CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

ANTONIO HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari

To the Eighth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2008, federal prosecutors compelled federal Judge Carol Jackson to impose a mandatory 20-year minimum term for Harris's possession of 60 grams of crack with intent to distribute by filing a notice of his prior marijuana conviction. Judge Jackson noted that the 20-year term was Congress's choice, not hers. She rejected the then-applicable career offender Sentencing Guidelines range of 360-years to life, which was based on a theft Harris committed as a teenager. In 2010 Congress amended the penalties for crack to address unjustified racial sentencing disparities like the 20-year mandatory term Judge Jackson lamented applying in 2008. In 2018, President Trump and Congress authorized Courts to retroactively apply the 2010 crack sentence reductions to "covered offenses" sentenced before August 2010. The 20-year mandatory term for Harris's offense dropped to 10 years. His 2019 sentencing guidelines range advised only 120-130 months, due to intervening, empirically-based changes to the career offender definition. A new judge imposed a "slight" reduction of Harris's 20 year term under the First Step Act, stating he found nothing excessive in the 20 year mandatory term Congress struck down in 2010 and 2018." He gave no consideration to the 120-130 month Guidelines range recommended for Harris's offense and record in 2019. The issue presented here is:

Can federal judges ignore the current United States Sentencing Guidelines calculation when considering whether to reduce a sentence for a "covered offense" pursuant to Section 404 of the First Step Act of 2020, Pub. L. No. 115-391, 132 Stat. 5194, a question on which the Circuits disagree?

Parties to the Proceedings

Petitioner Antonio Harris was represented in the lower court proceedings by his counsel, Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, and Lucille G. Liggett, Assistant Federal Public Defender, 1010 Market, Suite 200, Saint Louis, Missouri, 63101. The United States is represented by United Sates Attorney Sayler Fleming and Assistant United States Attorney, Tiffany G. Becker, Thomas Eagleton Courthouse, 111 South 10th Street, Saint Louis, Missouri, 63102.

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The decision of the United States Court of Appeals for the Eighth Circuit is published at 960 F.3d 1103. It appears in the Appendix ("Appx", at 1).

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on June 5, 2020. Appx. 1-6. Mr. Harris filed a timely motion for rehearing, which was denied August 3, 2020. Appx. 7. This petition is timely filed within 150 days of the denial of the petition for rehearing by mailing to the Clerk of this Court through the United States Postal Service, first-class postage prepaid on December 31, 2020. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The First Step Act, Pub. L. 115-391, 132 Stat. 5194 (2018), states in relevant part:

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was 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".

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION. The United States Sentencing Commission shall— (1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and (2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

1 U.S.C. § 109 (2019) provides in relevant part:

The repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide.

18 U.S.C. § 3553(a) (2020) states in relevant part:

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

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

(2) the need for the sentence imposed— (A) to reflect the seriousness of the offense, to promote respect for the law, and to 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

United States Sentencing Guidelines Provisions

U.S.S.G. §4B1.2(a) (2008), provides

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

U.S.S.G. §§4B1.2(a) (2019), provides

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. §5845(a), or explosive material . . . . .

STATEMENT OF THE CASE

The Circuits disagree on the authority of federal judges to consider the statutory Sentencing Goals in 18 U.S.C. §3553(a), including the current sentencing recommended by the United States Sentencing Commission when considering whether to reduce a crack cocaine sentences imposed before August 3, 2010. The landmark First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, granted federal judges authority to consider imposing a reduced sentence in cases of persons sentenced prior to the effective date of the Fair Sentencing Act of 2010. The 2010 legislation prospectively remedied the long criticized racial inequities generated by the Anti-Drug Abuse Act of 1987, which imposed on offenders involved with crack cocaine the same mandatory minimum sentence applied to identical conduct with 100 times that amount of powder cocaine, from which crack is made. The United States Sentencing Commission had for at least 15 years urged congress to sharply reduce the crack-to-powder differential, because the 100:1 ratio negated the goal of sentencing uniformity in the Sentencing Reform Act of 1984, to treat like offenders alike. Responding to empirical evidence by the Sentencing Commission and the public perception that the 100:1 ratio reflected unjustified race-based differences, the Fair Sentencing Act of 2010 reduced the ratio to 18:1 for sentences imposed after August 2, 2010. Section 404(b) of the First Step authorized discretionary reduction of sentences in crack cases sentenced prior to August 3, 2010. The eight circuits to address the issue disagree on whether judges must take into account the entire range of §3553(a) sentencing factors anew, including the current Sentencing Guideline range. Harris's case illustrates the huge impact the answer has on furthering or impairing Congress's remedial goals in enacting §404(b) of the First Step Act.

In Harris's original prosecution, the government alleged he possessed 60.92 grams of crack found when he gave police the key to an apartment he shared with his brother and said marijuana was there. In 2008, the statutory penalty came from the Anti-Drug Abuse Act of 1986, which mandated high

mandatory minimum prison terms to punish crack cocaine crimes with a severity reserved for 100 times the same amount of powder. When Harris insisted on trial, the government filed a notice of his prior conviction for possessing marijuana to compel an enhanced mandatory minimum 20 years in prison for his crack offense, instead of a 10-year minimum sentence. 18 U.S.C. §§841(b)(1)(A), 851(a) (2008). Harris's only other prior conviction was a theft he committed as a teenager. In 2008, both prior convictions counted as predicate "crimes of violence" that prompted a career offender Guidelines enhancement of 360-months-to-life for any controlled substance crime punishable by life in prison.

Judge Carol Jackson, the first African American woman to sit on the District Court bench for the Eastern Missouri, told Harris at his sentencing that the 20-year mandatory term for the quantity of crack in his case was not her choice:

> "That's what the Congress has determined. It is not what I determined. . . . Congress made that decision. We have to accept that. There is no way that I can sentence you below 20 years, unless the government filed a motion, which of course they haven't done and won't do; but I have to accept that this is a decision that Congress has made."
>
> "Now, whether Congress should rethink the disparity between crack and powder cocaine, I think it should. Will it? I think it won't. At least not all at once."

The U.S. Sentencing Commission had long urged Congress to strike the "100:1" crack/powder disparity with empirical research refuting the assumed greater danger and violence in crack cases upon which Congress based that ratio. *Dorsey v. United States*, 567 U.S. 260, 268 (2012). The Commission reported this impaired Congress's goal of sentencing uniformity, and cited the public perception that the sharp sentencing disparity it drove reflected "unjustified race-based differences." *Id.* The filing of the government's notice of Mr. Harris's prior marijuana conviction denied Judge Jackson the power to impose less than 20-years. In choosing the mandatory 20 year term, Judge Jackson rejected the 360-months-to-life career offender Sentencing Guidelines range of imprisonment, as other judges frequently

dame to do in cases like Harris's, where the "career" designation was based on teenage offenses.[1] As Judge Jackson foretold in 2008, Congress passed the Fair Sentencing Act of 2010, Public Law 111-220, 124 Stat. 2372, which reduced the disparity in punishing crack offenses from 100:1 to 18:1 for cases sentenced after August 3, 2010. Section 2 of the 2010 Fair Sentencing Act increased the drug quantity threshold triggering the enhanced mandatory minimum prison term of 10 years in §841(b)(1)(A) from 50 grams to 280 grams, and raised the quantity triggering a 5 year mandatory minimum from 5 grams to 28 grams in §841(b)(1)(B). Congress did not make these changes retroactive to cases sentenced before August 3, 2010, such as Harris's case. *Dorsey*. 567 U.S. at 280.

In late 2018, Congress and President Trump enacted the "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act" ("First Step Act"), Pub. L. No. 115-391, 132 Stat. 5194. It authorized sentencing reductions for "covered offenses," defined in Section 404(a) as crimes "the statutory penalties for which were altered by section 2 or 3 of the Fair Sentencing Act of 2010" and that were committed before August 3, 2020. Section 404(b) of the Act provided that "[a] court that imposed a sentence for a covered offense may, on motion of the defendant . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . .were in effect at the time the covered offense was committed."

Harris moved to reduce his sentence under Section 404(b). He pointed out his prior convictions no longer supported a career offender range in light of the Sentencing Commission's empirical findings that theft from a person did not justify a "crime of violence" designation. Under §3553(a)(4)(ii), Harris's guideline range in 2019 was only 120-130 months in prison. The government agreed the First Step Act gave the district court power to impose a reduced sentence as low as the post-Fair Sentencing Act minimum of 120 months. It opposed the "application" of the 2019 guidelines, on the basis this

[1] *See, e.g., United States v. Feemster*, 572 F.3d 455 (8th Cir. 2009) (*en banc*).

converted the reduction proceeding resentencing into a "plenary" resentencing. It nevertheless agreed a judge could consider that the Sentencing Commission no longer deemed Harris a career offender.

Judge Jackson having retired, Judge John Ross was assigned Harris's First Step Act motion. Judge Ross did not adopt any particular guideline range as being "applicable" to the proceeding. He declared that nothing in the record indicated that the 20 years Judge Jackson imposed was excessive, and termed her choice of 20 years "lenient," making no mention of her observation it was not the punishment she would impose for the quantity of crack in this case. Judge Ross anchored his choice of reduced sentence to that 2008 mandatory 20-year term—which Congress had by then twice declared excessive (prospectively in the 2010 Fair Sentencing Act and retroactively in the 2018 First Step Act) as his starting point. The Court gave a "slight reduction" from the 2008 mandatory 20-year mandatory minimum term to 216 months, as a nod to Harris's course work in prison.

Harris appealed, arguing that the district Court clearly erred in concluding that nothing in the record indicated the 20-year term Judge Jackson imposed was "excessive." Harris pointed to (1) Congress's landmark legislation in the First Step Act of 2018 and the 2010 Fair Sentencing Act that struck down that mandatory 20 year term for crimes involving 60.92 grams sequentially for crimes sentenced both before and after August 3, 2010, (2) Judge Jackson's criticism of 20 years in 2008 as the punishment for Harris's case, and (3) the 2019 Sentencing Guidelines of 120-130 months (nine-to-ten years less than the repudiated 20 year mandate), as refuting Judge Ross's premise that nothing indicated the original 20 year sentence was excessive. Mr. Harris argued that Judge Ross "anchored," "tethered" his "slight" reduction to the mandatory 20 year mandatory term Congress eliminated in this case violated the First Step Act remedy of "impos[ing] a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2020 [] were in effect at the time the covered offense was committed." Section 404(b). Counsel noted that Judge Ross did not identify any "applicable" Guideline range, and that his

reference to granting a "slight" reduction to the 20 year mandatory term proved he did not "apply" the 2008 career offender guidelines range of 360-months-to-life, as the adjective "slight" did not fit a 216 month sentence some 12 years below the 360-month career offender minimum. Harris similarly argued that the 18 year term Judge Ross imposed was substantively unreasonable, eight years longer than the 2019 sentencing guidelines recommended for his non-violent offense, citing Eighth Circuit case law declaring substantively unreasonable a similarly large leap due to a misapplied career offender range.[2]

A panel of the Eighth Circuit rejected Harris's claims. Appendix 1-6. The court criticized appellant for describing Judge Ross as "tethering" his choice of reduced sentence to the 20-year mandatory minimum retroactively stricken by the First Step Act in Section 404(b). The panel held that that the First Step Act directs judges analyze a reduction by beginning "with the sentence sought to be reduced," Appendix p. 5, although no such language appears in Section 404(b). The panel held:

> Harris further argues the 216 month sentence is substantively unreasonable, arguing the district court gave significant weight to the improper factor of the repudiated mandatory minimum and failed to give sufficient weight to the fact that he would not be a career offender if resentenced under the current advisory guidelines. We review this issue under a deferential abuse-of-discretion standard. . . . Harris does not argue the current advisory guidelines must be applied in First Step Act resentencing. Therefore, we need not consider this contention, which . . . has been rejected by other circuits. *See United States v. Foreman*, 958 F.3d 506, 510-12 (6th Cir. 2020); *United States v. Hegwood*, 934 F.3d 414, 418-19 (5th Cir. 2019); *United States v. Carter*, 792 F. App'x 660, 663-64 (11th Cir. 2019) (unpublished). However, the § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines. *Cf. United States v. Smith*, 954 F.3d 446, 452 & n.8 (1st Cir. 2020).

Appendix at 5-6. Harris sought rehearing, citing opinions from three circuits that had ruled district courts should take into account the current Sentencing Guidelines calculations when considering imposition of a reduced sentence. Petitioner also noted that the panel's decision had already been cited in subsequent Eighth Circuit opinions for the proposition that a district court had no obligation to consider the current Sentencing Guidelines. Rehearing was denied August 3, 2020, Appendix p. 7.

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[2] *See United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016)

Reasons for Granting the Writ

This Court should grant certiorari to resolve the circuit split concerning a federal court's discretion to consider the current United States Sentencing Guidelines when deciding whether to impose a reduced sentence pursuant to §404 of the First Step Act of 2018. The District of Columbia Circuit Court of Appeals has just joined three others circuits that hold it proper for district courts to consider the current view of the United States Sentencing Commission on what constitutes a reasonable sentencing when imposing a reduced sentence in "covered offenses" involving crack that were originally sentenced before August 3, 2020. The Eighth Circuit in Harris's case declared that a judge may consider the propriety of doing so, while simultaneously declaring that this was rejected in other circuits. Appendix at 5-6. The Eighth Circuit subsequently cited the ruling in Harris's case as precedent for its claim that a district court judge need never consider the sentencing factors in 18 U.S.C. § 3553(a), including the current advisory Sentencing Guidelines calculation listed in §3553(a)(6). *See United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020). Resolution of the circuit conflict will warrant Harris's resentencing. Harris's claim in the Eighth Circuit that the district court granted no consideration to the 2019 Sentencing Guidelines recommendation of a sentence between 120-to-130 months when it ruled that it saw nothing in the record suggesting the 20-year mandatory minimum term that the original judge lamented imposing would require warrant reconsideration if this Court resolves the circuit split to require district courts to consider the §3553(a) factors in this context.

1. Four circuits say federal judges must not consider the current Sentencing Guidelines in First Step Act Resentencing

The Second, Fifth, Ninth and Tenth Circuits have ruled that district courts must not consider the Sentencing Commission's current view of what a reasonable sentence should be when contemplating a reduction in sentence pursuant to the First Step Act. The Fifth Circuit first adopted this position in *United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir. 2019). Hegwood pled guilty to possessing with

intent to distribute 9.32 grams of crack, and had prior convictions that were predicate convictions for a career offender enhancement in 2008. He received a sentence of 200 months as a career offender. In 2019, his prior convictions did not support a career offender designation, but the district court refused to consider the current Guidelines calculation, limiting its reconsideration of Hegwood's sentence to incorporating the reduced statutory limits. The Fifth Circuit affirmed, concluding that the language in §404(b) authorizing a reduction "as if Sections 2 and 3 of the Fair Sentencing Act of 2010" were in effect, meant that "Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense." *Id.* at 418. The Court referred to Congress's "express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010," to support its rationale. *Id.* The Fifth Circuit held that under the First Step Act, "[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.*

The Ninth Circuit followed suit in *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020). The Tenth Circuit adopted *Hegwood*'s reasoning in an unpublished opinion in *United States v. Drew Samuel Bates*, 2020 WL 5422410 (10th Cir. , Sept 10, 2020), although it simultaneously held that a district court can take into account an erroneous application of the career offender guideline based on intervening case law since the original sentencing, *see United States v. Brown*, 974 F.3d 1137, 1145 (10th Cir., Sept. 9, 2020) ("If the district court erred in the first Guideline calculation, it is not obligated to err again"). The Second Circuit rejected a defendant's challenge to a district court's failure to take into account intervening case law invalidating one of the defendant's career offender predicate offenses, joining the Fifth Circuit's view in *United States v. Moore*, 975 F.3d 84, 90 & n. 30 (2nd Cir. 2020). The Eleventh Circuit also adopted *Hegwood*'s reasoning in *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) (in ruling on a First Step Act motion, "the district court . . .. is not free to . . reduce the

defendant's sentence on the covered offense based on changes in the law beyond those mandated by Sections 2 and 3 [of the Fair Sentencing Act] . . . .").

None of these circuits took into account that Congress had to specifically cite Sections 2 and 3 of the Fair Sentencing Act to satisfy the mandate in 1 U.S.C. § 109 (2019) that, "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, *unless the repealing Act shall so expressly provide.*" (Emphasis added). *See Dorsey*, 567 U.S. at 272 (explaining that penalties are "incurred" when the offender "commits the underlying conduct"). These four circuits did not contemplate that Congress explicitly referenced Sections 2 and 3 of the Fair Sentencing Act to fulfill the §109 requirement, rather than to prohibit consideration of the §3553(a) factors when imposing a reduced sentence. Taken to its logical conclusion, the *Hegwood* analysis would prohibit judges from applying the revised Sentencing Guidelines the Fair Sentencing Act ordered the Sentencing Commission to adopt on an emergency basis in *Section 8* of the 2010 law—a section mentioned nowhere in §404(b) of the First Step Act. In fact, these four circuits take for granted that Courts must incorporate the revised Sentencing Guidelines ordered the Commission to draft so as to incorporate the 18:1 ratio, though Section 8 is not mentioned in § 404(b) of the First Step Act as something to be applied in a reduced sentence.

2. Four Circuits hold to the contrary that Courts may and should consider today's Guideline range when deciding whether and how much to reduce sentences under the first Step Act.

As of this week, four circuits hold that district courts have the authority if not the obligation to apply the current sentencing Guidelines. The Fourth Circuit in *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020), reversed the order of a North Carolina judge who agreed Chambers was eligible for a First Step act reduction because the Fair Sentencing Act reduced the minimum sentence for his offense, but denied reduction in the belief that the court had to apply the original career offender guideline. The First Step Act statutory alterations had not reduced the maximum statutory penalty for Chambers crack

offense, upon which a career offender guideline range depends. The Fourth Circuit likened the updating of Sentencing Guideline ranges to fixing "a typo":

> "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. In doing so, it did not import the strictures of [18 U.S.C.] §3582(c)(2), even though it certainly could have. Perhaps it did not want to because it hoped for greater justice for individuals like Chambers. To self-circumscribe a sentencing court's authority under the First Step Act would not only subvert Congress's will but also undermine judicial integrity. It is one thing to ignore an error when we are explicitly told to do so . . . ;' it is quite another to maintain a retroactive Guidelines error when we are not so told."

956 F.3d at 674. The Seventh Circuit likewise held 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 looking at §3553(a) factors anew." The Seventh Circuit observed the significance of a district court's consideration of the §3553(a) sentencing factors as fulfilling Congress's First Step Act goal:

> ""Because of lengthy statutory penalties attached to crack offenses, a judge presiding over a request for a sentence reduction under the Act may not be the same judge who imposed a defendant's original sentence. This could hamper a judge's consideration of a defendant's arguments, because the new judge would be heavily reliant on a previous explanation and record that was 'not created with the current statutory framework in mind."
>
> "Counsel may have pressed different arguments based on a different statutory framework; a court may have credited those arguments differently, as the statutory minimum and maximum often anchor a court's choice of a suitable sentence. What is more, today's Guidelines may reflected updated views about the seriousness of a defendant's offense or criminal history."

Id. at 741-42. In *United States v. Hudson*, 967 F.3d 605, 611 (7th Cir. 2020), the Court added that the First Step Act authorizes the district court to consider a range of factors to determine whether a sentence imposed is sufficient, but not greater than necessary, to fulfill the purposes of § 3553(a), including current Guidelines, post-sentencing conduct and other relevant information about one's history and conduct.

The Sixth Circuit vacated a sentence imposed at a First Step Act resentencing, explaining that "at a minimum" such a resentencing "includes an accurate calculation of the amended [G]uidelines range at

the time of resentencing and thorough renewed consideration of the § 3553(a) factors." *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020). The Sixth Circuit particularly noted that §404(c) refers to "a complete review of the motion on the merits" as " show[ing] the dimensions of the resentencing inquiry Congress intended district courts to conduct: complete review of the resentencing motion on the merits." *Id.* A "resentencing predicated on an erroneous or expired [G]uideline calculation would seemingly run afoul of Congressional expectations." Id. The Sixth Circuit also pointed out that the Sentencing Commission recognized that in First Step Act resentencing, "courts should consider the [G]uidelines and policy statements, along with the other § 3553(a) factors, during the resentencing." *Id.*

Finally, this week the District of Columbia Court of Appeals also ruled that held that district courts should consider the §3553(a) factors in exercising the discretionary power to impose a reduced sentence in *United States v. Antone White*, No. 19-3058, 2020 WL 7702705, *10 (D.C. Cir., Dec. 29, 2020). The D.C. Circuit noted this Court's instruction that when a statute fails to specify any limits on a district court's discretion, the court must look to the purpose of the statute to determine whether to sustain the trial court judge's exercise of discretion. *Id.* at 8, citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Court of Appeals concluded that a district court's exercise of discretion under the First Sep Act must take into account Congress's purposes in passing the Fair Sentencing Act: *Id.* at *9. In so doing, the Court observed the remedial goal of the First Step Act went beyond merely reducing sentencing disparities in the federal courts, noting "Congress [also] authorized the courts to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme." *Id.*, quoting *Chambers*, 956 F.3d at 674. The District of Columbia Court of Appeals further added:

> "[i]t is not incongruous that [the Fair Sentencing Act and First Step Act] offer the possibility of remedial action for persons who were convicted of criminal conduct. Congress determined that persons who are eligible for sentence reductions under the First Step Act were likely victims of unfair and racially discriminatory treatment in our criminal justice system. Therefore, the affected defendants are serving sentences that Congress now deems unfair. The First Step Act

> "make[s] possible the fashion[ing] [of] the most complete relief possible.' *Albemarle*, 422 U.S. at 421 . . . This is no small matter.

Id.

This Court has long recognized that remedial statutes should be construed generously to achieve their ameliorative goals. *See, Peyton v. Rowe*, 391 U.S. 54, 65 (1968). Unlike the four circuits (and the Eighth Circuit in Harris's case) that discourage or prohibit consideration of the current Sentencing Guidelines range as being contrary to the First Step Act, the District of Columbia Circuit spotlighted the uniquely remedial goal in the First Step Act to alleviate the racially disparate excesses of the repudiated 100:1 crack/powder sentencing ratio. Neither the Eighth Circuit nor the circuits employing the *Hegwood* analysis made any reference or acknowledgment of the uniquely remedial and reparative nature of the First Step Act.

3. This case presents an excellent vehicle to examine the impact of the conflicting views on the First Step Act's goals

Harris's case presents a quintessential example of the unjustified excesses and racial disparity Congress intended the First Step Act to rectify, as well as the negation of Congress's goal when courts refuse or are forbidden to consider the §3553(a) factors and, specifically, the current Sentencing Guidelines. In 2008, Judge Jackson expressly lamented having to impose a 20 year mandatory sentence on Harris for the quantity of crack involved in his case, which the prosecutor compelled by filing notice of his prior conviction for possessing marijuana. She rejected the career offender guideline range of 30-years-to-life, which was built on noting more than that same marijuana conviction plus a teenage offense of stealing, yet she could not go below the huge 20 year mandatory minimum the government forced her to apply. In two separate landmark pieces of legislation, Congress eradicated that 20 year mandatory minimum specifically to alleviate the unjustifiable racial disparities the prior crack sentencing regimen perpetuated. Meanwhile, the Sentencing Guidelines were amended in part due to intervening decisions

of this Court declaring unconstitutionally vague a residual definition for predicate crimes by which Harris's theft conviction qualified (*see United States v. Langston*, 8000 F.3d 1004, 1005 (8th Cir. 2015)), and in part due to the Sentencing Commission's own empirical research that theft from a person did not categorically warrant designation as an enumerated crime of violence. *See* U.S.S.G. §4B1.2(a)(2); 2018 Guidelines Manual (Supplement to Appendix C, amend. 798 (effective Aug. 1, 2016).

Today, a district court sentencing Harris for the same offense and his unchanged criminal record would employ the Sentencing Commissions recommendation to choose a sentence from between 120-130 months. The "slightly" reduced sentence the judge imposed against Harris, 216 months, exceeds the currently recommended Guidelines range for his offense and criminal record by eight-to-ten years. Eighth Circuit precedent has previously declared substantively unreasonable this degree of variance substantively unreasonable in a similar misapplication of a career offender sentence, *see United States v. Martinez*, 821 F.3d 984 (8th Cir. 2016).

Petitioner's case provides an excellent vehicle by which to measure the impact of the conflicting views that already divide eight of the twelve circuits.

CONCLUSION

WHEREFORE, petitioner Hudson respectfully prays that this Court grant his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

October 2020 Term

ANTONIO HARRIS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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United States Court of Appeals
For the Eighth Circuit

No. 19-2031

United States of America

Plaintiff - Appellee

v.

Antonio Harris

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: January 17, 2020
Filed: June 5, 2020

Before SMITH, Chief Judge, LOKEN and GRUENDER, Circuit Judges.

LOKEN, Circuit Judge.

In 2008, a jury convicted Antonio Harris of violating 21 U.S.C. § 841(a)(1) when he possessed with intent to distribute more than 50 grams of cocaine base (crack cocaine). At sentencing, Harris was found to be a career offender under USSG § 4B1.1, producing an advisory guidelines sentencing range of 360 months to life imprisonment. District Judge Carol E. Jackson varied downward and sentenced Harris to 240 months imprisonment, the statutory mandatory minimum sentence

because the government had filed an information disclosing his prior Missouri conviction for possession of marijuana with intent to distribute. See 21 U.S.C. §§ 841(b)(1)(A)(iii) and 851 (2008). We affirmed the conviction and sentence. United States v. Harris, 557 F.3d 938 (8th Cir. 2009). In 2019, Harris filed a motion for a sentence reduction under the First Step Act of 2018. The district court[1] ruled that Harris was eligible for a First Step Act reduction and reduced his sentence to 216 months. Harris appeals, arguing the court erred in not granting a greater reduction. We affirm.

I. Background

The Fair Sentencing Act of 2010 reduced the mandatory minimum sentencing disparities between crack and powder cocaine offenses. The Act's more lenient provisions were held not to apply to those sentenced before its enactment. Dorsey v. United States, 567 U.S. 260, 282 (2012). Congress and the President responded by enacting the First Step Act in 2018. At issue here is Section 404 which provides:

> (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.

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[1]The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.

> (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.

First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). Harris is eligible for First Step Act relief because, had the Fair Sentencing Act been in effect when he was sentenced, the mandatory minimum for his drug offense would have been ten rather than twenty years. See 21 U.S.C. § 841(b)(1)(B); United States v. McDonald, 944 F.3d 769, 772 (8th Cir. 2019).

As Judge Jackson had retired, Harris's First Step Act motion was reassigned to District Judge John A. Ross. The Probation Office reported to Judge Ross that Harris's guidelines sentencing range as a career offender remained 360 months to life imprisonment. The report also summarized Harris's time in prison, including completion of business and wellness courses and seven conduct violations. Harris submitted a Response arguing that "Mr. Harris today does not qualify as a career offender" and that his postsentencing rehabilitation warrants a sentence at the bottom of his current guidelines range, 110 months imprisonment (the mandatory minimum sentence under the Fair Sentencing Act is 120 months). Judge Ross then held a motion hearing, determining that Harris's presence was not required.

Early in the hearing, Judge Ross asked defense counsel, "Do you agree though that the guideline range here today is still 360 months to life?" Counsel replied:

> Well, if the Court determines he is still a career offender, yes, that's a guideline. But what I wanted to do is point out to the Court

> today Mr. Harris would not be a career offender. So I'm asking the Court to take that into consideration under the 3553(a) factors . . . to further reduce his sentence. . . . Today under the First Step Act . . . he has a 120 month mandatory minimum. So I'm asking the Court to exercise discretion and vary downward to 120 months.

The government agreed the court had First Step Act discretion to reduce Harris's sentence to 120 months but urged the court not to reduce the 240-month sentence, which was ten years below the bottom of his guidelines range.

In ruling on the motion, Judge Ross explained he had carefully reviewed the entire record because the case had been reassigned. The court recognized its discretion to reduce Harris's sentence to 120 months, the Fair Sentencing Act mandatory minimum. The court noted "very troubling circumstances around his conviction and sentencing" and stated:

> Judge Jackson . . . noted all of the things that the Government has noted about his history, his criminal background, his violations while in the State Department of Corrections, and yet the judge still chose to substantially vary downward. . . . So the circumstances around his sentence simply don't indicate that that sentence was in any way excessive . . . . [T]here is just nothing in that sentence that would indicate under the First Step Act [it] was excessive or unduly harsh. . . .
>
> So that would indicate to me that there should be no reduction in this case. Having said that, I do look at . . . is there something in the record . . . since he has been confined, that should otherwise cause the Court to consider any reduction of sentence.

The court invited and received further argument from counsel, took the matter under advisement, and issued a written order reducing Harris's sentence to 216 months and 8 years of supervised release. The Order explained, "While the Court recognizes

[Harris] continues to have some violations of prison rules, he does appear to have made significant progress in completing job training and educational programs."

II. Discussion

On appeal, Harris first argues the district court improperly "tethered" the reduced sentence to an inflated 240 month mandatory minimum that the First Step Act reduced to 120 months. "Tethered" is counsel's choice of words. It has no legal or sentencing bona fides; worse yet, it is analytically wrong. The district court simply began its analysis, as the First Step Act required, with the sentence sought to be reduced. The court accurately noted that sentence was a substantial downward variance from the applicable guideline range and concluded the initial variance had eliminated excessiveness the First Step Act was intended to remedy. In evaluating the existing sentence, the court also considered postsentence rehabilitation and the 18 U.S.C. § 3553(a) sentencing factors, consistent with our First Step Act decision in United States v. Williams, 943 F.3d 841 (8th Cir. 2019); see United States v. Shaw, 957 F.3d 734, 740-42 (7th Cir. 2020); United States v. Allen, 956 F.3d 355, 357-58 (6th Cir. 2020). There was no procedural or legal error. See First Step Act § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

Harris further argues the 216 month sentence is substantively unreasonable, arguing the district court gave significant weight to the improper factor of the repudiated mandatory minimum and failed to give sufficient weight to the fact that he would not be a career offender if resentenced under the current advisory guidelines. We review this issue under a deferential abuse-of-discretion standard. United States v. Huston, 744 F.3d 589, 593 (8th Cir. 2014). Harris does not argue the current advisory guidelines *must* be applied in First Step Act resentencing. Therefore, we need not consider this contention, which would be inconsistent with our decision in Williams and has been rejected by other circuits. See United States v. Foreman,

958 F.3d 506, 510-12 (6th Cir. 2020); United States v. Hegwood, 934 F.3d 414, 418-19 (5th Cir. 2019); United States v. Carter, 792 F. App'x 660, 663-64 (11th Cir. 2019) (unpublished). However, the § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines. Cf. United States v. Smith, 954 F.3d 446, 452 & n.8 (1st Cir. 2020).

Harris argues his sentence is substantively unreasonable because it is almost ten years higher than his range of 110-137 months under the current advisory guidelines. Harris made the district court aware that he may not be a career offender under the current guidelines. But after reviewing the entire record, the court concluded that the initial 240-month sentence reflected substantial leniency given Harris's lack of acceptance of responsibility, likely perjury at trial, and disrespectful conduct at sentencing. Thus, viewed from the First Step Act's perspective, the sentence was not excessive or harsh. The court then recognized that Harris's postsentence conduct reflected positive educational and vocational rehabilitation efforts but also numerous conduct violations while in prison. Balancing these positives and negatives, the court granted Harris a significant 24-month sentence reduction. A district court has wide latitude to weigh the § 3553(a) factors and assign some factors greater weight than others in determining an appropriate sentence. See, e.g., United States v. Reynolds, 643 F.3d 1130, 1136 (8th Cir. 2011). The court did not abuse its substantial sentencing discretion or impose a substantively unreasonable sentence by declining to reduce Harris's sentence below 216 months imprisonment.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2031

United States of America

Appellee

v.

Antonio Harris

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:07-cr-00321-JAR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 03, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans