court of appeals erred by not requiring the district court, in considering his motion under Section 404, to reevaluate his career-offender designation under circuit precedent issued since his original sentencing. The court of appeals' unpublished, per curiam decision was correct and does not conflict with any decision of this Court. Moreover, although there is some tension in the circuits' approaches to intervening legal developments in Section 404

proceedings, this Court's intervention is not warranted at this time. This Court has previously denied a petition for a writ of certiorari presenting a similar question in Hegwood v. United States, 140 S. Ct. 285 (2019) (No. 19-5743), the decision on which the per curiam decision in this case relied. And the Court recently denied another petition presenting a similar question in Bates v. United States, 141 S. Ct. 1462 (2021) (No. 20-535). The same result is warranted here.

1. The court of appeals correctly determined that the district court did not commit reversible error in declining to reconsider petitioner's career-offender designation before granting in part his Section 404 motion. Pet. App. A1-A3.

"'A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment' and may not be modified by a district court except in limited circumstances." Dillon v. United States, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. 3582(b)) (brackets omitted); see 18 U.S.C. 3582(c). Section 3582(c)(1)(B) creates an exception to that general rule of finality by authorizing a court to modify a previously imposed term of imprisonment "to the extent otherwise expressly permitted by statute." 18 U.S.C. 3582(c)(1)(B). Section 404 of the First Step Act, which expressly permits a court to reduce a previously imposed sentence for a "covered offense," § 404(a) and (b), 132 Stat. 5222, is such a statute. But its express authorization is narrowly

drawn, permitting the district court only to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222. Section 404 does not expressly permit other changes to a sentence for a covered offense, and Section 3582(c)(1)(B) states that a previously imposed term of imprisonment may be modified only "to the extent otherwise expressly permitted." 18 U.S.C. 3582(c)(1)(B). Accordingly, Section 404 does not permit a plenary resentencing.

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

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

Accordingly, every court of appeals to consider the question has agreed that Section 404 does not create any entitlement to a plenary resentencing. See United States v. Concepcion, 991 F.3d 279, 289-290 (1st Cir. 2021); United States v. Moore, 975 F.3d 84, 90 (2d Cir. 2020); United States v. Easter, 975 F.3d 318, 326 (3d Cir. 2020); United States v. Wirsing, 943 F.3d 175, 181 & n.1 (4th Cir. 2019); United States v. Hegwood, 934 F.3d 414, 415 (5th Cir.), cert. denied, 140 S. Ct. 185 (2019); United States v. Smith, 958 F.3d 494, 498 (6th Cir.), cert. denied, 141 S. Ct. 907 (2020); United States v. Kelley, 962 F.3d 470, 475-476 (9th Cir. 2020),

petition for cert. pending, No. 20-7474 (filed Mar. 15, 2021); United States v. Brown, 974 F.3d 1137, 1144 (10th Cir. 2020); United States v. Denson, 963 F.3d 1080, 1089 (11th Cir. 2020); see also United States v. Brewer, 836 Fed. Appx. 468, 468-469 (8th Cir. 2021) (per curiam).

As those courts have explained, "[b]y its express terms, [Section 404] does not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing." Moore, 975 F.3d at 90. It does not, in other words, entitle movants to relitigate each and every legal issue that may have affected their original statutory and guidelines ranges. Instead, "[t]hrough its 'as if' clause, all that § 404(b) instructs a district court to do is to determine the impact of Sections 2 and 3 of the Fair Sentencing Act." Id. at 91 (citation omitted). The "as if" clause requires the district court to place itself in a "counterfactual legal regime," assessing how "the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape * * * would affect the defendant's sentence," before deciding whether to reduce the sentence to one "consistent with that change." Kelley, 962 F.3d at 475 (citation omitted); see Hegwood, 934 F.3d at 418 ("The express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 * * * supports that Congress did not

intend that other changes were to be made as if they too were in effect at the time of the offense.").

In requiring the district court to place itself in that "counterfactual legal regime," Kelley, 962 F.3d at 475, Section 404's "as if" clause does not authorize the court to recalculate the applicable guidelines range based on intervening changes in law unrelated to the Fair Sentencing Act. Petitioner errs (Pet. 17-19) in relying on the term "impose" as used in Section 404(b) to argue for his contrary approach. See First Step Act § 404(b), 132 Stat. 5222 (court "may * * * impose a reduced sentence"). A district court that grants a motion under Section 404 does not "impose a new sentence in the usual sense," but instead -- because the "impos[ition]" is limited by the "as if" clause, among other things -- effects "a limited adjustment to an otherwise final sentence." Dillon, 560 U.S. at 826-827 (discussing Section 3582(c)(2) sentence reductions); see Moore, 975 F.3d at 91 ("[T]he First Step Act does not simply authorize a district court to 'impose a sentence,' period."); Kelley, 962 F.3d at 477 (rejecting argument that the word "'impose'" in the "resentencing context" signals Congress's intent to "authorize a plenary resentencing"). In that context, Congress's use of the phrase "impose a reduced sentence," § 404(b), 132 Stat. 5222, simply clarifies that the court is not limited to reducing "the sentence" for the covered offense, but may also correspondingly reduce the overall sentence

to the extent it embodies an intertwined sentencing package. Cf. Dean v. United States, 137 S. Ct. 1170, 1178 (2017).

Petitioner also errs in asserting (Pet. 19-20) that the First Step Act's purpose requires district courts to reevaluate a defendant's guidelines calculations unrelated to the Fair Sentencing Act. To the contrary, the manifest purpose of Section 404 was to finish the work of the Fair Sentencing Act, by reducing the unwarranted sentencing disparities caused by the now-discredited 100-to-1 ratio in the treatment of powder and crack cocaine from sentences imposed before that Act. Interpreting Section 404(b) to require district courts to reevaluate guidelines calculations under "case law unrelated to crack cocaine sentencing disparities would not create a level playing field but, rather, would put defendants convicted of crack cocaine offenses in a more advantageous position than defendants convicted of powdered cocaine offenses." Concepcion, 991 F.3d at 287.

Finally, the newsletter issued by the Sentencing Commission's Office of Education and Sentencing Practice on which petitioner relies (Pet. 20) provides his argument no support. That newsletter, stating that district courts addressing motions under Section 404 "should consider the guidelines and policy statements," First Step Act, ESP Insider Express: Special Edition, Feb. 2019, at 8, does not purport to state an official view of the Sentencing Commission itself and does not address which version of

the Sentencing Guidelines Manual a court should consult or whether courts should reevaluate guidelines calculations unrelated to the Fair Sentencing Act based on intervening changes in law. Instead, the newsletter notes that "[c]ourts will have to decide whether a resentencing under the Act is a plenary resentencing proceeding or a more limited resentencing." Ibid.

2. Petitioner argues (Pet. 14-17) that further review is warranted because the courts of appeals are divided on the question presented. The alleged conflict is recent and lopsided. And although some tension exists in the circuits regarding the precise manner in which a Section 404 sentence reduction may be informed by legal developments since the original sentencing, petitioner overstates the scope and practical effect of any disagreement.

Petitioner identifies (Pet. 14) five circuits as recognizing that district courts "are not required to calculate" the current guidelines range in considering a sentence reduction under the First Step Act. See Pet. 14-15 (citing cases from the Second, Fifth, Sixth, Ninth, and Eleventh Circuits). As explained above, that is a correct interpretation of the First Step Act. But those decisions should not be read to preclude a court from considering intervening changes in law in exercising its discretion whether to impose a reduced sentence in a Section 404 proceeding.

The Second, Fifth, and Sixth Circuits have all made that explicit. In United States v. Moore, supra, the Second Circuit

explained: "We hold only that the First Step Act does not obligate a district court to consider post-sentencing developments. We note, however, that a district court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence." 975 F.3d at 92 n.36. The Fifth Circuit has similarly stated, post-Hegwood, that "a district court, in exercising the sentencing discretion granted by the First Step Act, may consider, as a § 3553(a) sentencing factor, that a defendant originally sentenced as a career offender, for purposes of U.S.S.G. § 4B1.1, would not hold that status if originally sentenced, for the same crime, today." United States v. Robinson, 980 F.3d 454, 465 (2020) (emphasis omitted). And the Sixth Circuit recently observed that, "[w]hile [its cases] do not require district courts to conduct plenary resentencing hearings in response to a petition under the First Step Act, they permit courts to consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much." United States v. Maxwell, 991 F.3d 685, 691 (2021).

Although the decisions that petitioner cites (Pet. 15) from the Ninth and Eleventh Circuits contain some language that could be read not to permit such consideration, the question was not directly presented in those cases. See Kelley, 962 F.3d at 475 (explaining that the "only question on appeal" was "whether the First Step Act authorizes a plenary resentencing"); Denson, 963

F.3d at 1082 ("The issue on appeal is whether the district court is required to first hold a hearing at which [the defendant] was present" before resolving a Section 404 motion). And as the cases from the other circuits show, the courts' answers to those questions do not necessarily indicate that they would preclude all consideration of intervening legal developments. See, e.g., United States v. Sims, 824 Fed. Appx. 739, 744 (11th Cir. 2020) (per curiam) (assuming without deciding that district courts "may consider the current guideline range when 'determining whether and how to exercise their discretion,'" under Denson) (brackets and citation omitted).

Petitioner asserts that the Fourth and the Tenth Circuits have adopted a different approach. See Pet. 15-16 (citing United States v. Brown, supra, and United States v. Chambers, 956 F.3d 667 (4th Cir. 2020)). But neither decision squarely conflicts with the unpublished decision below. In Brown, the Tenth Circuit agreed that Section 404 "does not authorize plenary resentencing." 974 F.3d at 1139. Although petitioner describes (Pet. 15) the court of appeals as having also held that "courts must, at least in some circumstances, calculate and apply the current Guidelines," all the court actually said is that Section 404 "allows a district court to at least consider [the defendant's] claim that sentencing him as a career offender would be error given subsequent decisional law." Id. at 1139-1140 (emphasis added);

see id. at 1145 ("[I]n imposing a First Step Act sentence, the district court is not required to ignore all decisional law subsequent to the initial sentencing."). As noted, the Fifth Circuit has similarly concluded that a district court may consider post-sentencing legal developments in the exercise of its discretion under Section 404. See Robinson, 980 F.3d at 465. And nothing in the unpublished decision below is inconsistent with that binding circuit precedent.

In Chambers, the Fourth Circuit did find that a district court erred by declining to apply intervening case law concerning the defendant's career-offender designation in calculating the defendant's post-Fair Sentencing Act guidelines range. 956 F.3d at 668. But in so doing, the court of appeals distinguished the Fifth Circuit's decision in Hegwood, inter alia, on the ground that "the intervening Fifth Circuit case law that would have removed Hegwood's career-offender enhancement ha[d] not been declared retroactive" to cases on collateral review, while the intervening Fourth Circuit case law at issue in Chambers had been. Id. at 672-673. Petitioner relies (Pet. 11) on the same non-retroactive Fifth Circuit case law, United States v. Tanksley, 848 F.3d 347, supplemented, 854 F.3d 284 (5th Cir. 2017) (en banc), to support his request for a sentence reduction here.

In short, "[a]lthough the case law is still evolving, it appears that most circuits generally permit, but [do] not require,

some consideration of current guideline ranges, in evaluating a First Step Act motion, insofar as the information relates to § 3553(a) factors." Robinson, 980 F.3d at 465 (emphasis omitted). Given the emerging consensus in the courts of appeals and petitioner's failure to identify any decision indicating that any court of appeals would have rendered a different judgment in his case, this Court's intervention is unnecessary at this time.

3. Finally, even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it, because the district court would be unlikely to reduce petitioner's sentence any further even if the question were decided in his favor. Even if petitioner's prior conviction for Texas felony delivery of a controlled substance no longer qualifies him as a career offender under Sentencing Guidelines § 4B1.1, it is still relevant in evaluating petitioner's "history and characteristics" under 18 U.S.C. 3553(a)(1) as part of petitioner's extensive criminal history. In the district court, petitioner emphasized that, without a career-offender enhancement, the Probation Office calculated his criminal history category to be IV, instead VI. See D. Ct. Doc. 345, at 6. But that calculation was based on only his prior convictions for delivery of a controlled substance, possession of a controlled substance, and attempted robbery. PSR ¶¶ 59-61. Petitioner also had 16 additional prior convictions for various offenses, including

theft, escape, possession of drug paraphernalia, and trespass, that were not formally counted in his criminal history score. PSR ¶¶ 43-58. Moreover, as the government explained to the court (and petitioner did not dispute), since his original sentencing, petitioner has also "threatened to kill his previous attorney," D. Ct. Doc. 345, at 14, and, as the Probation Office noted, in prison, petitioner "has had nine disciplinary actions and is classified as a high security risk," Addendum to PSR 2; see Robinson, 980 F.3d 463-464 (explaining that a district court may consider a defendant's "extensive criminal history" and post-sentencing conduct in a Section 404 proceeding) (citation omitted). The court has accordingly made clear that, given petitioner's history and these "other matters," life imprisonment remains the "appropriate sentence in this case." D. Ct. Doc. 345, at 20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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