No. 20-7474

IN THE SUPREME COURT OF THE UNITED STATES

EZRALEE J. KELLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 962 F.3d 470. The opinion of the district court (Pet. App. 20a-24a) is not published in the Federal Supplement but is available at 2019 U.S. Dist. LEXIS 52378. An order of the district court (Pet. App. 25a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2020. A petition for rehearing was denied on November 9, 2020 (Pet. App. 28a-29a). 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 March 15, 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 Eastern District of Washington, petitioner was convicted of conspiring to possess with intent to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2006), and 21 U.S.C. 846 (2006). Judgment 1. The district court sentenced petitioner to 192 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 her sentence under Section 404 of that Act. Pet. App. 7a. The district court granted the motion, reducing petitioner's term of imprisonment to 180 months. Id. at 8a-9a. The court of appeals affirmed. Id. at 1a-19a.

1. Petitioner and her boyfriend distributed crack cocaine from petitioner's house in Spokane, Washington. Presentence Investigation Report (PSR) ¶¶ 11-15. In November 2006, detectives with the Spokane Police Department obtained a warrant for petitioner's arrest. PSR ¶ 17. They subsequently observed

petitioner driving with a suspended license, pulled her over, and arrested her. PSR ¶ 19. At the time of her arrest, petitioner was carrying .65 grams of a substance containing crack cocaine. PSR ¶¶ 19, 23. Later that day, law enforcement executed a search warrant at petitioner's house. PSR ¶ 20. During the search, a special agent with the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives found two electronic scales with white residue on them and several baggies with a total of 262.2 grams of a substance containing crack cocaine. PSR ¶¶ 20, 23.

A grand jury in the Eastern District of Washington returned a superseding indictment charging petitioner with conspiring to possess with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2006), and 21 U.S.C. 846 (2006); and possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. 841(b)(1)(A) (2006). Superseding Indictment 1-2. Petitioner pleaded guilty to the conspiracy count pursuant to a plea agreement. Judgment 1; Plea Agreement 1-12. In the plea agreement, the government agreed to dismiss the distribution count and not to file an enhanced penalty information, which would have increased petitioner's statutory-minimum term of imprisonment to 20 years. Plea Agreement 7; see 21 U.S.C. 841(b)(1)(A)(iii) (2006) (specifying a term of imprisonment of at least 20 years for a defendant who violates

Section 841(a) "after a prior conviction for a felony drug offense has become final"). The parties further agreed, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C) (2006), that if the district court accepted the plea agreement, it would be bound to sentence petitioner to a term of imprisonment of between 180 and 262 months and a term of supervised release of five years. Plea Agreement 9-10. The district court accepted the plea agreement. D. Ct. Doc. 124 (July 26, 2007).

2. The Probation Office's presentence report determined that petitioner was responsible for 162.97 grams of crack cocaine, which resulted in a base offense level of 34. PSR ¶ 30. And it calculated a criminal history score of eight, which resulted in a criminal history category of IV. PSR ¶ 67; see PSR ¶¶ 45-65.

The Probation Office further determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (2006), which enhances the advisory sentencing range for defendants with at least two prior felony convictions for a crime of violence or a controlled substance offense under state or federal law. Id. § 4B1.1(a); see PSR ¶ 39. The Probation Office found that petitioner qualified as a career offender based on two previous Washington convictions for conspiracy to deliver a controlled substance. PSR ¶¶ 39, 54, 57. Petitioner's career-offender classification increased her offense level to 37 and her criminal history category to VI. PSR ¶¶ 39, 67. After reducing

petitioner's offense level by three points for acceptance of responsibility, see Sentencing Guidelines § 3E1.1 (2006), the Probation Office determined that petitioner's guidelines sentencing range was 262 to 327 months of imprisonment. PSR ¶¶ 40, 111.

At sentencing, the district court adopted the Probation Office's findings and calculations. Statement of Reasons 1. Consistent with the parties' plea agreement, see id. at 4, the court sentenced petitioner to 192 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. Petitioner did not file a direct appeal.

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 non-recidivist defendant convicted of trafficking 50 grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, 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 non-recidivist defendant convicted of trafficking five grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, 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. 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." 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." 132 Stat. 5222. Section 404(c) provides, inter alia, that Section 404 "shall [not] be construed to require a court to reduce any sentence." 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. C.A. E.R. 26-61. Petitioner contended that her conviction was for a "covered offense[]," and argued that the district court should reduce her term of imprisonment because of her "extraordinary" post-offense rehabilitation. Id. at 26-27, 30, 32-34. She also argued for an adjustment to her guidelines range based on post-conviction changes unrelated to the Fair Sentencing Act. Principally, she cited intervening Ninth Circuit precedent to support a claim that her Washington convictions for conspiring to deliver a controlled

substance should not classify her as a career offender under Sentencing Guidelines § 4B1.1(b)(A) for purposes of the Section 404 proceeding. C.A. E.R. 32-33 (citing United States v. Brown, 879 F.3d 1043 (2018)). And she contended that, under intervening changes to the Sentencing Guidelines that would apply if that classification were removed, the sentencing court's drug-quantity finding would correspond to a base offense level of 28, rather than 34. Ibid. Accounting for an adjustment for acceptance of responsibility, petitioner argued that her guidelines range would be 84 to 105 months. Ibid.

The government agreed that petitioner was eligible for a sentence reduction under Section 404 because, after the Fair Sentencing Act, her offense would now be subject only to the lesser penalties in Section 841(b)(1)(B)(iii). C.A. E.R. 69. The government further acknowledged that because the statutory-maximum sentence under Section 841(b)(1)(B)(iii) would be 40 years of imprisonment, rather than life imprisonment, petitioner's offense level under the career-offender guideline, Sentencing Guidelines § 4B1.1 (2006), would have been 34, yielding an adjusted guidelines range of 188 to 235 months of imprisonment. C.A. E.R. 70. The government maintained, however, that Section 404 does not authorize a plenary resentencing at which a defendant may challenge her career-offender designation. Id. at 70-72. The government recommended that the district court reduce petitioner's term of

imprisonment to 188 months, which would remain within the sentencing range set forth in the parties' binding Rule 11(c)(1)(C) plea agreement. Id. at 71.

The district court granted petitioner's motion and reduced petitioner's term of imprisonment to 180 months -- at the bottom of the range in the plea agreement. Pet. App. 20a-24a. The court determined that petitioner was eligible for a sentence reduction and that, while relief under the First Step Act "is discretionary," it was appropriate for petitioner "to benefit from passage of [t]he First Step Act[,] which recognizes that individuals convicted and sentenced prior to passage of the Fair Sentencing Act of 2010 were also subject to disproportionately severe penalties for crack cocaine offenses." Id. at 23a. In reducing her sentence, the court took account of petitioner's behavior as a "model inmate during her incarceration," but declined to reassess petitioner's career-offender designation or recalculate petitioner's guidelines range under the current Sentencing Guidelines. Id. at 21a-23a. Explaining that Section 404 does not permit a "plenary re-sentencing," and instead allows the court only to reduce a sentence "as if the Fair Sentencing Act's increased cocaine base requirements were in effect at the time the covered offense was committed," id. at 22a (citation and internal quotation marks omitted), the court modified the original guidelines range based only on that Act's statutory amendments. It thus determined that

petitioner's recalculated advisory guidelines range was 188 to 235 months of imprisonment, and then varied below that to the minimum of the range in the plea agreement.

4. The court of appeals affirmed. Pet. App. 1a-19a.

Petitioner raised only one argument on appeal -- namely, that "[t]he First Step Act authorizes plenary resentencing." Pet. C.A. Br. 8 (heading); see id. at 1; Pet. App. 9a. The court of appeals observed that petitioner's argument for plenary resentencing was foreclosed by the "plain language" of Section 404(b), which authorizes a sentence reduction only "as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." Pet. App. 9a-10a (citation omitted). The court explained that the "as if" clause "requires consideration of a counterfactual situation," authorizing a district court "to consider the state of the law at the time the defendant committed the offense, and change only one variable: the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape." Id. at 10a. The court reasoned that, because Section 404(b) "asks the court to consider a counterfactual situation where only a single variable is altered, it does not authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense." Id. at 10a-11a.

The court of appeals rejected petitioner's suggestion that she was entitled to a plenary resentencing because Section 404 is "implemented" through 18 U.S.C. 3582(c)(1)(B), which authorizes a court to "'modify an imposed term of imprisonment to the extent * * * expressly permitted by statute.'" Pet. App. 13a (quoting 18 U.S.C. 3582(c)(1)(B)). The court explained that Section 3582(c)(1)(B) merely authorizes a district court to "implement another statute" under the terms of that other statute itself, and reiterated that Section 404 "does not permit a plenary resentencing." Id. at 14a. The court further rejected petitioner's suggestion that Section 404(b) requires a plenary resentencing because it uses the phrase "impose a reduced sentence." Ibid. (quoting First Step Act § 404(b), 132 Stat. 5222) (emphasis omitted). The court reasoned that, although the term "impose" in some contexts describes the "initial imposition of a sentence," the text of Section 404(b) "plainly indicates" that district courts in this context may apply only sections 2 and 3 of the Fair Sentencing Act. Id. at 15a-16a.

Finally, the court of appeals observed that a plenary-resentencing requirement "lacks plausibility in context," because such a requirement would place defendants convicted of crack-cocaine offenses "in a far better position than defendants convicted of other drug offenses." Pet. App. 17a. Crack-cocaine defendants "could have their career offender statuses reevaluated,

and be eligible for other positive changes in their Guidelines calculations, while other criminal defendants would be deprived of such a benefit." Ibid. Moreover, the court noted, if the district court were bound to conduct a plenary resentencing under Section 404, some defendants might face a higher guidelines range, which in turn might cause district courts to deny reductions even where the Fair Sentencing Act would have modified a defendant's statutory penalties. Id. at 17a-18a.

The court of appeals described its approach as consistent with decisions of the Fifth and Sixth Circuits. Pet. App. 11a (citing United States v. Hegwood, 934 F.3d 414, 418 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019), and United States v. Smith, 958 F.3d 494, 498 (6th Cir.), cert. denied, 141 S. Ct. 907 (2020)). The court acknowledged the Fourth Circuit's conclusion that "there is no limiting language [in Section 404] to preclude the court from applying intervening case law," id. at 11a-12a (quoting United States v. Chambers, 956 F.3d 667, 672 (4th Cir. 2020)), and its suggestion that Section 404 requires a district court to apply intervening precedent that would apply to cases on collateral review, id. at 12a n.7. But it found the former conclusion atextual and the latter "not relevant to a sentence reduction under the First Step Act." Ibid.; see id. at 11a.

The court of appeals thus affirmed the district court's exercise of its discretion in reducing petitioner's sentence. Pet.

App. 18a-19a. The court of appeals explained that the district court "correctly applied the applicable laws existing when [petitioner's] covered offense was committed, 'as if' the Fair Sentencing Act was also in existence," and it permissibly "exercised its discretion to impose a reduced term of imprisonment of 180 months." Ibid.

5. By the time the appeal was decided, petitioner had completed her term of imprisonment and had been released from prison. See Fed. Bureau of Prisons, Find an inmate, http://www.bop.gov/inmateloc (showing release date of February 21, 2020, for Federal Bureau of Prisons Register No. 11563-023).

ARGUMENT

Petitioner contends (Pet. 20-24) that the court of appeals erred by not requiring the district court, in considering her motion under Section 404, to reevaluate her career-offender designation under circuit precedent issued since her original sentencing. The court of appeals' decision was correct and does not conflict with any decision of this Court. Although the circuits' approaches to intervening legal developments in Section 404 proceedings are not uniform, this Court's intervention is not warranted. And even if the question presented warranted the Court's consideration, this case would be a poor vehicle for considering it because it involved a binding Rule 11(c)(1)(C) plea agreement and, moreover, petitioner has already been released from

prison. 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]

1. The court of appeals correctly rejected petitioner's argument that the district court should have conducted a plenary resentencing in the course of granting her Section 404 motion. Pet. App. 1a-19a.

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

[1] Petitions for writs of certiorari presenting similar questions are currently pending in Harris v. United States, No. 20-6832 (filed Jan. 5, 2021); Deruise v. United States, No. 20-6953 (filed Jan. 7, 2021); Concepcion v. United States, No. 20-1650 (filed May 24, 2021); Maxwell v. United States, No. 20-1653 (filed May 24, 2021).

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 First Step Act § 404(b) and (c), 132 Stat. 5222. And analogously to Dillon, Section 404(b) limits the scope of relief available, authorizing a reduction only "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222.

Accordingly, every court of appeals to consider the question has agreed that Section 404 does not create any entitlement to a plenary resentencing. See United States v. Concepcion, 991 F.3d 279, 289-290 (1st Cir. 2021), 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); Pet. App. 9a-11a; United States v. Dymond Brown, 974 F.3d 1137, 1144 (10th Cir. 2020); United States v. Denson, 963 F.3d 1080, 1089 (11th Cir. 2020); see also United States v. Brewer, 836 Fed. Appx. 468, 468-469 (8th Cir. 2021) (per curiam).

As those courts have explained, "[b]y its express terms, [Section 404] does not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing." Moore, 975 F.3d at 90. It does not, in other words, entitle movants to relitigate each and every legal issue that may have affected their original statutory and guidelines ranges. Instead, "[t]hrough its 'as if' clause, all that § 404(b) instructs a district court to do is to determine the impact of Sections 2 and 3 of the Fair Sentencing Act." Id. at 91 (citation omitted). The "as if" clause requires the district court to place itself in a "counterfactual legal regime," assessing how "the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape * * * would affect the defendant's sentence," before deciding whether to reduce the sentence to one "consistent with that change." Pet. App. 10a-11a (citation omitted).

Petitioner errs (Pet. 22-23) insofar as she relies on the term "impose" as used in Section 404(b) to argue for her 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."); Pet. App. 15a (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," First Step Act § 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).

Nor do Section 404(c)'s limitations on the circumstances in which district courts may consider Section 404 motions on the merits indicate that such consideration must formally take into account any intervening changes in law beyond those specified in Section 404(b). Cf. Pet. 21-22. 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.

Petitioner appears to acknowledge that Section 404 does not require a "'plenary resentencing,'" but she offers no sound basis to distinguish between the "clear legal errors in Guidelines calculations" that, in her view, must be corrected and the other "legal and factual issue[s]" that courts need not address. Pet. 24 (citation omitted). She asserts (Pet. 22-23) that it would be "bizarre" for Congress to preclude district courts from correcting guidelines errors made at a defendant's original sentencing. But as petitioner implicitly acknowledges (Pet. 23), Section 3582(c)(2) does precisely that, treating such errors as "outside the scope of the proceeding." Dillon, 560 U.S. at 831. Furthermore, contrary to petitioner's assertion (Pet. 23), the manifest purpose of Section 404 was not to indiscriminately "show[]

leniency" to defendants eligible for a discretionary sentence reduction, see First Step Act § 404(c), 132 Stat. 5222 ("Nothing in this section shall be construed to require a court to reduce any sentence."), but to finish the work of the Fair Sentencing Act, by eliminating the unwarranted sentencing disparities caused by the now-discredited 100-to-1 ratio in the treatment of powder and crack cocaine. And petitioner cannot dispute that interpreting Section 404(b) to require courts to reevaluate guidelines calculations under "case law unrelated to crack cocaine sentencing disparities would not create a level playing field but, rather, would put defendants convicted of crack cocaine offenses in a more advantageous position than defendants convicted of powdered cocaine offenses," who cannot seek reductions. Concepcion, 991 F.3d at 287; see Pet. App. 17a.

2. Although the circuits' approaches concerning legal developments since the original sentencing in the context of a Section 404 proceeding are not uniform, petitioner overstates the scope and practical effect of the disagreement. Petitioner posits (Pet. 11-12) three approaches prevailing in the courts of appeals as to whether and when a district court may consider intervening legal developments in deciding to reduce a sentence under Section 404. She contends (ibid.) that three circuits (the Fifth, Ninth, and Eleventh Circuits) categorically forbid district courts from considering any such developments; four circuits (the Third,

Fourth, Sixth, and Tenth Circuits) mandate that district courts invariably consider those developments; and five circuits (the First, Second, Seventh, Eighth, and D.C. Circuits) permit, but do not require, district courts to consider those developments in the exercise of their discretion. In fact, most circuits fall into the third category, and none of the decisions petitioner cites necessarily would preclude a district court from considering intervening changes in law in exercising its discretion whether to reduce a sentence under Section 404.

a. As petitioner observes (Pet. 19 n.2), several circuits have expressly recognized a district court's ability to, in its discretion, consider intervening changes in law in deciding a motion for a Section 404 sentence reduction. In United States v. Concepcion, supra, for example, the First Circuit explained that although a district court must begin by "plac[ing] itself at the time of the original sentencing and keep the then-applicable legal landscape intact," the court "may take into consideration any relevant factors (other than those specifically proscribed), including current guidelines, when deciding to what extent a defendant should be granted relief." 991 F.3d at 289-290. Likewise, in United States v. Moore, supra, the Second Circuit explained: "We hold only that the First Step Act does not obligate a district court to consider post-sentencing developments. We note, however, that a district court retains discretion to decide

what factors are relevant as it determines whether and to what extent to reduce a sentence." 975 F.3d at 92 n.36. And in United States v. Hudson, 967 F.3d 605 (2020), the Seventh Circuit concluded that "nothing in the First Step Act precludes a court from looking at [18 U.S.C] § 3553(a) factors with an eye toward current Guidelines." Id. at 612. The First, Eighth, and D.C. Circuits are in accord.[2]

Although petitioner asserts (Pet. 13-14) otherwise, the Fifth Circuit has also expressly adopted a similar approach. In United States v. Robinson, 980 F.3d 454, 465 (2020), the Fifth Circuit explained that its earlier decision in United States v. Hegwood, supra, on which petitioner relies (Pet. 13), holds only that a district court is not "required to consider [a] lower non-career offender guideline range that would apply" if the defendant were resentenced de novo. Robinson, 980 F.3d at 465. Like the circuits cited above, the Fifth Circuit in Robinson made clear that "a

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[2] See United States v. White, 984 F.3d 76, 90 (D.C. Cir. 2020) (agreeing with the Seventh Circuit that Section 404 "authorizes a court to consider a range of factors" under Section 3553(a), including "current Guidelines") (citation omitted); United States v. Harris, 960 F.3d 1103, 1106 (8th Cir. 2020) ("[T]he § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines."), cert. denied, 141 S. Ct. 1438 (2021); United States v. Smith, 954 F.3d 446, 452 & n.8 (1st Cir. 2020) (reserving decision on whether the current Sentencing Guidelines Manual applies at a Section 404 proceeding, but noting that, even if it does not, "the district court could still take into consideration [an] insight from the updated manual in deciding whether a downward variance is appropriate").

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." Robinson, 980 F.3d at 465 (emphasis omitted).

And although the decision below and decisions that petitioner cites (Pet. 14) from the Eleventh Circuit contain some language that could be read not to permit such consideration, the question was not directly presented in those cases. See Pet. App. 9a (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); see also United States v. Gee, 843 Fed. Appx. 215, 216-218 (11th Cir. 2021) (per curiam) (considering whether a district court may reduce a defendant's sentence on counts other than a covered offense); United States v. Thompson, 846 Fed. Appx. 816, 818 (11th Cir. 2021) (per curiam) (same). As the Fifth Circuit's clarification of Hegwood in Robinson exemplifies, the courts' answers to those questions do not necessarily indicate that they would preclude all consideration of intervening legal developments in a case in which the issue is squarely presented. Indeed, petitioner herself states

(Pet. 13) that the "Ninth Circuit self-consciously adopted the Fifth Circuit's" approach, and -- as just explained -- the Fifth Circuit has recognized that, in exercising its discretion under Section 404, a district court may consider intervening changes in law. See pp. 22-23, supra; see also 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. By contrast, petitioner asserts that the Third, Fourth, Sixth, and Tenth Circuits do not merely permit, but instead invariably require district courts to consider at least some intervening changes in law. See Pet. 14-19. But any differences between the approaches of those circuits and the majority approach are limited.

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. But 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), petition for cert. pending, No. 20-1653 (May 24, 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 691 (emphasis added).

In United States v. Easter, the Third Circuit relied on Boulding in concluding that Section 404 requires district courts to consider the Section 3553(a) factors. 975 F.3d at 325-326; cf. Pet. 18. Unlike the Sixth Circuit, the Third Circuit has since held, in a divided decision, that a district court "must make 'an accurate calculation of the amended guidelines range at the time of resentencing,' which includes a fresh inquiry into whether the defendant qualifies as a career offender." United States v. Murphy, No. 20-1411, 2021 WL 2150201, at *8 (May 27, 2021); see ibid. (Bibas, J., dissenting). But at the same time, the court

"emphasize[d] that nothing in [its] holding" would "constrain[] a district court's discretion to depart or vary from the Guidelines range as it sees fit," including by "consider[ing] a defendant's changed career-offender status and still retain[ing] his previously imposed sentence." Id. at *7 (majority opinion). Given that no court of appeals categorically precludes a district court from consulting a defendant's career-offender status based on intervening changes in law, the practical effect of the Third Circuit's decision on offenders who might seek a Section 404 reduction at this point (two and a half years after the Act's enactment) may be limited.

Petitioner likewise overstates (Pet. 14-16) differences in the approaches of the Fourth and Tenth Circuits. In United States v. Chambers, 956 F.3d 667 (2020), the Fourth Circuit concluded 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. And 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. Dymond 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 Dymond 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 Dymond Brown, "a district court may reconsider career offender status in ruling on a First Step Act motion"). Either circuit could follow the trend of tightening up or refining statements in prior opinions on this point. Again, where no circuit precludes consideration of all legal developments, the significance of the Fourth and Tenth Circuits' decisions is also yet to be determined.

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 a 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.

3. Finally, even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it. To begin with, it involved a Rule 11(c)(1)(C) plea agreement, which is binding at an initial sentencing. See Fed. R. Crim. P. 11(c)(1)(C). Accordingly, in reducing petitioner's term of imprisonment, the district court emphasized that it had chosen a term "within the range agreed to by the parties in their [Rule] 11(c)(1)(C) Plea Agreement." Pet. App. 24a. It is not clear that Section 404 in fact authorizes a district court to disregard such a binding plea agreement for reasons unrelated to Sections 2 and 3 of the Fair Sentencing Act, while holding the government to its end of the bargain. See 18 U.S.C. 3582(c)(1)(B).

Furthermore, since petitioner filed her motion for a reduced sentence of imprisonment, she has been released from prison. See p. 13, supra. While the court of appeals speculated that, if petitioner had prevailed on appeal, the district court nevertheless could reduce her term of supervised release in its discretion, see Pet. App. 9a n.5, petitioner never asked the district court to reduce her term of supervised release and she already received the term of supervised release to which the parties agreed in the Rule 11(c)(1)(C) plea agreement. See C.A. E.R. 26-34. Granting review, moreover, would require this Court

to address whether "[t]he possibility that the [district] court will use its discretion to modify the length of [a defendant's] term of supervised release * * * is so speculative" that it does not suffice to present a live case or controversy. Burkey v. Marberry, 556 F.3d 142, 149 (3d Cir.), cert. denied, 558 U.S. 969 (2009) (citation omitted); see United States v. Martin, 974 F.3d 124, 140-144 (2d Cir. 2020). Those obstacles render this case unsuitable for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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