NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JEFFERSON LEVINE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Brenda G. Bryn
Assistant Federal Public Defender
One East Broward Blvd., Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in order to properly exercise its discretion under Section 404(b) of the First Step Act of 2018 to impose a reduced sentence for an eligible defendant, the district court must consider all of the applicable 18 U.S.C. § 3553(a) factors, or whether consideration of § 3553(a) factors is merely permissive but not required under Section 404(b).

2. Whether proper exercise of the court's discretion under Section 404(b) necessitates consideration of how post-sentencing conduct affects the § 3553(a) factors, if argued by the defendant.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Jefferson Levine ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming Petitioner's convictions and sentence, *United States v. Levine*, 829 F. App'x 909 (11th Cir. Oct. 7, 2020) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming Petitioner's convictions and sentence was entered on Oct. 7, 2020. This petition is timely filed pursuant to

Supreme Court Rule 13.1, as extended by this Court's March 19, 2020 order due to the COVID-19 pandemic.

STATUTORY PROVISIONS INVOLVED

The First Step Act of 2018

Section 404 of the First Step Act, entitled "Application of the Fair Sentencing Act," 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. 2374) 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 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.

Section 2 of the Fair Sentencing Act, entitled "Cocaine Disparity Reduction," provides in pertinent part:

(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".

21 U.S.C. § 841. Prohibited Acts A

As amended by the Fair Sentencing Act of 2010, § 841 provides, in pertinent part:

(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowing or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

* * *

(b) Penalties. Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

(iii) 280 grams or more of a substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

Such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall . . . include a term of supervised release of at least 5 years in addition to such term of imprisonment. . ..

(B) In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 28 grams or more or a mixture or substance described in clause (ii) [*i.e.,* cocaine] which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years . . . Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall . . . include a term a term of supervised release of at least 3 years in addition to such term of imprisonment.

18 U.S.C. § 3553. Imposition of a sentence

(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 . . . ;

(5) any pertinent policy statement—

> (A) issued by the Sentencing Commission . . . ;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

The conviction and original sentence

On December 14, 2000, Petitioner was charged in a two-count indictment with: possessing with intent to distribute in excess of five (5) grams of a substance containing a detectable amount of crack cocaine on September 14, 2000 (Count 1), and possessing with intent to distribute in excess of fifty (50) grams of a substance containing a detectable amount of crack cocaine on September 21, 2000 (Count 2), both in violation of 21 U.S.C. § 841(a)(1).

On March 26, 2001, the jury acquitted Mr. Levine of Count 1, but convicted him of count 2 as charged.

In the pre-sentence investigation report, the Probation Office found that Petitioner's base offense level was 32 because he was accountable for 109 grams of crack. Ultimately, however, that finding had no effect on Petitioner's sentence because he faced a penalty of 10-life on Count 2 (for 50 g. or more of crack), and qualified as a Career Offender. As a Career Offender with a statutory maximum of life under § 841(b)(1)(A), his guideline offense level automatically rose to a 37. And with a criminal history category of VI, his Guideline range as a Career Offender was 360 months-life.

At the July 17, 2001 sentencing, the Guidelines were mandatory. The court sentenced Petitioner at the top of the mandatory Guideline range, to life imprisonment, followed by 5 years supervised release. (DE 51). The Court did not discuss the § 3553(a) factors in imposing sentence. Nor did the Court explain why it chose to sentence Petitioner to life imprisonment, as opposed to any other term within the 360-life range.

The Fair Sentencing Act of 2010

The Anti-Drug Abuse Act of 1986, which governed when Petitioner was sentenced, treated each gram of crack cocaine as the equivalent of 100 grams of powder. On August 3, 2010, in light of the longstanding and widespread recognition that penalties for crack cocaine under the Anti-Drug Abuse Act were far too harsh and had a disparate impact on African Americans, Congress enacted the Fair Sentencing Act of 2010 ("FSA"). *See Kimbrough v. United States*, 552 U.S. 85, 97-99 (2007); *Dorsey v. United States*, 567 U.S. 260, 268-69 (2012). Section 2 of the FSA modified the statutory penalties for crack offenses by increasing the amount of crack necessary to support the statutory ranges for convictions under § 841(b)(1)(A) from 50 to 280 grams, for convictions under § 841(b)(1)(B) from 5 to 28 grams, and for convictions under § 841(b)(1)(C) from less than 5 to less than 28 grams. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010).

The purpose of the FSA was to "restore fairness to Federal cocaine sentencing," *id*., "decrease racial disparities and help restore confidence in the criminal justice system, especially in minority communities."[1] "The change had the effect of lowering the 100–to–1 crack-to-powder ratio [underlying the penalty scheme in § 841(b)] to 18–to–1." *Dorsey*, 567 U.S. at 269. But that change applied only to defendants sentenced on or after August 3, 2010. *Id*. at 264, 281. It did not apply retroactively to defendants like Petitioner sentenced before its enactment.

Commutation of Mr. Levine's term of imprisonment

On October 11, 2016, President Obama commuted Petitioner's life sentence to a term of 327 months imprisonment, leaving his 5-year term of supervised release intact.

The First Step Act of 2018

On December 21, 2018, Congress enacted the First Step Act of 2018. Pub. L. No. 115-391.

[1] Letter from Senators Durbin and Leahy to Attorney General Holder (Nov. 17, 2010), https://sentencing.typepad.com/files/fair-sentencing-act-ag-holder-letter-111710.pdf.

Section 404 of the First Step Act made sections 2 and 3 the Fair Sentencing Act fully retroactive to offenders like Petitioner who were sentenced before its enactment. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841). The Act passed the Senate by a vote of 87–12 and the House by a vote of 358–36.

Under Section 404 of the First Step Act, eligibility for retroactive application of the FSA turns on whether the defendant was previously sentenced for a "covered offense." Congress defined a "covered offense" in § 404(a) of the Act 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 of 2010 [] that was committed before August 3, 2010." In § 404(b), Congress authorized any court that "imposed a sentence for a covered offense" to now "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 [] were in effect." Finally, in § 404(c), Congress clarified that while section 404 gave the sentencing court discretion to grant a reduction if the defendant was eligible, the Act did not "require" such a reduction. *See* Section 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."). However, Congress was also clear in § 404(c) that a First Step Act motion could only be denied "after a complete review on the merits."

Petitioner's motion for appointment of counsel to file a First Step Act motion

Although the Federal Defender's Office had remained counsel of record for Petitioner since his appeal, on March 18, 2019, due to a misunderstanding he filed a *pro se* "Motion for Appointment of Counsel" to assist him in "bring[ing] a proper [First Step Act] motion to [the district court's] attention."

Two days later, on March 20, 2019, the district court entered an order denying Petitioner's request for the appointment of counsel, stating:

> Count Two now would be punishable by up to forty (40) years in prison. As a Career Offender, the guidelines now would have been Offense Level 34, Criminal History Category VI for a range of 262-327 months in prison. The Court previously sentenced at the high end of the guidelines. No relief is due since Levine is serving a commuted sentence of 327 months.
>
> Wherefore, Levine's Motion for Appointment of Counsel [DE -100] is Denied, without prejudice to his filing a Motion to Reduce Sentence.

Petitioner's counseled motion to reduce sentence under the First Step Act

On June 18, 2019, with the assistance of counsel, Petitioner filed a Motion to Reduce Sentence under the First Step Act. In the new counseled motion, Petitioner argued as a threshold matter that because the court had "imposed a sentence for a covered offense," and his sentence has not been "previously imposed or previously reduced in accordance" with section 2 of the Fair Sentencing Act, the district court "may . . . impose a reduced sentence as if" section 2 of the Fair Sentencing Act "were in effect."

He noted that under Section 2 of the Fair Sentencing Act, his statutory range had been reduced from a term of 10 years-life and a term of supervised release of 5-life under 21 U.S.C. § 841(b)(1)(A)(2001), to a term of imprisonment of 5-40 years and a term of supervised release of at least 4 years under 21 U.S.C. § 841(b)(1)(B). Petitioner also noted that the court had incorrectly stated in its prior order that "No relief is due since Levine is serving a commuted sentence of 327 months." He noted that as of that writing every court that had considered that very issue had ruled that the fact that a defendant's sentence had been commuted did *not* bar the district court from imposing a further reduced term of imprisonment and supervised release pursuant to the First Step Act. And indeed, he pointed out, the fact that President Obama's order of commutation expressly left intact his original 5-year term of supervised release imposed under § 841(b)(1)(A) in and of itself confirmed that he was now eligible under the Act for a further reduction in both his imprisonment and supervised release.

Petitioner asked the court, accordingly, to exercise its discretion under Section 404(b) to reduce both his term of incarceration and his term of supervised release after considering the § 3553(a) factors, which had been impacted by his substantial post-sentencing rehabilitation. As support, he first detailed 33 separate courses that he had completed starting in 2002, underscoring that "[e]ven while serving his life sentence – thinking he might never see a day of freedom – he had demonstrated in multiple ways that he had an intense desire to turn his life around, educate himself, rehabilitate himself, become a better parent, and become a more productive member of society. (DE 102:10). But even beyond that, Petitioner argued, and most notably:

> [U]nlike the many defendants in this district who have received substantial reductions under the First Step Act despite lengthy disciplinary records while in jail,[2] [he] ha[d] *not had even one disciplinary infraction for the past 18 years*. After two early DRs in 2001 for "being in an unauthorized area," and "refusing to obey an order," [he] completely turned himself around. He has had perfect behavior while in prison ever since. Judge Bucklew in [*United States v.*] *Stilling* [No. 8:08-cr-230-T-24SPF, DE 112 (M.D. Fla. March 15, 2019)] took into account the defendant's good conduct in imposing a reduced sentence after a commutation. So did Judge Lefkow in [*United States v.*] *Biggs*, [2019 WL 2120226 (N.D.Ill. May 15, 2019)]. The Court should do so here as well.
>
> For the Court to refuse such clearly-authorized and well-deserved relief for [him], when the similarly-situated defendants in [other commutation cases] have all had their commuted sentences further reduced under the First Step Act, would create unwarranted disparities contrary to Congress' intent.
>
> Finally, unlike the many above-discussed defendants who have received a "time served" sentence through a variance below the Career Offender range, [he] is *not* asking the Court for a variance. He is simply seeking a sentence at the bottom of the newly-applicable reduced Career Offender range, as well as the now-reduced minimum statutory term of supervised release.

[2] Petitioner informed the court that many Career Offenders in the Southern District of Florida had received substantial reductions under the First Step Act with less than perfect disciplinary records, and that even defendants who had had their sentences commuted had received further reductions, based upon a good prison record or even without one. He argued that to refuse him relief when all of these defendants had received reductions would "create unwarranted disparities contrary to Congress' intent."

Within one (1) day – without even calling for a response from the government to find out if the government would agree to a further reduction within the new guideline range in light of Petitioner's post-sentencing rehabilitation and his extraordinary accomplishment in serving 18 straight years without a single disciplinary infraction – the district court summarily denied the motion, stating:

> On March 19, 2019, this Court denied a request for the appointment of counsel [DE-101]. In doing so, the Court did not hold that his prior commutation of sentence disqualified him from relief under the First Step Act. Indeed, the Court has previously rejected the Government's positon that commutation disqualifies a defendant from receiving First Step Act relief. *See,* [DE-210] in *U.S. v. Straughter,* 94-14098 (S.D. Fl. March 20, 2019.
>
> In this latest request, Levine seeks relief pursuant to Section 404 of the First Step Act. Count Two now would be punishable by up to forty (40) years in prison. As a Career Offender, the guidelines now would have been Offense Level 34, Criminal History Category VI for a range of 262-327 months in prison. The Court previously sentenced at the high end of the guidelines. No relief is due since Levine is serving at the high end of the guidelines sentence of 327 months. On March 20, 2019, the Court understood that it had the discretion to further reduce Levine's 327 month sentence and his ensuing five years of supervised release. The Court has considered the additional post-sentence rehabilitation evidence presented in this latest motion, along with the proffered disparate sentences imposed by other judges, and again exercises discretion to deny relief.
>
> As usual, [defense counsel] should be commended for her excellent advocacy. In spite of that, relief is denied.

The Eleventh Circuit Appeal and Affirmance

Petitioner appealed to the Eleventh Circuit, arguing that the district court had abused its discretion under the First Step Act in two separate respects in its order denying him any relief from his current sentence.

First, he argued, the district court had not adequately and properly considered the 18 U.S.C. § 3553(a) factors. In that regard, he noted with significance that the court had not solicited the government's input before denying relief and plainly had not explicitly or implicitly considered

all relevant § 3553(a) factors, or his arguments as to those factors before denying him relief. In the latter regard, he acknowledged that the court need not explicitly mention every factor but argued that the record must still show that the court considered all of the relevant factors. And here, he argued, the record did not show the required "consideration" because the court had not even acknowledged § 3553(a) in its order, and did not explicitly address his arguments as to how his perfect disciplinary record impacted several relevant factors. For a court to properly exercise its discretion under Section 404(b), he argued, the court cannot simply focus on past conduct; it must consider how a defendant's post-sentencing conduct impacts the need for the current sentence to deter him from recidivating, protect the public, and avoid unwarranted disparities. Ultimately, he argued, the court must assure – consistent with Congress' express dictate in § 3553(a) – that whatever sentence is imposed (or left intact) is "sufficient but not greater than necessary to comply with all of the purposes of sentencing" identified in § 3553(a)(2) at this time. The district court did not do so here.

Second, he argued, the district court had not provided an adequate explanation for its ruling. Indeed, he argued, the court's statement that it had originally sentence him to the high end of the Guidelines range (when it was life) so it would keep the current sentence at the top of the amended range, did not show that the court had considered all of the relevant § 3553(a) factors or his arguments as to how his post-sentencing conduct impacted those factors. Rather, the paltry explanation given confirmed that the court remained fixated upon the law-breaking man he was in 2001, and refused to consider the changed, law abiding man he had shown himself to be after having served 18 years in prison without violence, drug use, or any infraction. There was nothing in the court's order that would confirm that the court understood that its exercise of discretion under Section 404(b) must be based on all of the evidence available to it in 2019, not simply his

pre-offense criminal record dating back to 2001, and it must assure that the sentence imposed was "sufficient but not greater than necessary" to comply with all of the purposes of sentencing in § 3553(a)(2).

After the briefing concluded, Petitioner filed two letters of supplemental authority pursuant to Fed. R. App. P. 28(j). First, he alerted the Eleventh Circuit to *United States v. Shaw*, 957 F.3d 734 (7th Cir. April 28, 2020), where the Seventh Circuit had reversed a denial of Section 404 relief where the district court's silence as to a defendant's specific arguments as the relevance of his post-sentencing conduct to the § 3553(a) factors left no "assurance that the district court considered [those] arguments, even if it didn't ultimately find them persuasive." *Id.* at 742. In his case, Petitioner argued, the district court was similarly silent as to his specific arguments for a reduction in his term of imprisonment to the bottom of the reduced Career Offender range, and/or the new statutory minimum term of supervised release. A crucial fact supporting both requests, he noted was his perfect disciplinary record which the district court never specifically acknowledged. Here, as in *Shaw*, he argued, the court "cannot confidently say that, had the district court taken [the defendant's] arguments into account, the court would have decided as it did: denying [the] motion for a reduced sentence." *Id.*

Thereafter, Petitioner advised that in *United States v. Jones*, 962 F.3d 1290 (11th Cir. June 16, 2020), where the court had not only confirmed that he had a "covered offense" under Section 404(a), and recognized that under Section 404(b) a district court "may consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a)," but indeed, on the latter point had cited with approval *United States v. Allen*, 956 F.3d 355 (6th Cir. 2020). That was significant for his case, he argued, since the Sixth Circuit in *Allen* found that a district court had reversibly erred in believing that its authority under Section 404(b) was limited to considering the

defendant at the time he committed the "covered offense," and "any good behavior that occurred after the covered offense is immaterial." *Id.* at 357. In his case, Petitioner argued, the district court did not acknowledge § 3553(a), and its single stated reason for denial suggested that it had erroneously considered his conduct only at the time he committed the "covered offense." There was no indication in the order of denial, he noted, that the court actually understood that under Section 404(b) his good conduct (indeed, his perfect disciplinary record for over 18 years) was a relevant factor to be considered. Accordingly, he argued, just as in *Jones* where the court reversed because of the possibility that the court "applie[d] an incorrect standard" in denying relief to two eligible defendants under Section 404(b), the court should remand for reconsideration of a discretionary reduction under the correct standard.

The government did not respond to either letter. Although it notably had not disputed the correctness of these arguments for a remand after *Jones*, the Eleventh Circuit refused to remand the case.

Indeed, on October 7, 2020, without hearing oral argument, a panel of the Eleventh Circuit issued a decision affirming the district court's denial of any relief to Petitioner, even while recognizing that the district court had only considered some – not all – of the relevant § 3553(a) factors here. *United States v. Levine*, 829 F. App'x 909 (11th Cir. Oct. 7, 2020). In concluding that consideration of all of the § 3553(a) factors was *not* legally required in a Section 404 proceeding, as would be the case at an initial sentencing, the court stated:

> Although district courts are required to consider the § 3553(a) factors at the initial sentencing, *see Chavez-Meza v. United States*, 585 U.S. ___, 138 S.Ct. 1959, 1963 [] (2018), this Court has not required them to consider those factors when determining whether to reduce a sentence under the First Step Act. *See Jones*, 962 F.3d at 1304 ("In exercising their discretion [district courts] *may* consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a)." (emphasis added). And, even where consideration of the § 3553(a) factors is mandatory, like at the initial sentencing stage, it is not necessary for the district court

> to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors. *United States v. Kuhlman*, 711 F.3d 1321, 1326 (11th Cir. 2013).

Id. at 912.

Here, the court found it "evident from the record" that the district court had considered "several" § 3553(a) factors, namely, that Levine was previously sentenced at the high end of the Career Offender guideline; the original sentence was thus based in part on his criminal history; his "career offender status" had not changed; and – according to the court – the record showed that "the district court also considered the 'post-sentence rehabilitation evidence' Levine presented, 'along with the proffered disparate sentences imposed by other judges.'" *Id.* at 913. However, the court found, the district court

> "again exercise[d] discretion" not to reduce Levine's sentence. Rather, it found that a 327-month sentence was warranted, even if it was on the "high end" of the guideline range. Under this Court's precedent, the district court did not abuse its discretion when it implicitly considered the § 3553(a) factors without "affirmatively show[ing] that it considered all of them.

Id.

Nor, in the Eleventh Circuit's view, did the district court abuse its discretion in failing "to explain why, 'after [Levine] had served 18 straight years in prison without a single disciplinary incident, . . . a sentence at the bottom of the guideline range . . . would not have been sufficient to satisfy the goals of sentencing." *Id.* Neither *Rita v. United States*, 551 U.S. 338 (2007) nor any circuit precedent required such an explanation here. *Id.*

REASON FOR GRANTING THE WRIT

The Circuits are in conflict on whether, in order to properly exercise its discretion under Section 404(b) of the First Step Act of 2018, the district court must consider all of the 18 U.S.C. § 3553(a) factors as applicable at the present time including factors impacted by post-sentencing conduct, or whether consideration of the § 3553(a) factors is permissive and never required in a Section 404 proceeding.

The circuits are in conflict on two related issues: first, whether a district court must consider the "applicable" 18 U.S.C. § 3553(a) factors in order to properly exercise its discretion to impose a reduced sentence for an eligible defendant under Section 404(b) of the First Step Act, and second, whether a proper exercise of discretion under Section 404(b) requires that the court consider how post-sentencing conduct affects the § 3553(a) factors, if argued by the defendant.

These conflicts are untenable. They can and should be resolved in this case.

I. The threshold issue: Whether consideration of the § 3553(a) factors is permissive or mandatory under Section 404.

A. The circuit conflict.

1. On one side of this threshold conflict stand the Fifth, Eighth, Tenth, and the Eleventh Circuits. In each of these circuits, consideration of the § 3553(a) factors is permissive, not mandatory. Notably, both the Eighth and Tenth Circuit have found significant, in so ruling, that there is no mention of § 3553(a) in Section 404. *See United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020) ("When reviewing a section 404 petition, a district court may, but need not, consider the section 3553 factors;" citing a long line of Eighth Circuit decisions so holding; finding significant that Section 404 "does not mention the section 3553 factors"); *United States v. Mannie*, 971 F.3d 1145, 1158 at n. 18 (10th Cir. 2020) ("Notwithstanding the fact that neither the 2018 FSA nor [18 U.S.C.] § 3582(c)(1)(B) reference the 18 U.S.C. § 3553(a) factors, they are permissible, although not required, considerations when ruling on a 2018 FSA motion").

Although the Eleventh Circuit in *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020) did not articulate its precise rationale for adopting a similarly permissive rule with regard to the § 3553(a) factors under Section 404, it has unquestionably treated § 3553(a) as a permissive consideration rather than mandatory procedural requirement. *See id.* at 1304 ("District court have wide latitude . . . in [the § 404] context[, and i]n exercising their discretion they may consider all relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a)"). Indeed, in the decision below, the Eleventh Circuit cited *Jones* as direct support for its specific holding that – by contrast to original sentencings – in a Section 404 proceeding district courts are not "required" to consider the § 3553(a) factors. *Levine*, 829 F. App'x at 912. And in fact, the court below upheld the district court's exercise of its discretion as proper under Section 404(b) notwithstanding its recognition that there was no "affirmative[] show[ing]" on the record that the court considered "all of" the § 3553(a) factors. *Id.* at 913.

2. On the other side of this threshold conflict stand the Third, Fourth, Sixth, and D.C. Circuits. In *United States v. Easter*, 975 F.3d 318 (3rd Cir. 2020), the Third Circuit acknowledged that the threshold question of whether a district court *must* consider any or all of the § 3553(a) factors under Section 404(b), had divided its sister courts. *Id.* at 323. While noting that the "emerging consensus is that, *at minimum*, a district court *may* consider the § 3553(a) factors" in a First Step Act proceeding, 975 F.3d at 323 (emphasis added), and that some courts had not yet weighed in, the Third Circuit recognized that some courts – in particular, the Eighth Circuit in *Moore*, the Tenth in *Mannie*, and the Eleventh Circuit in *Jones* – had concluded definitively that consideration of the § 3553(a) factors is "permissive, although not required."

The Third Circuit in *Easter* squarely rejected the view of these courts. Instead, expressing its agreement with the Sixth Circuit in *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir.

2020) that § 404 review requires a "thorough renewed consideration of the § 3553(a) factors," and the Fourth Circuit in *United States v. Chambers*, 56 F.3d at 674, that the § 3553(a) factors "must apply," the Third Circuit likewise recognized in *Easter* that district courts *must* consider "all of the § 3553(a) factors to the extent they are applicable" in deciding whether to reduce an eligible defendant's term of imprisonment.

Most recently, in *United States v. White*, 984 F.3d 76 (D.C. Cir. 2020) the D.C. Circuit noted that the government had actually agreed in that case that the district court "should give proper consideration to the sentencing factors outlined in 18 U.S.C. § 3553(a) in assessing [a] motion for reduced sentence." And indeed, the D.C. Circuit ordered that the court do so on remand. *Id.* at 92-93. Given the government's concession in *White* and other cases (including *Chambers*), there should be no dispute that the Eleventh Circuit erred in holding that consideration of the § 3553(a) factors was not required here.

B. The Eleventh Circuit and other courts holding that consideration of the § 3553(a) factors under Section 404(b) is merely permissive, and not mandatory, are incorrect.

For the many reasons explained by the Third Circuit in *Easter*, the ruling below and by similar courts is incorrect. A district court *must* consider "all of § 3553(a) factors to the extent they are applicable." *Easte*r, 975 F.3d at 323-24.

First, as the Third Circuit rightly found, the text of both 18 U.S.C. § 3582(c)(1)(B) and § 404(b) indicate that the § 3553(a) factors must be considered in ruling on a First Step Act motion. *Id.* Section 3582(c)(1)(B) authorizes a court to modify "an imposed term of imprisonment to the extent otherwise expressly permitted by statute." And here, "that statute is § 404(b) of the First Step Act," which not only "gives the district court broad authority to '*impose* a reduced sentence,'" *id.* at 324 (emphasis added), but in fact uses the word "impose" twice. *See* § 404(b) ("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 (Public Law 111-220;124 Stat. 2373) were in effect at the time the covered offense was committed").

The Third Circuit found it "important" that § 404(b) used the verb "impose" (twice) rather than "reduce" or "modify," because the term "impose" was also used in § 3553(a). And,

> When a court "imposes" a sentence, the text of § 3553(a) – i.e., "**Factors to be considered in *imposing* a sentence**" – mandates that a district court "shall consider" the factors set forth therein. 18 U.S.C. § 3553(a) (italicized emphasis added); *see also* Small, Merriam-Webster Abridged, https://www.merriam-webster.com/dictionary/shall (last visited September 9, 2020) (defining "shall" as an auxiliary verb "used in laws . . . to express what is mandatory.").

Easter, 975 F.3d at 324. The court recognized that § 3582(c)(1)(B) "does not expressly mention § 3553, unlike § 3582(c)(1)(A) and § 3582(c)(2)," but found

> that omission does not mean that § 3553(a) does not apply. First, § 3582(c)(1)(B) makes clear that the procedural framework for proceedings under that provision must be found either in the statute authorizing the resentencing or Rule 35 of the Federal Rules of Criminal Procedure. 18 U.S.C. § 3582(c)(1)(B). Here that statute, as discussed above, is the First Step Act, and § 404(b) clearly uses the verb 'impose," which means that § 3553(a) applies.

Id.

Second, and relatedly, the Third Circuit agreed with the district court in *United States v. Rose*, 379 F. Supp. 3d 223, 244 (S.D.N.Y. 2019), that Congress was "not legislating on a blank state." And therefore, "the scope of the district court's discretion must be defined against the backdrop of existing sentencing statutes," which had consistently used the word "impose" to refer to "the act of imposing the original sentence." *Easter*, *id.* at 324-25 (citing *Rose*, 379 F. Supp. at 233).

Although the Third Circuit did not list the many sentencing statutes in this category, they include: 18 U.S.C. § 3553(a) ("The court shall impose a sentence sufficient but not greater than

necessary . . ."); 18 U.S.C. § 3553(a)(2) (directing courts to consider "the need for the sentence imposed" to further specific purposes of sentencing identified by Congress); 18 U.S.C. § 3553(c) (entitled, "Statement of Reasons for Imposing a Sentence," and requiring the sentencing court to state "the reasons for its imposition of the particular sentence"); 18 U.S.C. § 3661 ("No limitation may be placed on the information . . . which a court . . . may receive and consider for the purpose of imposing an appropriate sentence"); 18 U.S.C. § 3742 (repeatedly referring to the sentence "imposed"); 18 U.S.C. § 4104(h) ("'sentence means not only the penalty imposed but also the judgment of conviction"); Fed. R. Crim.P. 32 (setting forth the requisite procedures to follow to "impose sentence" in federal court).

Notably, even beyond the question of this statutory "backdrop" to the First Step Act, it is well-settled in statutory construction that a court may look to the use of an identical term in related contexts to determine its meaning. *See, e.g.*, *Home Depot v. Jackson*, 139 S.Ct. 1743, 1749 (2019) (looking to the "use of the term 'defendant' in related contexts" to interpret the term's meaning); *Mount Lemmon Fire Dist. v. Guido*, 139 S.Ct. 22, 26 (2018) (interpreting the phrase "also means" via its typical meaning in "dozens of" federal statutes); *Artis v. D.C.*, 138 S. Ct. 594, 605 (2018) (looking to "[n]umerous other statutes" to interpret the one at issue); *see also Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227, 1236 n.4 (10th Cir. 2018) ("the phrase 'prevailing party' appears in multiple fee-shifting statutes and should be interpreted in a 'consistent manner' across those statutes").

Third, as further support for its reading of Section 404(b), the Third Circuit noted with significance that not only in the case before it, but in many others throughout the country, the government had candidly conceded that courts should consider the § 3553(a) factors in ruling on First Step Act motions. *See* 975 F.3d at 325 (citing *United States v. Chambers*, 956 F.3d 667, 674

(4th Cir. 2020); *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) (noting that the government had argued "that the ordinary Section 3553(a) considerations apply to determine whether to reduce the defendant's sentence")).

While the Third Circuit did not delve into the government's practice before the district courts in this regard, the government notably has argued in many First Step Act cases before the district courts that under Section 404(b) the court should consider the defendant's post-incarceration conduct *whether favorable or unfavorable*, because such conduct is not only part of the defendant's history and characteristics, a required consideration under § 3553(a)(1); but also, it directly impacts the need for further deterrence, or protection of the public from further crimes by the defendant, which are required considerations under §§ 3553(a)(2)(B) and (2)(C). *See United States v. Rose*, No. 1:03-cr-1501-VEC-3, DE 422 at 4 (S.D.N.Y. May 13, 2019) ("the Department of Justice is of the position that you should consider [the defendant's] post-incarceration conduct, the 3553 factors").

Fourth, the Third Circuit rightly underscored that there were also "pragmatic" reasons for interpreting Section 404(b) in the way it suggested as well. 975 F.3d at 325. Most importantly, "if the district court were not required to consider the [§ 3553(a)] factors, then it is unclear how the district court's exercise of discretion would be reviewable on appeal." *Id.* at 324. And clearly, a "permissive regime" would permit sentencing courts to "ignore the § 3553(a) factors entirely for some defendants and not others, inviting unnecessary sentencing disparities among similarly situated defendants," which would result in a regime "antithetical to Congress' intent and the Guidelines' purpose." *Id.* at 325.

The Third Circuit's reading of Section 404(b) in *Easter* is persuasive in every regard. And indeed, its conclusion is correct for an additional reason the Third Circuit did not consider.

According to the consistent usage canon discussed in Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 170-173 (2012), "[a] word or phrase is presumed to bear the same meaning throughout *a text*." *Id.* at 170 (emphasis added). This Court has applied that canon in refusing to give a single word different meanings in a single statutory section. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 818 (1980) (refusing "to give the word 'filed' two different meanings within the same statutory section"). The district court in *Rose* correctly applied that canon in highlighting the "proximity of the repetition" of the word "impose" in Section 404(b). *See* 379 F.Supp.3d at 234 ("Given the proximity of the repetition, the strength of the interpretative principle that 'identical words and phrases within the same statute should normally be given the same meaning' is at its zenith.")

But indeed, this canon is *not* limited to the use of the same word in a single section of a statute. It applies much more broadly to the use of a single term throughout different sections of *a statute*. And here, quite significantly, in the immediately-preceding section of the First Step Act, Section 403, Congress enacted a clarifying amendment for 18 U.S.C. § 924(c), but limited the applicability of that amendment to cases for which "a *sentence* for the offense has not been *imposed* as of [the] date of enactment. § 403.

When the appellant in *United States v. Smith*, 967 F.3d 1196 (11th Cir. 2020) argued that his sentence was not "imposed" until his conviction was final on appeal, the Eleventh Circuit swiftly rejected that argument – holding that the term "imposed" in Section 403(b) could *only* refer to the time sentence "was pronounced in the district court," given longstanding circuit precedent holding that "a sentence is 'imposed' . . . when the district court imposes it." *Id.* at 1212-13. The Eleventh Circuit's reading of the term "impose" in Section 403(b) as referring to an original sentencing is significant for this case. For indeed, Congress' consistent use of the terms "impose"

and "sentence" together in these succeeding provisions of the First Step Act further confirms that Congress intended the phrase "impose a reduced sentence" in § 404(b) to mandate consideration of the § 3553(a) factors, in the manner they would be considered at an original sentencing.

In short, applying every textual clue – from the use of the terms "impose" and "imposed" in close proximity in Section 404(b), to the use of the term "imposed" with "sentence" in the preceding section of the First Step Act, to the use of the term "imposed" with "sentence" in other sentencing statutes including § 3553(a) itself – it is clear that the word "impose" within § 404(b) signals that a proceeding under that section is analogous to an original sentencing, at which all § 3553(a) factors must be considered in the court's exercise of its discretion.

For all of the above reasons, when a district court is authorized to "impose a reduced sentence" under Section 404(b), it *must* consider all applicable § 3553(a) factors. And indeed, for the reasons set forth below, for the court to consider all applicable § 3553(a) factors and properly exercise its discretion under Section 404(b), the court must consider – if argued – how a defendant's post-sentencing rehabilitative conduct impacts the § 3553(a) factors.

II. The secondary issue: Whether a district court abuses its discretion in failing to consider post-sentencing conduct emphasized by the defendant in evaluating the § 3553(a) factors under Section 404(b).

A. The circuit conflict.

Although a defendant's arguments as to the relevance of his post-sentencing conduct to certain § 3553(a) factors *may* properly be considered in the Eighth, Tenth, and Eleventh Circuits, *see, e.g, Mannie,* 971 F.3d at 1157-58, because the court is not required to consider any § 3553(a) factors, it will never be an abuse of discretion in these circuits to give such conduct no weight and deny relief entirely based on the nature of the offense and the defendant's criminal history. *See id.* at 1158.

By contrast, as explained by the Third Circuit in *Easter*, the court's disregard of any mandatory § 3553(a) factor should require reversal, because district courts *must* consider "all of the § 3553(a) factors to the extent they are applicable" in deciding whether to reduce an eligible defendant's term of imprisonment. The *Easter* Court found that for a court to consider the § 3553(a) factors "to the extent they are applicable" requires that it meaningfully consider post-sentencing rehabilitation if the defendant argues that his rehabilitation impacts the § 3553(a) calculus. 975 F.3d at 326 (citing *United States v. Chambers*, 56 F.3d 667, 675 (4th Cir. 2020) (quoting *Pepper v. United States*, 562 U.S. 476, 491 (2011), as finding post-sentencing evidence "highly relevant" to several of the § 3553(a) factors); and *United States v. Hudson*, 967 F.3d 605, 612 (7th Cir. 2020) ("[A] defendant's conduct after sentencing is 'plainly relevant' to a defendant's rehabilitation, characteristics, and the sufficiency of the sentence imposed").

While neither the Fifth, Sixth, Seventh, or D.C. Circuits has as yet addressed and resolved the threshold question as to whether the § 3553(a) factors *may* or *must* be considered under Section 404(b), each of these circuits recognize that at minimum, all relevant § 3553(a) factors *may* be considered. *United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020); *United States v. Shaw*, 957 F.3d 734, 741-742 (7th Cir. 2020); *United States v. Jackson*, 945 F.3d 315, 322 n. 8 (5th Cir. 2019); *United States v. Batiste*, 980 F.3d 466, 474 (5th Cir. 2020) (citing *Jackson* as holding only that the district court *could* consider the § 3553(A) factors in deciding whether to reduce a sentence under the First Step Act); *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020). However, these courts have reached conflicting results on whether post-sentencing conduct *must* be considered as part of the evaluation of "applicable" §3553(a) factors in a Section 404 proceeding.

In *Allen*, notably, the Sixth Circuit held that a district court abuses its discretion if it fails to consider such evidence when argued by the defendant. 956 F.3d at 356-58 (holding that the

district court reversibly erred in believing its authority under Section 404 was limited to considering the defendant at the time he committed the "covered offense," and "any good behavior that occurred after the covered offense is immaterial").

In *Shaw*, the Seventh Circuit held that the district court must at least consider a defendant's argument that a reduction is warranted based upon post-sentencing rehabilitation, and – unlike the rule in the Eleventh Circuit – the record must affirmatively reflect that consideration. *See* 957 F.3d at 742 (vacating and remanding where the order denying relief did not provide assurance that the court considered the defendant's arguments about the relevance of his post-sentencing conduct under § 3553(a); "we cannot confidently say that had the court taken [the defendant's] arguments into account, the court would have decided as it did: denying [his] motion for a reduced sentence).

In *White,* the D.C. Circuit stated that it was "especially important" where a defendant has advanced arguments about post-sentencing rehabilitation and how it affects the § 3553(a) factors, for the district court to consider those factors "when passing on a motion for relief under Section 404." 984 F.3d at 90-91. And indeed, a decision in this context, must therefore be supported by "a sufficient compelling justification." *Id.* at 90 (citing *Boulding,* 90 F.3d at 784). And, although a defendant's past misdeeds "are not irrelevant," "they are not the whole story" under Section 404(b). *Id.* at 91. According to the D.C. Circuit, where as here a defendant raises well-founded mitigation arguments based on his conduct in prison, and those arguments are not specifically addressed in an order denying relief, the case must be reversed and remanded to assure that the district court considers such mitigating arguments. *Id.* at 92-93 (agreeing with the Seventh Circuit in *Shaw*).

By contrast to all of these courts, the Fifth Circuit stands alone in holding that the focus of any § 3553(a) analysis under Section 404(b) *must* be the factors as they existed at the time of

sentencing. Not only is a district court *not* "obliged to consider [a defendant's] post-sentencing conduct" under Section 404(b)" in the Fifth Circuit; consideration of post-sentencing conduct is *impermissible* under Section 404(b) in the Fifth Circuit. *Jackson*, 945 F.3d at 321-22 (given the holding in *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019) that under Section 404(b) the court must "place itself in the time frame of the original sentencing," *id.* at 418, finding that it would "make little sense to mandate, as Jackson would have it, that the court consider a defendant's post-sentencing conduct, which would be to peer outside the time frame of the original sentencing;" holding that district court did not abuse its discretion in denying relief after considering only "Jackson's extensive criminal history and role in the offense in declining to reduce the sentence").

In the Fifth Circuit – as in the Eighth, Tenth, and Eleventh Circuits – a court may now deny Section 404 relief based entirely on a defendant's criminal history, and the nature of his offense, without any consideration of a defendant's post-sentencing conduct under Section 404(b). By contrast, it is impermissible for a court to do so in the Third, Fourth, Sixth, Seventh, and D.C. Circuits. If Petitioner's appeal had been heard in the Third, Fourth, Sixth, Seventh, or D.C. Circuits, the decision below would have been vacated and his case remanded for reconsideration of his argument as to how his perfect disciplinary record for 18 straight years impacted the need for the sentence imposed at the current time to afford adequate deterrence to criminal conduct, § 3553(a)(2)(B), and protect the public from further crimes of the defendant, § 3553(a)(2)(C), and whether maintaining the current sentence – including the original term of supervised release – was sufficient but not greater than necessary to comply with all of the purposes of sentencing in § 3553(a)(2) at this time.

B. The Eleventh Circuit and other courts holding that a district court may properly exercise its discretion under Section 404(b), without considering how post-sentencing conduct impacts the § 3553(a) factors, are incorrect.

For the reasons stated by this Court in *Rita v. United States*, 551 U.S. 338 (2007) and *Pepper*, and the D.C. Circuit in *White*, consideration of the "applicable" § 3553(a) factors in a Section 404 proceeding mandates consideration of a defendant's post-sentencing conduct, if argued by the defendant as grounds for imposition of a reduced sentence.

In *Rita*, this Court specified what type of explanation the court must provide in imposing a sentence. Although "brevity or length" will "depend upon [the specific] circumstances" of the case, the Court held, a district court "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own decisionmaking authority." 551 U.S. at 357.

The court's "explanation" for its sentence did *not* do that. The court did not acknowledge it was even bound to conduct the inquiry mandated in §3553(a). It did not specifically reference any §3553(a) factor. Nor did it respond to Petitioner's specific arguments based on those factors, or eveb specifically acknowledge the evidence he had presented as to his 18-year perfect disciplinary record. Although the Court in *Rita* held that where a defendant presents a "nonfrivolous reason for imposing a different sentence," a judge should "normally" "explain why he has rejected those arguments," *id.*, the court did *not* explain why it had rejected any of Petitioner's arguments for a reduced sentence, which were *not* "frivolous."

Nor is it possible for this Court to presume the district court made a "reasoned judgment under §3553(a), when that provision mandates that the court impose a sentence that is "sufficient but *not greater than necessary*" to comply with the purposes of sentencing in §3553(a)(2). The court failed to acknowledge that mandate, or any of the of the purposes of sentencing. It did not

even recite in rote form that the current sentence was not "greater than necessary" at this time, or confirm that it understood its ruling must be based on all of the evidence available to it in 2019, not simply Petitioner's pre-offense criminal record dating back to 2001.

A specific "point-in-the range" *explanation* consistent with the above principles was required here by 18 U.S.C. §3553(c)(1), because the reduced Guideline range exceeded 24 months. Notably, in *United States v. Burgest*, 791 F. App'x 164 (11th Cir Jan. 21, 2010), the government conceded—and the Court found—that the "point-in-the-range" requirement in §3553(c)(1) applies to First Step Act proceedings. *Id.* at 164-165. Notably, the district court in *Burgest* imposed a reduced sentence—toward the bottom, but not at the bottom—of the reduced Guideline range (which was the same range Petitioner faced here). In imposing that sentence, the *Burgest* court explained that it had "reviewed the record, the parties' arguments and the §3553(a) factors," and "found that a sentence within Burgest's Sentencing Guidelines range would be sufficient but not greater than necessary to comply with §3553(a)." *Id.* While this Eleventh Circuit found that brief explanation "enough" to satisfy §3553(c)(1), and also provide assurance that the district court had a "reasoned basis" for its sentence, *id.*, the district court here did not even meet the low *Burgest* standard in refusing Petitioner ***any*** reduction from a top-of-the Guidelines sentence.

The decision below is also wrong to the extent it disregarded *Pepper*. There, the Court rightly recognized that post-sentencing rehabilitation is "highly relevant to several of the § 3553(a) factors"– not only does it flesh out the complete "history and circumstances" of a defendant, § 3553(a)(1), but it is also relevant to "the need to guard against recidivism," § 3553(a)(2)(B), and "the need to provide rehabilitation," § 3553(a)(D). The Third Circuit in *Easter*, the Fourth Circuit in *Chambers*, the Seventh Circuit in *Hudson*, and the D.C. Circuit in *White*, have all rightly followed *Pepper* in finding that post-sentencing developments such as rehabilitation, when

specifically raised by a defendant, must be considered by the district court under Section 404(b). *See Easter*, 975 F.3d at 327 (citing *Chambers* and *Hudson* which quoted *Pepper*; finding district court reversibly erred by only considering the Guidelines, and not defendant's specific arguments as to rehabilitation under Section 404(c); ordering that "[u]pon remand all of the § 3553(a) factors must be considered."); *White*, 984 F.3d at 93.

Finally, additional reasons stated by the D.C. Circuit in *White* also compel a finding that the district court abused its discretion in failing to mention (and therefore consider) Petitioner's argument for a reduced sentence based upon his disciplinary record here. The D.C. Circuit noted with significance that this Court "has instructed that when a statute does not specify any limits on the district court's discretion we must look to the purpose of the statute to determine whether to sustain the trial judge's exercise of discretion." 984 F.3d at 89 (citing cases). Here, it noted, "any review of a district court's exercise of discretion under the First Step Act must take into account Congress's purposes in passing the Fair Sentencing Act" and the First Step Act. *Id.* Both statutes, the D.C. Circuit noted, were "strong remedial statutes, meant to rectify disproportionate and racially disparate sentencing penalties." *Id.* at 90. Given the "important goals of both statutes," the district court was required to consider *all* factors relevant to the motion for reduction of sentence, and where the court made no mention of the particular mitigating evidence proffered by the defendant, it was impossible to determine whether the court gave any consideration to that evidence. *Id.* at 93. For the reasons the D.C. Circuit vacated and remanded in *White*, the Court should do so here.

III. This case is an ideal vehicle to resolve both conflicts

The availability of Section 404 relief should not be a function of geography. Both conflicts presented for resolution here were pressed and passed upon below, and the Court's decision in Petitioner's favor would be case-dispositive. There are no other side issues in this case.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: *s/Brenda G. Bryn*
Brenda G. Bryn
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
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