No. 20-6953

IN THE SUPREME COURT OF THE UNITED STATES

DWYNE BYRON DERUISE, AKA DUKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH 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 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 (N.D. Fla.):

United States v. Deruise, No. 07-cr-80041 (Oct. 16, 2007)

Deruise v. United States, No. 10-cv-80733 (Mar. 31, 2011)

Deruise v. United States, No. 16-cv-81129 (June 30, 2016)

United States Court of Appeals (11th Cir.):

Deruise v. United States, No. 11-11790 (July 21, 2011)

In re Deruise, No. 16-13775 (July 22, 2016)

United States v. Deruise, 19-12707 (Aug. 14, 2020)

Supreme Court of the United States:

Deruise v. United States, No. 11-8421 (Feb. 21, 2012)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 816 Fed. Appx. 427.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2020. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment or order denying a timely petition for rehearing. The

petition for a writ of certiorari was filed on January 7, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of manufacturing and possessing with intent to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1); and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Judgment 1. The district court sentenced petitioner to 264 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not appeal. Following the 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. See Pet. App. 1. The district court granted the motion, reducing petitioner's sentence to 228 months of imprisonment. See id. at 2. The court of appeals affirmed. Id. at 1-3.

1. In early February 2007, the Drug Enforcement Agency (DEA) made multiple controlled purchases of crack cocaine and powder cocaine from petitioner through a confidential source in Delray Beach. Presentence Investigation Report (PSR) ¶¶ 4-6. On February 28, 2007, petitioner agreed to sell an additional five ounces of crack cocaine to the confidential source and an

undercover agent. PSR ¶ 7. When petitioner arrived at the meeting location, DEA agents arrested him. PSR ¶ 8. At the time of his arrest, petitioner had approximately four ounces of crack cocaine in his car and a loaded .32 caliber gun in his pocket. Ibid.

A federal grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of distributing a detectable amount cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of distributing five grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(B) (2006); one count of distributing 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) (2006); one count of manufacturing 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) (2006); one count of possessing with the 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) (2006); and one count of carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Indictment 1-4. Petitioner pleaded guilty to the drug-possession and firearm-possession charges. Pet. App. 1.

The Probation Office's presentence report determined that petitioner was specifically responsible for 215.3 grams of crack cocaine, 26.7 grams of powder cocaine, and 14.5 grams of marijuana, resulting in a base offense level of 34. PSR ¶¶ 25-26. It

assigned petitioner a two-level leadership enhancement under Sentencing Guidelines § 3B1.1(c) (2006). PSR ¶ 29. And it calculated a criminal history score of 31, resulting in a criminal history category of VI. PSR ¶ 64; see PSR ¶¶ 37-61.

The Probation Office further determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (2006). PSR ¶ 32. Section 4B1.1(a) provides that a defendant is a "career offender," subject to an increased offense level, 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.

Sentencing Guidelines § 4B1.1(a) (2006); see id. § 4B1.1(b) and (c). Section 4B1.2 of the 2006 Sentencing Guidelines defined a "crime of violence" to include (inter alia) an "offense under * * * state law, punishable by imprisonment for a term exceeding one year, that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." Id. § 4B1.2(a). The Probation Office found that petitioner qualified as a career offender based on two previous Florida convictions for battery on a law enforcement officer. PSR ¶¶ 32, 47, 56. Petitioner's

career-offender classification increased his offense level to 37 pursuant to Sentencing Guidelines § 4B1.1(b) (2006). PSR ¶ 32.

After a three-level reduction for acceptance of responsibility under Sentencing Guidelines § 3E1.1 (2006), petitioner's total offense level was 34. PSR ¶¶ 33-35. The Probation Office determined that petitioner's guidelines range was 322 to 387 months of imprisonment. PSR ¶ 102. It also observed that petitioner's drug offense carried a minimum term of ten years of imprisonment, pursuant to 21 U.S.C. 841(b)(1)(A) (2006), and that petitioner's firearm offense carried a mandatory consecutive term of five years of imprisonment, yielding a statutory-minimum sentence of 15 years of imprisonment. PSR ¶¶ 101.

At sentencing, petitioner did not challenge the Probation Office's calculations, Sent. Tr. 3, and the district court adopted the Probation Office's findings and calculations, see Statement of Reasons 1. The court nevertheless varied downward from the advisory guidelines range, and sentenced petitioner to 204 months of imprisonment for the drug offense and a consecutive term of 60 months of imprisonment for the firearm offense, to be followed by five years of supervised release. Judgment 2-3.

2. In 2010, this Court decided Johnson v. United States, 559 U.S. 133, which considered the definition of "violent felony" in the elements clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), and held that an offense

involves "'physical force'" for purposes of the ACCA when it requires "violent force -- that is, force capable of causing physical pain or injury to another person." 559 U.S. at 140 (emphasis omitted). Because the Florida battery offense at issue in Johnson did not necessarily require the use of physical force to secure a conviction, the Court concluded that it was not categorically a violent felony for purposes of the ACCA. Id. at 138-143. The Court further explained, however, that "[w]hen the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not" -- in other words, when the statute is divisible into multiple distinct offenses -- the "'modified categorical approach'" permits courts to consider certain materials relevant to the prior conviction to determine whether it was for a qualifying offense. Id. at 144 (citation omitted).

Following Johnson, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255, arguing that he should not be considered a career offender because the definition of "crime of violence" in Sentencing Guidelines § 4B1.2(a) (2006) contained an elements clause similar to the ACCA's, and thus Johnson called into question whether a Florida conviction for battery on a law enforcement officer was a crime of violence under that provision. 10-cv-80733 D. Ct. Doc. 1, at 4 (June 18, 2010). The district

court denied petitioner's motion. 10-cv-80733 D. Ct. Doc. 22 (Mar. 31, 2011). Adopting the magistrate judge's report and recommendation, the court reasoned that petitioner's sentence, particularly in light of the downward variance, did not turn on petitioner's status as a career offender. 10-cv-80733 D. Ct. Doc. 19, at 6-8 (Feb. 25, 2011); 10-cv-80733 D. Ct. Doc. 22, at 1. And the court found no error in petitioner's career-offender designation in any event. 10-cv-80733 D. Ct. Doc. 22, at 1-2. The court of appeals denied petitioner's request for a certificate of appealability. 10-cv-80733 D. Ct. Doc. 36 (July 28, 2011). The court noted that petitioner's claim was likely time barred, id. at 3, and additionally reasoned that the sentencing court did not err in determining that he qualified as a career offender, id. at 5. This Court denied a petition for a writ of certiorari. 565 U.S. 1226.

3. 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 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). A 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). 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 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." First Step Act § 404(b), 132 Stat. 5222. Section 404(c) provides, inter alia, 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. 149 (May 3, 2019). Petitioner and the government agreed that he had been sentenced for a "covered offense" because he was convicted of possessing at least 50 grams of crack cocaine in violation of Section 841(b)(1)(A)(iii) and because the Fair Sentencing Act modified the penalties for that offense by increasing the amount of crack cocaine necessary to trigger them from 50 grams to 280 grams. Id.

at 2-3; D. Ct. Doc. 152, at 4-5 (May 10, 2019). The parties further agreed that because his drug offense would now be subject to the statutory-maximum sentence under Section 841(b)(1)(B)(iii) of only 40 years of imprisonment, rather than life imprisonment, his career-offender base offense level under Sentencing Guidelines § 4B1.1(b) (2006) would have been 34, rather than 37, yielding an advisory guidelines range for the drug offense of 188 to 235 months of imprisonment, rather than 262 to 327 months. D. Ct. Doc. 149, at 2-3; D. Ct. Doc. 152, at 4-5.

Petitioner also argued that the district court should apply the law and Guidelines in effect today, rather than at the time he committed his offense. D. Ct. Doc. 149, at 5-8. Specifically, he contended that, after Johnson, his Florida battery convictions would not render him a career offender and that his advisory guidelines range on his drug offense for purposes of the sentence-reduction proceedings should be 110 to 137 months of imprisonment. Id. at 3, 8.

The government opposed any reduction in petitioner's sentence, observing that the district court's original downward variance to 204 months of imprisonment for the drug offense had resulted in a sentence within the guidelines range that would have applied if the Fair Sentencing Act had been in effect at the time of petitioner's sentencing. D. Ct. Doc. 152, at 1. The government also opposed petitioner's request that the court disregard the

career-offender guideline, observing, inter alia, that Section 404 does not authorize a plenary resentencing at which a defendant may challenge guidelines determinations unrelated to the Fair Sentencing Act. Id. at 8-11.

The district court granted petitioner's motion for a sentence reduction. D. Ct. Doc. 156, at 1 (July 1, 2019). The court explained that it had granted a downward variance at the time of petitioner's original sentencing "because it believed that the original guideline range was too harsh." Id. at 2. Nevertheless, the court decided that petitioner "should receive the benefit of the passage of the First Step Act and receive a further reduction in his sentence." Ibid. Accordingly, the court reduced petitioner's sentence on the drug offense from 204 months to 168 months of imprisonment, to be followed by a 60-month mandatory consecutive sentence on the firearm offense, for a total of 228 months of imprisonment. Ibid.

In response to petitioner's motion to clarify, D. Ct. Doc. 158 (July 3, 2019), the district court subsequently explained that the First Step Act "does not authorize a full resentencing or sentencing de novo" and therefore, "in granting [petitioner's] motion for a reduction in his sentence," the court "continued to treat [petitioner] as a career offender," D. Ct. Doc. 159, at 1 (July 3, 2019).

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-3.

Relying on its earlier decision in United States v. Denson, 963 F.3d 1080 (11th Cir. 2020), the court of appeals explained that "the First Step Act does not authorize the district court to conduct a plenary or de novo resentencing." Pet. App. 2 (quoting Denson, 963 F.3d at 1089). The court reasoned that the First Step Act permits a district court to reduce a sentence "only 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when [the defendant] committed the covered offense," and therefore the district court "'is not free to change the defendant's original guidelines calculations that are unaffected by sections 2 and 3 [or] to reduce the defendant's sentence on the covered offense based on changes in the law beyond those mandated by sections 2 and 3.'" Ibid. (quoting Denson, 963 F.3d at 1089) (brackets in original). The court of appeals thus determined that "the district court did not err in concluding that it lacked the authority to conduct a de novo resentencing under the First Step Act to consider [petitioner's] career-offender status." Id. at 2-3.

ARGUMENT

Petitioner contends (Pet. 14-21) that the court of appeals erred in declining to require the district court to reassess his career-offender status under current law in deciding whether to grant him a discretionary sentence reduction under the First Step

Act. The court of appeals' unpublished, per curiam decision was correct and does not conflict with any decision of this Court. Moreover, although the circuits' approaches to intervening legal developments in Section 404 proceedings are not uniform, this Court's intervention is not warranted. This Court has previously denied petitions for writs of certiorari presenting similar questions in Hegwood v. United States, 140 S. Ct. 285 (2019) (No. 19-5743), and Bates v. United States, 141 S. Ct. 1462 (2021) (No. 20-535). The Court should follow the same course here.*

1. The court of appeals correctly determined that the district court did not commit reversible error in leaving in place petitioner's original career-offender designation before granting his Section 404 motion. Pet. App. 2a-3a.

"'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

* Petitions for writs of certiorari presenting similar questions are currently pending in Harris v. United States, No. 20-6832 (filed Jan. 5, 2021), Kelley v. United States, No. 20-7474 (filed Mar. 15, 2021), and Concepcion v. United States, No. 20-1650 (filed May 24, 2021).

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) allows 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 § 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), petition for cert. pending, No. 20-1650 (filed May 24, 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. 285 (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). Contrary to petitioner's assertion (Pet. 18), 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. Instead, 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).

Petitioner errs (Pet. 16-17) 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 -- 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).

Because the "as if" clause directs the court to consider the appropriate sentence "at the time the covered offense was committed," subject only to the now-retroactive change to the sentencing scheme, First Step Act, § 404(b), 132 Stat. 5222, Congress did not need to redundantly further direct the district court to otherwise consider the law "in effect on the date of the previous sentencing," Pet. 17 (quoting 18 U.S.C. 3742(g)(1)). The requirement in Section 3553(a)(4)(A)(ii) and Sentencing Guidelines § 1B1.11(a) to use the Guidelines Manual "in effect on the date that the defendant is sentenced" continues to refer to the original plenary sentencing proceedings. And Section 404's requirement to consider the Section 3553(a) factors "at the second [discretionary] step of [a] circumscribed inquiry," does not "transform the proceedings under [Section 404] into plenary resentencing proceedings." Dillon, 560 U.S. at 827.

Finally, Section 404(c)'s limitations on the circumstances in which district courts may consider Section 404 motions on the merits do not indicate that such consideration must formally take into account any intervening changes in law beyond those specified in Section 404(b). Cf. Pet. 18-19. Section 404(c)'s prohibition on entertaining a successive Section 404 motion if a previous motion was "denied after a complete review of the motion on the

merits," First Step Act § 404(c), 132 Stat. 5222, merely "bars repetitive litigation" and does not describe what "'a complete review'" entails. Moore, 975 F.3d at 91 (citation omitted). It "does not require that any particular procedures be followed during that review, much less that the review entail a full-blown opportunity to relitigate Guidelines issues, whether legal or factual." Ibid. Petitioner's definition of "complete review" as including intervening developments unrelated to the Fair Sentencing Act is inconsistent with the "as if" clause in Section 404(b) and ultimately question begging.

2. Petitioner argues (Pet. 11-16) that further review is warranted because the courts of appeals are divided on whether a district court may "consider the current Guidelines, including a defendant's current status as a career offender," in resolving a motion for reduced sentence under Section 404. But petitioner overstates the scope and practical effect of the disagreement regarding the precise manner in which a Section 404 sentence reduction may be informed by legal developments since the original sentencing.

a. Petitioner errs in contending that five circuits, including the court of appeals below, categorically prohibit district courts from considering all intervening changes in law in considering a sentence reduction under the First Step Act. See Pet. 14-15 (citing cases from the Second, Fifth, Ninth, and Tenth

Circuit). With the possible exception of the Tenth Circuit, see pp. 23-24, infra, those circuits do not require a district court to take account of intervening changes in law when considering a sentence reduction. But none of the cited decisions necessarily would preclude a district court from considering intervening changes in law in exercising its discretion whether to reduce a sentence under Section 404.

The Second and Fifth Circuits have made that explicit. In United States v. Moore, 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 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).

No court of appeals squarely prohibits a court from considering all intervening changes in law in exercising its discretion whether to impose a reduced sentence in a Section 404

proceeding. Although decisions from the Ninth and Eleventh Circuits (including the decision below) contain some language that could be read not to permit such consideration, see Pet. 13, the question was not directly presented in the precedential decisions from those circuits. 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). Even in the unpublished opinion in this case, the court of appeals stated only that "the district court did not err in concluding that it lacked authority to conduct a de novo resentencing under the First Step Act to consider [petitioner's] career-offender status under current law." Pet. App. 2-3. 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).

b. Any differences between the approach of the Eleventh Circuit and other circuits are limited. In United States v.

Hudson, 967 F.3d 605 (2020), for example, the Seventh Circuit concluded that "nothing in the First Step Act precludes a court from looking at § 3553(a) factors with an eye toward current Guidelines." Id. at 612 (citing United States v. Shaw, 957 F.3d 734, 741 (7th Cir. 2020)). But it has not held that a district court proceeding under Section 404 must calculate the defendant's applicable guidelines range by reference to all intervening changes in law unrelated to the Fair Sentencing Act.

The Third and Sixth Circuits are similar. In United States v. Boulding, 960 F.3d 774 (2020), the Sixth Circuit considered, as relevant here, whether Section 404 guarantees a defendant the opportunity to present objections to a district court's calculation of the applicable guidelines range. Id. at 784. In concluding that it does, the Sixth Circuit observed in passing that "the necessary review [under Section 404] -- at a minimum -- includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors." Ibid. The Third Circuit later quoted that language in concluding that Section 404 requires district courts to consider the Section 3553(a) factors. Easter, 975 F.3d at 325-326. But neither Boulding nor Easter squarely held that a district court must apply all intervening changes in law to determine the defendant's guidelines range. In fact, the Sixth Circuit has since clarified that Boulding does not "requir[e] the

court to redetermine the guidelines range based on all intervening legal developments," but instead "speaks to a court's discretion to consider intervening legal developments when responding to a petition under the First Step Act." United States v. Maxwell, 991 F.3d 685, 690 (2021); see ibid. (noting that First Step Act itself required amended guidelines range in Boulding). In doing so, the Sixth Circuit emphasized that it is in accord with "most of [its] sister circuits," which "permit (but do not require) district courts to consider" "intervening developments, such as changes to the career-offender guidelines," when "balancing the § 3553(a) factors and in deciding whether to modify the original sentence." Id. at 692 (emphasis added).

Recent Tenth Circuit decisions have intermingled permissive and mandatory language in describing the way in which district courts should approach intervening guidelines-interpretation developments. Compare, e.g., United States v. Brown, 974 F.3d at 1139-1140 (stating 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") (emphasis added), and United States v. Crooks, No. 20-1025, 2021 WL 1972428, at *4 (May 18, 2021) ("If the district court erred in the first Guideline calculation, it is not obligated to err again.") (citation omitted), with Brown, 974 F.3d at 1146 ("Upon remand, the district court shall consider [the defendant's]

challenge to his career offender status in accordance with this opinion."); Crooks, 2021 WL 1972428, at *5 ("The district court should have recalculated the guidelines range."); see also id. at *5 n.8 (noting the government's concession that, after Brown, "a district court may reconsider career offender status in ruling on a First Step Act motion"). Although not cited in the petition, the Fourth Circuit concluded in United States v. Chambers, 956 F.3d 667 (2020), that a district court erred by declining to apply intervening case law concerning the defendant's career-offender designation, which had been declared retroactive, in considering a sentence reduction under Section 404. Id. at 668. But particularly given that either circuit could follow the trend of tightening up or refining statements in prior opinions on this point, and where no circuit precludes consideration of such developments, the significance of those decisions is unclear.

In sum, "[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 (emphases omitted). And because Section 404 sentence reduction is always discretionary, see First Step Act § 404(b)-(c), 132 Stat. 5222, different approaches may not have a substantial practical effect. Accordingly, this Court's intervention is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2021