No. 20-7474

IN THE
Supreme Court of the United States

EZRALEE J. KELLEY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER
U.S. VIRGIN ISLANDS
1336 Beltjen Rd.
Suite 202
St. Thomas, USVI 00802
(340) 774-4449
Matt_Campbell@fd.org

NEAL KUMAR KATYAL
MITCHELL P. REICH
REEDY C. SWANSON
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004

KRISTINA ALEKSEYEVA
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017

Counsel for Petitioner

(Additional counsel listed on inside cover)

Additional counsel:

COLIN PRINCE
FEDERAL DEFENDERS OF
EASTERN WASHINGTON
& IDAHO
10 North Post St.
Suite 700
Spokane, WA 99201

Counsel for Petitioner

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INTRODUCTION

The courts of appeals are deeply divided over whether Congress authorized district courts to consider intervening legal developments when imposing a reduced sentence under the First Step Act. Since the petition was filed, the situation has deteriorated, with multiple additional circuits weighing in on opposing sides of the split.

Only this Court can "resolve[] the[se] fractured views," and "the sooner" it does, "the better off we all will be." *United States* v. *Lancaster*, 997 F.3d 171, 177 (4th Cir. 2021) (Wilkinson, J., concurring in the judgment). In effect, the circuit split substitutes the crack-powder disparity that Congress sought to eliminate

with a new disparity, in which a prisoner's ability to receive a corrected sentence depends purely on geography.

This case is the right vehicle to resolve the conflict. It is the only petition ready for decision presenting the Court with all legal arguments that could yield a decision with a practical impact. The Court should therefore grant this petition.

ARGUMENT

I. THE SPLIT IS REAL AND IMPORTANT.

The Government admits (at 13) that the circuit decisions addressing treatment of intervening legal developments under the First Step Act are "not uniform." That is a considerable understatement: There are at least three established positions.

1. Three circuits *require* district courts to consider case law affecting the Guidelines range when imposing a reduced sentence under the First Step Act. The Government admits (at 25) that the Third Circuit reaffirmed this position two weeks ago in *United States* v. *Murphy*, __ F.3d __, 2021 WL 2150201, at *8 (3d Cir. May 27, 2021).

The Fourth Circuit agrees. *United States* v. *Chambers*, 956 F.3d 667, 672-675 (2020). The Government asserts (at 27) that the court could "tighten[] up or refin[e] statements in prior opinions," but the Fourth Circuit's opinions since *Chambers*—which the Government ignores—foreclose that possibility. *See United States* v. *Collington*, 995 F.3d 347, 355 (4th Cir. 2021) ("district courts *must* accurately recalculate the Guidelines sentence range" including by "*correct[ing]* original Guidelines errors and apply[ing] intervening case law" (first emphasis added));

Lancaster, 997 F.3d at 178 (Wilkinson, J., concurring in the judgment) (agreeing Fourth Circuit precedent "*requires* courts to take into account all intervening case law").

The Tenth Circuit concurs. *United States* v. *Dymond Brown*, 974 F.3d 1137, 1146 (10th Cir. 2020); *United States* v. *Crooks*, __ F.3d __, 2021 WL 1972428, at *4-5 (10th Cir. May 18, 2021). That the court has "intermingled permissive and mandatory language," Opp. 26, reflects mere rhetorical variation; the court has insisted that a First Step Act resentencing "necessarily requires a correct calculation of the guidelines range." *Crooks*, 2021 WL 1972428, at *4. Thus, in both *Dymond Brown* and *Crooks*, the court mandated that the district court apply a corrected Guidelines range on remand; it did not simply state that a corrected sentence was allowed. *See Dymond Brown*, 974 F.3d at 1146; *Crooks*, 2021 WL 1972428, at *6.

2. In stark contrast, five circuits *forbid* district courts from considering intervening case law when determining the operative Guidelines range.

The First Circuit recently joined this camp in *United States* v. *Concepcion*, 991 F.3d 279 (1st Cir. 2021), over a vigorous dissent. *Id.* at 289 ("a district court's decision to permit a modification must be based solely on the changes that sections 2 and 3 of the Fair Sentencing Act require to be made with respect to the defendant's original [Guidelines range]"); *id.* at 292-313 (Barron, J., dissenting).

The Sixth Circuit likewise recently clarified its law to adopt this position. *United States* v. *Maxwell*, 991 F.3d 685, 689, 692-693 (6th Cir. 2021); *see United States* v. *Jarvis*, __ F.3d __, 2021 WL 2253235, at *3

(6th Cir. June 3, 2021) (confirming this reading of *Maxwell*).

These courts aligned themselves with the Fifth, Ninth, and Eleventh Circuits, all of which had already adopted the same view. *See United States* v. *Hegwood*, 934 F.3d 414, 418-419 (5th Cir. 2019); Pet. App. 11a; *United States* v. *Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020).

At most, these circuits allow for consideration of intervening developments only after the operative Guidelines have been recalculated, as part of the 18 U.S.C. § 3553(a) analysis. *See Concepcion*, 991 F.3d at 290; *United States* v. *Robinson*, 980 F.3d 454, 462-463 (5th Cir. 2020)[1]; *Jarvis*, 2021 WL 2253235, at *3.

The Government asserts (at 20-21) that this means the split will have little practical impact. But the decision to vary downward from the Guidelines is very different from the decision to impose a within-Guidelines sentence. This Court has recognized that the Guidelines establish "the essential framework" for federal "sentencing proceedings." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1345 (2016). They are the "lodestar" for sentencing and exert a "real and pervasive effect" despite the theoretical possibility of a downward variance. *Id.* at 1346. Thus, "a defendant who has shown that the district court mistakenly deemed applicable an incorrect, higher Guidelines range has demonstrated a reasonable probability of a different outcome." *Id.*

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[1] Even the Government recognizes that *Robinson* does not allow for consideration of intervening legal developments other than "as a § 3553(a) sentencing factor." Opp. 23 (quoting *Robinson*, 980 F.3d at 465).

3. Moreover, the Ninth and Eleventh Circuits do not allow consideration of intervening judicial interpretations even as part of a Section 3553(a) analysis; each prohibits *any* alteration to the sentence based on intervening developments. *See* Pet. App. 11a-12a; *Denson*, 963 F.3d at 1089. The Government suggests (at 23-24) that these circuits may yet clarify their law to allow permissive consideration as a Section 3553(a) factor. But there is no such wiggle room. In this case, that permissive approach would *still* have required reversal, because the District Court opined that it could not consider the fact that Kelley is not a career-offender. Pet. App. 22a (First Step Act does not authorize "reconsideration of original sentencing determinations"). Yet the Ninth Circuit affirmed, squarely holding that the Act does not "authorize[]" sentence reductions based on "changes in law other than sections 2 and 3 of the Fair Sentencing Act." *Id.* at 12a. The Eleventh Circuit likewise holds that a district court "is not free * * * to reduce the defendant's sentence * * * based on changes in the law beyond those mandated by sections 2 and 3" of the Fair Sentencing Act. *Denson*, 963 F.3d at 1089.[2]

[2] The remaining regional circuits have held that district courts are at least *permitted* to consider intervening legal developments, without taking a firm position on whether they may do so as part of the corrected Guidelines calculation. *See United States* v. *Moore*, 975 F.3d 84, 92 & n.36 (2d Cir. 2020); *United States* v. *Hudson*, 967 F.3d 605, 612 (7th Cir. 2020); *United States* v. *Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020); *United States* v. *White*, 984 F.3d 76, 90 (D.C. Cir. 2020).

II. THIS CASE IS THE SUPERIOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

There are at least two routes to resolving the split in Kelley's favor. First, the Court might conclude that a district court can calculate a fully current and correct Guidelines range, including changes to the text of the relevant Guidelines. *See, e.g.*, *Murphy*, 2021 WL 2150201, at *5. Alternatively, the court might conclude that, at minimum, intervening decisional law can be considered. *See, e.g.*, *Dymond Brown*, 974 F.3d at 1144-45; *Concepcion*, 991 F.3d at 294 (Barron, J., dissenting).

Only this petition squarely tees up both possibilities in a case that will affect the outcome. The petition clearly articulated both theories, placing them in full view. Pet. 20-23; *infra* pp. 9-12. And success on either would likely result in a new and more favorable sentence for Kelley. In concluding its revised sentence was correct, the District Court expressly relied on a revised Guidelines range that incorporated Kelley's erroneous career-offender designation. Pet. App. 23a. Without that error, her Guidelines prison term would have been shorter than the 180 months she served by at least six years. *See* Pet. 8. Confronted with this reality, the District Court is highly likely to reduce her term of supervised release to the four-year statutory minimum. *See* Pet. App. 23a (noting Kelley was "a model inmate").

1. Each of the other pending petitions presenting this question is flawed. In *Harris* v. *United States*, as the Government has explained without rebuttal, the petitioner is highly unlikely to secure any practical

relief regardless of the outcome of his appeal. *See* U.S. Br. at 23-24, No. 20-6832 (U.S. May 7, 2021).

Unlike Kelley, the petitioner in *Concepcion* v. *United States*, No. 20-1650 (U.S.), can prevail only if the court can also consider changes to the Guidelines' text and factual developments. *Concepcion*, 991 F.3d at 281-282. As for *United States* v. *Maxwell*, No. 20-1653 (U.S.), the district judge has already indicated it has no intention of reducing his sentence. *United States* v. *Maxwell*, No. 2:09-033-DCR, 2020 WL 3472913, at *2 (E.D. Ky. June 25, 2020) ("Put simply, this is not a case in which the Court believed that a lower sentence was appropriate but was unable to impose it * * * ."). Additionally, those petitions also will not be ripe for action until after this Court's summer recess, unnecessarily prolonging the conflict.

Meanwhile, the petitioner in *Deruise* v. *United States* has only advanced the theory that district courts are "authorized to apply the law actually in effect on the date of the First Step Act resentencing"; he has not developed the separate argument that the Act authorizes corrections of the Guidelines in effect on the original sentencing date—the issue that is the principal focus of the circuit split. *See* Pet. 17, *Deruise* v. *United States*, No. 20-6953 (U.S. Jan. 7, 2021). That accords with his formulation of the question presented: whether courts are "prohibited from considering a defendant's *current*, legally correct Sentencing Guidelines range." *Id.* at i (emphasis added). Granting *Deruise* thus risks an unduly narrow and undertheorized presentation of the issues.

Additionally, unlike Kelley, Deruise is unlikely to obtain relief even if he prevails in this Court. The *Deruise* district court has already explained that it

believes Deruise's *original* sentence was "fair under all of the circumstances." Order at 2, *United States* v. *Deruise*, No. 9:07-cr-80041-KAM (S.D. Fla. July 1, 2019), ECF No. 156. Also unlike Kelley, Deruise received a revised sentence that is *already* a downward variation from the Guidelines range that the District Court thought applicable. *Id.* at 1-2. There is no basis for thinking a further reduction will be granted—especially in light of the Government's position that Deruise remains "a continued danger to the community." U.S. Resp. at 9, *Deruise*, No. 9:07-cr-80041-KAM (S.D. Fla. Sept. 23, 2020), ECF No. 180 (alteration omitted).

2. There are no obstacles to reviewing this petition. The Government newly claims (at 28) that Kelley's Rule 11(c)(1)(C) plea might impact the statutory authority to reduce her sentence. The Act's text refutes that suggestion: It authorizes a reduced sentence for anyone with an eligible "covered offense." First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222. Neither the definition of "covered offense" in Section 404(a) nor the limitations on relief in Section 404(c) have any relationship to the defendant's plea type. *Cf. Hughes* v. *United States*, 138 S. Ct. 1765, 1777 (2018) (concluding in the context of Section 3582(c) that "there is no reason a defendant's eligibility for relief should turn on the form of his plea agreement"). And, besides, the Government forfeited this argument by failing to raise it before the certiorari stage. *See generally* U.S. C.A. Br.; D. Ct. ECF No. 189.

Kelley's February 2020 release from prison is likewise no barrier to review. As the Ninth Circuit held, in a conclusion the Government has not challenged, the District Court has authority to reduce her term of supervised release if she prevails. Pet. App. 9a n.5;

see also First Step Act § 404(b) (authorizing reduction of entire "sentence," not just term of imprisonment). From the beginning, Kelley argued for a "substantial sentence reduction," not merely a reduced term of imprisonment, D. Ct. ECF No. 180 at 1, and she specifically requested "relief on her 60-month term of supervised release" shortly after the Government "moved up" her scheduled release date. Rule 28(j) Letter, *United States* v. *Kelley*, No. 19-30066 (9th Cir. May 12, 2020).

The possibility Kelley will receive a reduced sentence is also not so "wholly insubstantial and frivolous" that the case is moot. *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998) (internal quotation marks omitted). The District Court has given no indication that Kelley would have warranted an above-Guidelines sentence; on the contrary, it has called her a "model inmate." Pet. App. 23a.[3]

III. THE DECISION BELOW IS WRONG.

The Ninth Circuit's decision contorts settled principles of statutory interpretation, this Court's precedent, and common sense.

According to the Government, Section 404(b) "authoriz[es] 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.'" Opp. 16 (emphasis added). Its stunted interpretation rests on a word the statute omits: "only." But this Court is not in the

[3] The *Deruise* petitioner suggests Kelley could even further reduce her supervised-release period by seeking early termination, but the Ninth Circuit does not appear to permit termination before her mandatory period of supervised release has run. *See United States* v. *Island*, 336 F. App'x 759, 761 (9th Cir. 2009).

business of inserting words into statutes. *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015).

The Government also rewrites the plain text. Section 404(b) directs courts to "impose a reduced sentence." Not "modify," "which might suggest a mechanical application of the Fair Sentencing Act, but 'impose.'" *Chambers*, 956 F.3d at 672. Indeed, the Act uses that word twice: "A court that *imposed* a sentence for a covered offense may * * * *impose* a reduced sentence * * * ." First Step Act § 404(b) (emphases added). There is no question that the first "impose" entails authority to consider the full legal landscape. Yet the government assumes the second "impose" bestows more circumscribed authority. "To give these same words a different meaning," however, "would be to invent a statute rather than interpret one." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005).

Congress knows how to choose between "modify" and "impose." *Compare* 18 U.S.C. § 3661 ("No limitation shall be placed on the information" a court may "consider for the purpose of imposing an appropriate sentence."), *and id.* § 3582(a) ("The court, in determining whether to impose a term of imprisonment, * * * shall consider the factors set forth in section 3553(a) * * * ."), *and id.* § 3553(a) (setting out factors for "determining the particular sentence to be imposed"), *with id.* § 3582(b) (providing that a final sentence may be "modified" or "corrected"), *and id.* § 3582(c) (allowing courts to "modify a term of imprisonment once it has been imposed" under certain circumstances). In each of the former contexts, courts consider the state of the law as of the time of the sentencing hearing. Congress's word choice in light of

that backdrop must be respected. *See Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018); Americans for Prosperity et al. Br. 11.[4]

The government cites *Dillon* v. *United States*, 560 U.S. 817, 826 (2010), for the proposition that Section 404(b) "authorize[s] only a limited adjustment to an otherwise final sentence." Opp. 15-16. But *Dillon* concerned Section 3582(c)(2), in which a court "does not *impose* a new sentence in the usual sense." *Dillon*, 560 U.S. at 827. Here, however, there is no language limiting "the traditional discretion of sentencing courts." *Pepper* v. *United States*, 562 U.S. 476, 489 (2011).

"The only possible source" of such a "limitation" is Section 404(b)'s "'as if' clause." *Concepcion*, 991 F.3d at 302 (Barron, J., dissenting). But that language merely tells courts which statutory sentencing ranges apply in a First Step Act resentencing; it does not place any other conditions on how the court imposes a reduced sentence. Besides, the Government's interpretation would make sense only if the temporal reference were to the time of the original "sentencing hearing" rather than the date "the covered offense was committed." First Step Act § 404(b). Congress's

[4] The Government suggests that Section 3582(c)(1)(B) circumscribes Section 404(b). *See* Opp. 14. But that section merely "notes the authority to modify a sentence if modification is permitted by statute," *United States* v. *Triestman*, 178 F.3d 624, 629 (2d Cir. 1999) (Sotomayor, J.); it "does not itself impose substantive limits," *Concepcion*, 991 F.3d at 303 (Barron, J., dissenting). In other words, if the First Step Act authorizes considering intervening legal developments, then Section 3582(c)(1)(B) does too.

reference to the offense date suggests no limitation based on the original *sentencing* date.

Even if some limitation could be inferred, it would not operate to preclude intervening developments in *interpretive* law like the one Kelley invokes. *See* Pet. 8. That's because such cases merely elucidate what the law was "at the time the covered offense was committed." First Step Act § 404(b). Thus, even assuming Congress took further amendments to the Guidelines off the table, there is no textual basis for concluding that Congress, through the "as if" clause, commanded courts to repeat erroneous interpretations of the law in effect at the time of the original offense.

The Government suggests Congress intended this bizarre result because it would not want to deliver these prisoners a windfall unavailable to others. Opp. 20. But Congress indisputably *has* singled out these prisoners for favorable treatment—because they "bore the brunt of a racially disparate sentencing scheme." *Chambers*, 956 F.3d at 674; *see also* Howard University School of Law Human & Civil Rights Clinic et al. Br. 18-21. Having been persuaded to correct that historic injustice, it is far less plausible that Congress directed courts to *repeat* other errors that infected these sentences—particularly through the "cryptic" mechanism of the "as if" clause. *Concepcion*, 991 F.3d at 304 (Barron, J., dissenting).

CONCLUSION

The petition should be granted.

Respectfully submitted,

MATTHEW CAMPBELL
Counsel of Record
FEDERAL PUBLIC DEFENDER
U.S. VIRGIN ISLANDS
1336 Beltjen Rd.
Suite 202
St. Thomas, USVI 00802
(340) 774-4449
Matt_Campbell@fd.org

COLIN PRINCE
FEDERAL DEFENDERS OF EASTERN WASHINGTON & IDAHO
10 North Post St.
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555 Thirteenth St., N.W.
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KRISTINA ALEKSEYEVA
HOGAN LOVELLS US LLP
390 Madison Avenue
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Counsel for Petitioner

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