No. 20-6953

IN THE

# Supreme Court of the United States

DWYNE DERUISE,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

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

## REPLY BRIEF FOR PETITIONER

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
ANDREW L. ADLER
*Counsel of Record*
PETER BIRCH
ASS'T FED. PUBLIC DEFENDERS
1 E. Broward Blvd., Suite 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

*Counsel for Petitioner*

June 2, 2021

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## REPLY BRIEF FOR PETITIONER

The government concedes that "the circuits' approaches to intervening legal developments in Section 404 proceedings are not uniform." BIO 13. That's putting it mildly. Twelve circuits have divided three ways on whether district courts must or may consider intervening changes in the law when imposing a reduced sentence.

The government asks this Court to let that conflict fester, but it offers no sound reason to do so. The government claims that the law is "still evolving." BIO 24. But every possible circuit has already addressed the question in a precedential opinion. Many have done so multiple times, and many have acknowledged the split. And, just weeks ago, Judge Wilkinson urged this Court to promptly resolve the conflict.

The Court should heed his advice. The question presented has a major practical impact. Considering current law will often lower the guideline range and, in turn, increase the likelihood and extent of sentence reductions. And time is of the essence. Many eligible crack offenders are nearing the end of their sentences, and they only have one shot at relief. The Court should not let the government run out the clock.

This case offers the solution. Despite identifying vehicle defects in related petitions, the government identifies none here. This is the optimal vehicle for review.

### I. Twelve Circuits Are Divided Three Ways

Although the government admits the conflict (BIO 13, 19), it understates and mischaracterizes the conflict. Twelve circuits have divided into three camps.

**1.** At one end of the spectrum, three circuits *require* district courts to consider intervening changes in the law that are unrelated to Sections 2 and 3.

**a.** The Fourth Circuit has been crystal clear about that. Just a few weeks ago, that court issued its third precedential opinion mandating district courts to "recalculate the Guidelines sentencing range in light of 'intervening case law.'" *United States v. Lancaster*, __ F.3d __, 2021 WL 1823287, at *3–4 (4th Cir. May 7, 2021) (citing *United States v. Collington*, 995 F.3d 347, 355 (4th Cir. Apr. 26, 2021) and *United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020)). Mentioning only *Chambers*, the government speculates that the Fourth Circuit might adopt a more permissive approach. BIO 24. But that wishful thinking is foreclosed by that court's most-recent, post-*Chambers* decisions in *Lancaster* and *Collins*, neither of which the government even cites. That glaring omission is particularly striking given Judge Wilkinson's concurrence in *Lancaster*, where he repeatedly acknowledged that "our court has departed from the measured middle of the circuit split to an absolute position." 2021 WL 1823287, at *6. Fourth Circuit law is now both clear and fixed.

**b.** So is Third Circuit law. Just last week, and expressly breaking with other circuits, that court unambiguously held that a defendant is "entitled to an accurate calculation of the Guidelines range at the time of resentencing." *United States v. Murphy*, __ F.3d __, 2021 WL 2150201, at *1, *5–8 (3d Cir. May 21, 2021) (relying on *United States v. Easter*, 975 F.3d 318, 325–26 (3d Cir. 2020)). *Murphy* refutes the government's suggestion (BIO 22) that *Easter* was not definitive. It was.

**c.** Tenth Circuit law is also clear. In *United States v. Brown*, 974 F.3d 1137 (10th Cir. 2020), the court of appeals instructed that, "[u]pon remand, the district court *shall* consider Mr. Brown's challenge to his career offender status" in light of

intervening case law. *Id.* at 1146 (emphasis added). The government plucks out permissive dictum (BIO 23), but *Brown*'s actual mandate was mandatory. And the Tenth Circuit recently confirmed that approach in *United States v. Crooks*, __ F.3d __, 2021 WL 1972428 (10th Cir. May 18, 2021). Applying *Brown*, it reiterated that Section 404 "necessarily requires a correct calculation of the guidelines range." *Id.* at *4. Again, it mandated that, "[o]n remand, the district court should recalculate Crook's guideline range . . . without the career offender guidelines enhancement." *Id.* at *6; *see id.* at *5 ("The district court should have recalculated the guidelines range."). Tenth Circuit law is no more permissive than Third or Fourth Circuit law.[1]

**2.** Taking an intermediate approach, seven circuits have held that district courts may—but need not—consider as part of their discretion a defendant's current guideline range based on intervening changes in the law that are unrelated to Sections 2 or 3 of the Fair Sentencing Act. *See United States v. Concepcion*, 991 F.3d 279, 290–91 (1st Cir. 2021); *United States v. Moore*, 975 F.3d 84, 89–92 & n.36 (2d Cir. 2020); *United States v. Robinson*, 980 F.3d 454, 464–65 (5th Cir. 2020); *United States v. Maxwell*, 991 F.3d 685, 691–93 (6th Cir. 2021); *United States v. Hudson*, 967 F.3d 605, 609, 612 (7th Cir. 2020) (citing *United States v. Shaw*, 957 F.3d 734, 741–42 (7th Cir. 2020)); *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020); *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020) (endorsing *Hudson*).

[1] The Tenth Circuit does not go quite as far as the Third and Fourth Circuits, in that it requires the intervening change in the law to clarify the Guidelines that were in effect at the original sentencing; district courts cannot use new or amended Guidelines that were not in effect. *Crooks*, 2021 WL 1972428, at *5–6 & n.9. This sub-conflict within the first camp only injects more discord into the legal landscape.

**3.** At the other end of the spectrum, the Ninth and Eleventh Circuits have held that district courts are *prohibited* from considering intervening changes in the law that are unrelated to Sections 2 and 3. While the government acknowledges that "some language" in those Circuits' opinions "could" be so read, it argues that they do not "squarely prohibit[ ]" consideration of current law. BIO 20–21, 24. Yes, they do.

**a.** The Ninth Circuit has expressly "h[e]ld that a district court that decides to exercise its discretion under [Section 404 of] the First Step Act must . . . place itself in the counterfactual situation where all the applicable laws that existed at the time the covered offense was committed are in place, making only the changes required by sections 2 and 3 of the Fair Sentencing Act." *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020). Despite that explicit prohibtion, the government asserts that the issue was not directly presented (BIO 21), since *Kelley* stated that "the only question on appeal is whether the First Step Act authorizes a plenary resentencing." 962 F.3d at 475. But the government omits the very next sentence clarifying the issue: "In other words, the parties dispute whether a court exercising its discretion to resentence a defendant under the First Step Act has the authority to . . . apply current law," including as it relates to a defendant's career-offender status. *Id*. The Ninth Circuit then made clear that Section 404 "does not authorize the district court to consider [such] legal changes" that are unrelated to Sections 2 or 3. *Id*.

**b.** Just like the Ninth Circuit, the Eleventh Circuit has expressly held that, "in ruling on a defendant's First Step Act motion, 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." *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020). That leaves no wiggle room; courts are "not free" to consider intervening changes in the law other than Sections 2 or 3.

Despite that unambiguous prohibition, the government observes that *Denson* primarily addressed whether a defendant was entitled to a hearing. BIO 21. But the Eleventh Circuit has repeatedly rejected the suggestion that this language in *Denson* is "dicta. It isn't. It is an alternative holding, and in this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings." *United States v. Gee*, 843 F. App'x 215, 217 (11th Cir. 2021) (citation omitted). The court has explained that "necessary to [its] conclusion" in *Denson* that Section 404 did not entitle the defendant to a hearing "was [its] reasoning about the district court's limited scope of authority under § 404(b) of the First Step Act." *Id*. at 217–18.

The Eleventh Circuit applied that very holding in this case. The Eleventh Circuit understood the district court to have ruled that it "could not consider whether Deruise still qualified as a career offender" under current law. Pet. App. A-1 (816 F. App'x at 428). And, relying on *Denson*, the Eleventh Circuit expressly held that the district court "did not err in concluding that it lacked authority . . . to consider Deruise's career-offender status under current law." *Id*. (816 F. App'x at 429). The government fails to explain how this unqualified language—"could not consider"; "lacked authority to consider"—can be read to permit courts to consider current law. BIO 21. It cannot. The decision below thus confirms *Denson*'s categorical prohibition.

Nor is this case unique. The Eleventh Circuit has repeatedly reaffirmed *Denson*'s holding, including in *United States v. Taylor*, 982 F.3d 1295, 1302 (11th Cir. 2020).[2] Ignoring these many decisions, the government suggests (BIO 21) that *United States v. Sims*, 824 F. App'x 739 (11th Cir. 2020) contemplated a more permissive approach. To the contrary, *Sims* made clear that, "under *Denson*, the district court was not required *or even authorized*" to consider intervening changes in the law. *Id.* at 744 (emphasis added). And that "holding in *Denson* preclude[d]" the defendant's contrary argument. *Id.* at 743. In that regard, *Sims* reaffirmed that the key language in *Denson* was holding, not dicta. *Id.* at 744 & n.2. That *Sims* gratuitously observed that the defendant would still lose even if the court could consider current law hardly means that the Eleventh Circuit might moderate its position. It hasn't, and it won't.

* * *

In the end, and all minutiae aside, there is no doubt that the circuits are badly fractured. Numerous circuits have recognized the split.[3] And it is now fully mature.

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[2] *See also United States v. Ford*, __ F. App'x __, 2021 WL 2138899, at *3 (11th Cir. May 26, 2021); *United States v. Alston*, __ F. App'x __, 2021 WL 912696, at *3 (11th Cir. Mar. 10, 2021); *United States v. Thompson*, 846 F. App'x 816, 818 (11th Cir. 2021); *United States v. Moore*, 839 F. App'x 401, 403–04 (11th Cir. 2021); *United States v. Royster*, 833 F. App'x 776, 781–82 (11th Cir. 2020); *United States v. Lanier*, 826 F. App'x 791, 795, 797 (11th Cir. 2020); *United States v. Stephens*, 824 F. App'x 870, 872 (11th Cir. 2020); *United States v. Sterlin*, 825 F. App'x 631, 635 (11th Cir. 2020); *United States v. Ward*, 824 F. App'x 630, 632–33 (11th Cir. 2020); *United States v. Bullock*, 824 F. App'x 616, 619 (11th Cir. 2020).

[3] *See, e.g.*, *Murphy*, 2021 WL 2150201, at *6 (CA3) ("several of our sister circuits have taken the opposite approach"); *id.* at *9 (Bibas, J., dissenting) ("All eleven other circuits have taken sides in a three-way conflict."); *Maxwell*, 991 F.3d at 690–91 (CA6) (acknowledging split with Fourth Circuit); *Concepcion*, 991 F.3d at 285–86 (CA1)

Reflecting the recurring nature of the question presented, every circuit with criminal jurisdiction has addressed it in at least one precedential opinion. And several judges have written separately.[4] The circuit conflict is as open and deep as can be. Yet an entrenched three-way division persists. Only this Court can restore uniformity.

## II. The Question Presented Warrants Prompt Review

**1.** Just weeks ago, Judge Wilkinson urged this Court to resolve the split, and promptly. He opined that the question presented "is an altogether serious one in sentencing, and I respectfully suggest that the sooner the Supreme Court resolves the fractured views concerning it, the better off we all will be." *Lancaster*, 2021 WL 1823287, at *5 (Wilkinson, J., concurring in the judgment). He explained: "It is important that the Guidelines remain, as a matter of simple fairness, as uniform as possible. But the circuit split now magnified means that defendants in one set of circuits will be sentenced under one set of ground rules, defendants in other circuits under another set of ground rules, and defendants in our circuit under yet a third set of criteria. To repeat, arbitrariness now besets us from every angle." *Id*. at *8.

He was right. Section 404 proceedings now vary by geography. Thus, while the government devotes much space to the merits (BIO 13–19), review is warranted

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(recognizing "divided authority"); *Moore*, 975 F.3d at 90 n.30 (CA2) ("other Circuits have split on this issue"); *Brown*, 974 F.3d at 1142 (CA10) ("Our sibling circuits have taken different positions."); *Kelley*, 962 F.3d at 475 (CA9) ("we deepen a circuit split").

[4] *See, e.g.*, *Murphy*, 2021 WL 2150201, at *8–10 (Bibas, J., dissenting); *Lancaster*, 2021 WL 1823287, at *4–8 (Wilkinson, J., concurring in the judgment); *Concepcion*, 991 F.3d at 292–313 (Barron, J., dissenting); *Brown*, 974 F.3d at 1146–51 (Phillips, J., dissenting); *Chambers*, 956 F.3d at 675–80 (Rushing, J., dissenting).

no matter what approach is correct. If the Third, Fourth, and Tenth Circuits are correct, then crack offenders elsewhere are being improperly denied the benefit of current law. If the Ninth and Eleventh Circuits are correct, then crack offenders elsewhere are improperly receiving the benefit of current law. And if the intermediate camp is correct, then the Third, Fourth and Tenth Circuits are improperly mandating, and the Ninth and Eleventh Circuits are improperly precluding, a key permissive consideration. These methodological differences are not "limited" (BIO 21); they are fundamental. And the current tripartite regime will all but guarantee "unwarranted sentence disparities" based on geography alone. 18 U.S.C. § 3553(a)(6). Liberty should not turn on such an arbitrary criterion.

**2.** There is a lot of liberty on the line, too. There have been numerous changes in the law over the last decade, particularly with regard to the applicability of the career-offender enhancement in U.S.S.G. § 4B1.1. Those changes stem primarily from this Court's decisions. For example, in *Descamps v. United States*, 570 U.S. 254 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Court clarified how to apply the modified categorical approach, which governs the "crime of violence" and "controlled substance offense" definitions in U.S.S.G. § 4B1.2(a)–(b). Lower courts had previously been misapplying the modified categorical approach. So in light of *Descamps* and *Mathis*, many crack offenders who were sentenced as career offenders before August 3, 2010 would no longer qualify as career offenders today.

And the career-offender enhancement is a "particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). It automatically places all career

offenders in the highest criminal history category, and it typically increases their offense level too. U.S.S.G. § 4B1.1(b)–(c). As a result, and by design, it often catapults the guideline range to somewhere "at or near" the statutory maximum, 28 U.S.C. § 994(h), which is especially high in crack cases, *see* 21 U.S.C. § 841(b)(1)(A)–(C).

The severity of the career-offender enhancement raises the stakes. Thus far, more than half of all crack offenders to receive relief under Section 404 have been career offenders. U.S. Sentencing Comm'n, First Step Act of 2018 Resentencing Provisions Retroactivity Data Report tbl. 5 (May 2021).[5] And two thirds of all crack offenders to receive relief were originally sentenced between 2005 and 2010, *id*., tbl. 2, when the average career-offender guideline range was about 20 years (and the average sentence was 15 years), U.S. Sentencing Comm'n, Report to the Congress: Career Offender Sentencing Enhancements 23 (Aug. 2016).[6] That average guideline range will plummet if district courts consider current law in Section 404 proceedings.

The government responds that, because Section 404 relief is discretionary, the circuit conflict "may not" have a substantial practical effect. BIO 24. But that unsupported speculation is foreclosed by this Court's precedents, which have repeatedly recognized that the guideline range serves as the "starting point," "initial benchmark," "essential framework," "central role," and "lodestar" of sentencing. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345–46 (2016). Indeed, it is an

[5] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf.

[6] https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

empirical fact that, "when a Guidelines range moves up or down, offenders' sentences tend to move with it." *Id*. at 1346 (quoting *Peugh v. United States*, 569 U.S. 530, 544 (2013) (brackets omitted)). Thus, if district courts consider the non-career offender guideline range under current law, the likelihood and extent of sentence reductions will increase sharply. The practical impact of the question presented is undeniable.

**3.** In addition to being divisive, recurring, and important, the question presented requires prompt resolution. Imposed before August 3, 2010, many sentences for covered crack offenses will expire soon. And offenders are more likely obtain immediate release if courts consider current law. Indeed, many offenders have already served more than the high-end of their guideline range under current law. Delaying resolution, even for another few months, is time they will never get back.

Moreover, Section 404 proceedings are currently underway throughout the country. And if the Court ultimately rules in Petitioner's favor, then offenders in several circuits may be unable to benefit from the Court's decision. That is so because, under Section 404(c), eligible offenders may not re-file a second Section 404 motion if they have already had such a motion denied after a complete review on the merits. Thus, the Court should grant review now in order to limit the number of people who may potentially be subject to Section 404(c)'s bar on second motions.

Meanwhile, there is no upside to delay. As explained, there are dozens of appellate opinions addressing the question presented. Every circuit has issued at least one precedential opinion. Many have issued several, and numerous circuit

judges have written separately. Further percolation would not sharpen the arguments; lower courts are already just rehashing what has previously been said.

**4.** Finally, the government observes (BIO 13) that the Court previously denied review of a similar question in *Hegwood v. United States*, No. 19-5743 (cert. denied Oct. 7, 2019) and *Bates v. United States*, No. 20-535 (cert. denied Mar. 1, 2021). But *Hegwood* was the very first appellate decision to address the question, and there was no conflict when the Court denied review. As for *Bates*, the government itself explained that it was not a suitable vehicle for several reasons. *See Bates* BIO 10–11, 18–19, 23–25. Plus, review was denied before the conflict had fully matured. Nor was it a representative vehicle, in that it involved an amendment to the minor-role Guideline, not intervening case law affecting a defendant's career-offender status.

## III. The Court Should Grant Review in This Case

Because the conflict requires prompt resolution, the only question is: which case should the Court grant? The government has already signaled the answer. Unlike *Bates* and two pending petitions, it does not identify any vehicle defects here. That's because there are none. This case is the best vehicle, and it's not a close call.

### A. This Case Is an Excellent Vehicle

**1.** Petitioner Deruise has a great personal stake in the question presented. Indeed, it will likely determine whether he is immediately released from prison.

At his 2007 sentencing, Petitioner's career-offender guideline range was 322–387 months. That range was driven by the statutory maximum of life for his crack offense. *See* PSR ¶¶ 32, 102; U.S.S.G. §§ 4B1.1(b)(1), (c)(2)(A). The district court

varied downward to a sentence of 264 months, consisting of 204 months for the crack offense plus a mandatory consecutive 60 months for the 18 U.S.C. § 924(c) offense.

In the Section 404 proceeding, the parties agreed that, because the new statutory maximum for Petitioner's crack offense after Section 2 was 40 years instead of life, his career-offender guideline range dropped to 188–235 months for the crack offense, plus 60 months for the § 924(c) offense. The district court reduced his sentence to 228 months, consisting of 168 months for the crack offense and 60 months for the § 924(c) offense. That was a 20-month downward variance from the new career-offender range, and a 36-month reduction from the original sentence.

However, Petitioner would not be a career offender at all under current law. The government does not dispute that point here.[7] Without the career-offender enhancement, his guideline range today would be 130–162 months, plus 60 months for the § 924(c) offense. And his current release date is June 4, 2023, two years from now. *See* Fed. Bureau of Prisons, Inmate Locator, https://www.bop.gov/inmateloc/. Thus, a sentence in the middle of his current guideline range—*e.g.*, 144+60 for 204 months, 2 years below his current sentence—would result in his immediate release.

And there is good reason to believe that the court would impose such a sentence. After all, the court varied downward from the career-offender guideline range twice, both at the original sentencing and then in the Section 404 proceeding.

[7] The government argued otherwise below, relying on 2011 rulings in Petitioner's 28 U.S.C. § 2255 case. But by asking whether the PSR facts satisfied the federal definition, those rulings engaged in the exact mode of analysis that *Descamps* later forbade. That explains why neither court below accepted the government's argument. And that explains why the government has abandoned that argument in this Court.

Yet the career-offender ranges still anchored those determinations. Had the career-offender enhancement not applied at all, there is no reason to doubt that the court would have defaulted to a sentence within the unenhanced guideline range.

**2.** Reflecting these heightened stakes, Petitioner pressed this issue at every turn. In the district court, he argued that he was not a career offender under current law, and he urged the court to "impose a reduced sentence in accordance with current law and guidelines." Dist. Ct. Dkt. No. 149 at 3, 5–8; *see* Dist. Ct. Dkt. No. 155 at 3–5. After the court ruled without expressly addressing that argument, Petitioner moved to clarify. He reiterated that "he should no longer be considered a career offender," and he sought a ruling because it "could affect any issue raised on appeal." Dist. Ct. Dkt. No. 158 (attached here as App. 1a–2a). In response, the court clarified that, because Section 404 did not authorize a full re-sentencing, "the Court continued to treat [him] as a career offender." Dist. Ct. Dkt. No. 159 (attached here as App. 4a).

On appeal, Petitioner argued that "the district court erred when it concluded that the First Step Act did not allow it to consider whether [he] was still a career offender under current law." Pet. C.A. Br. 17. The Eleventh Circuit considered and rejected that argument. Pet. App. A-1 (816 F. App'x at 428–29). Applying *Denson*, it held that "the district court not err in concluding that it lacked authority . . . to consider [his] career-offender status under current law." *Id.* (816 F. App'x at 429).

In short, the question presented was pressed and passed on in the lower courts. They did not issue any alternative ruling that might obstruct review. And Petitioner would likely be immediately released were he to prevail here. This is an ideal vehicle.

### B. The Other Pending Petitions Are Poor Vehicles

**1.** *Kelley* is a poor vehicle. In light of the Rule 11(c)(1)(C) plea agreement, the government raises a threshold question about the district court's authority to grant relief. *See Kelly* BIO 13–14, 28–29 (No. 20-7474). And the government raises a threshold question of mootness, *id.*, given that Petitioner Kelley was released from prison on February 21, 2020. *See* BOP, Inmate Locator, *supra*. In any event, the most she could obtain is a 1-year reduction in supervised release from 5 to 4 years. But she never sought that relief below. *See* Case No. 06-cr-136, Dist. Ct. Dkt. Nos. 180, 196 (E.D. Wash. 2019). And because her supervised release is based on 21 U.S.C. § 841(b)(1)(B), not the Guidelines, her career-offender status has no bearing on the only potential relief that is still available. She has no stake in the question presented.

In fact, Petitioner Kelley could now obtain even greater relief without invoking Section 404 at all. Because she has already served more than one year of supervised release, she could file a motion to *terminate* her supervised release outright under 18 U.S.C. § 3583(e)(1). *See United States v. Johnson*, 529 U.S. 53, 60 (2000). Because § 3583(e)(1) provides an established mechanism for Petitioner Kelley to seek even greater relief than what she could obtain under Section 404, her case would be a particularly poor vehicle for the Court to take up and resolve the question presented.

**2.** *Harris* is a poor vehicle too. As the government has explained (and Petitioner Harris has not replied), the facts there led the district court to retain his original life sentence, even though it was no longer mandatory. So his career-offender status is unlikely to make any difference. *See Harris* BIO 11–12, 23–24 (No. 20-6832).

Plus, that petition comes from the Fifth Circuit, which has adopted the intermediate position. The Court should instead grant review out of the Ninth or Eleventh Circuits. The government endorses their extreme position that Section 404 "does not authorize" consideration of current law. BIO 16–17. And defendants in those circuits would stand to benefit from any holding by this Court that stops short of that position.

**3.** Finally, there are a pair of recently-filed petitions: *Concepcion v. United States*, No. 20-1650 (docketed May 26, 2021) and *Maxwell v. United States*, No. 20-1653 (docketed May 27, 2021). But, like *Harris*, they hail from circuits in the intermediate camp (the First and Sixth Circuits). Moreover, they will not even be conferenced until late September. By that time, the initial merits brief in this case (along with amicus briefs) would already be filed. And both of those Petitioners expressly agree that "[t]he Court should act now." *Concepcion* Pet. 5; *Maxwell* Pet. 5.

In sum, this is the only case that is both clean and ripe. The clock is ticking. And no better vehicle is forthcoming. The Court should grant review here and now.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
*/s/ Andrew L. Adler*
ANDREW L. ADLER
*Counsel of record*
PETER BIRCH
ASS'T FED. PUBLIC DEFENDERS
1 E. Broward Blvd., Suite 1100
Ft. Lauderdale, FL 33301
(954) 536-7436
Andrew_Adler@fd.org

# APPENDIX

## (Motion to Clarify & Order on Motion to Clarify)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80041-CR-MARRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DWYNE BYRON DERUISE,

Defendant.
_____/

**UNOPPOSED MOTION TO CLARIFY**

Defendant, Dwyne Deruise, by and through undersigned counsel, requests the Court to clarify if it classified Defendant as a career offender in granting Defendant's Motion To Reduce Sentence. As grounds therefor, Defendant states:

1. On May 3, 2019, Defendant filed a Motion To Reduce Sentence under the First Step Act. (DE 149). In his motion Defendant takes the position that he should no longer be considered a career offender as his convictions for battery on a law enforcement officer are no longer categorically a crime of violence. If not a career offender, Defendant's advisory guideline range is 130 to 162 months imprisonment. If classified as a career offender the advisory guideline range is 188 to 235 months.
2. In its Response the Government takes the position that Defendant should still be classified as a career offender with a guideline range of 188 to 235 months. (DE 152:6).
3. In its order the Court appears to continue to classify Defendant as a career offender but it is not expressly stated. As this could affect any issue

raised on appeal, Defendant seeks clarification whether the Court, in granting Defendant's motion, continued to classify him as a career offender.

**4.** Undersigned counsel has contacted Assistant United States Attorney Sean Cronin who does not object to this Court issuing an order clarifying whether it continued to classify Defendant as a career offender in granting his Motion To Reduce Sentence.

WHEREFORE, Defendant respectfully requests the Court to grant the above-styled motion.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

BY: *s/ Peter Birch*
Peter Birch
Assistant Federal Public Defender
Attorney for the Defendant
Florida Bar No. 304281
450 South Australian Avenue, Suite 500
West Palm Beach, Florida 33401
(561) 833-6288 - Telephone
Peter_Birch@FD.org

**CERTIFICATE OF SERVICE**

I HEREBY certify that on July 3, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

*s/ Peter Birch*
Peter Birch

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80041-CR-MARRA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DWYNE BYRON DERUISE,

Defendant.
_____/

**ORDER ON MOTION TO CLARIFY**

THIS CAUSE is before the Court upon Defendant's Unopposed Motion to Clarify [DE 158]. This Court having reviewed the pertinent portions of the record and being duly advised in the premises, it is hereby

ORDERED and ADJUDGED that the Court has concluded that a motion to reduce a defendant's sentence under the First Step Act does not authorize a full resentencing or a sentencing *de novo*. Therefore, in granting Defendant's motion for a reduction of his sentence, the Court continued to treat Defendant as a career offender.

DONE and ORDERED in West Palm Beach, Florida, this 3rd day of July, 2019.

KENNETH A. MARRA
United States District Judge

Copies provided to:

All counsel