No. 20-7878

IN THE SUPREME COURT OF THE UNITED STATES

MACI DENON DAVIS & JOE L. FRANKLIN, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error in proceedings under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, by declining to reduce petitioners' sentences below the low end of recalculated advisory Guidelines sentencing ranges.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Ark.):

United States v. Davis, No. 07-cr-50037 (Aug. 22, 2019)

United States v. Franklin, No. 08-cr-50060 (Sept. 4, 2019)

United States Court of Appeals (8th Cir.):

United States v. Davis, No. 19-3050 (Jan. 27, 2021)

United States v. Franklin, No. 19-3082 (Jan. 27, 2021)

United States v. Davis, No. 08-2360 (Mar. 25, 2009)

United States v. Franklin, No. 09-1549 (Jan. 25, 2010)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted at 834 Fed. Appx. 296. The order of the district court (Pet. App. 3a-8a) is unreported but is available at 2019 WL 3848946. The order of the district court denying reconsideration (Pet. App. 9a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2021. The petition for a writ of certiorari was filed on April

26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following guilty pleas in the United States District Court for the Western District of Arkansas, petitioners Maci Davis and Joe Franklin were convicted of possessing with intent to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and 21 U.S.C. (b)(1)(A)(iii) (2006). 07-cr-50037 D. Ct. Doc. 65, at 1 (May 12, 2008) (Davis Judgment); 08-cr-50060 D. Ct. Doc. 22, at 1 (Feb. 23, 2009) (Franklin Judgment). Petitioners were each sentenced to 262 months of imprisonment, to be followed by five years of supervised release. Davis Judgment 2-3; Franklin Judgment 2-3. The court of appeals affirmed both sentences. 317 Fed. Appx. 572; 362 Fed. Appx. 571.

After enactment of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, petitioners moved for sentence reductions under Section 404 of that Act. See Pet. App. 1a. The district court granted the motions and reduced each petitioner's sentence to 188 months of imprisonment. Ibid. Petitioners moved for reconsideration, seeking greater reductions, but the district court denied further relief. Id. at 9a-13a. The court of appeals affirmed. Id. at 1a-2a.

1. a. In 2007, law enforcement officers engaged a confidential informant to conduct a controlled drug buy from Davis. See 08-2360 Gov't C.A. Br. 3; Davis Presentence Investigation

Report (Davis PSR) ¶¶ 8-10. Officers subsequently obtained a search warrant for the house where Davis lived and had made the sale. See 08-2360 Gov't C.A. Br. 3; Davis PSR ¶ 14. Inside the house, officers found methamphetamine, powder and crack cocaine, marijuana, ecstasy pills, a handgun, and $17,160 in cash. 08-2360 Gov't C.A. Br. 3; Davis PSR ¶¶ 16-20. After officers arrested Davis, he admitted "that he had sold controlled substances from the residence." 08-2360 Gov't C.A. Br. 3.

Davis pleaded guilty to 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. (b)(1)(A)(iii) (2006). Pet. App. 1a. The Probation Office determined that Davis qualified as a career offender under Sentencing Guidelines § 4B1.1, based on two previous felony convictions for controlled substance offenses, and calculated an advisory Guidelines sentencing range of 262 to 327 months of imprisonment. Davis PSR ¶¶ 40, 74. The district court adopted the findings and calculations in the presentence report and sentenced Davis to 262 months of imprisonment, to be followed by five years of supervised release. Davis Sent. Tr. 54-55, 61-62; see Pet. App. 1a. The court of appeals affirmed. 317 Fed. Appx. 572.

b. In 2008, law enforcement officers learned from a confidential informant that Franklin "was supplying cocaine to a street dealer." 362 Fed. Appx. at 572-573; Franklin Presentence Investigation Report (Franklin PSR) ¶¶ 6-7. Officers launched an

investigation and discovered more than $145,000 in bank transactions over the previous eight months. 362 Fed. Appx. at 573; see Franklin PSR ¶¶ 7-14. Officers subsequently found cocaine on Franklin's person during a traffic stop and discovered "additional incriminating evidence" in his home. 362 Fed. Appx. at 573; see Franklin PSR ¶¶ 15-17.

Franklin pleaded guilty, pursuant to a conditional plea agreement in which he reserved his right to challenge the denial of a motion to suppress, to 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. (b)(1)(A)(iii) (2006). Pet. App. 1a; see 362 Fed. Appx. at 572. The Probation Office determined that Franklin qualified as a career offender under Sentencing Guidelines § 4B1.1, based on previous felony convictions for a crime of violence and a controlled substance offense, and calculated the same advisory Guidelines sentencing range of 262 to 327 months of imprisonment as it had in Davis's case. Franklin PSR ¶¶ 30, 57. The district court adopted the findings and calculations in Franklin's presentence report and sentenced him to 262 months of imprisonment, to be followed by five years of supervised release. Franklin Sent. Tr. 20-21, 32; see Pet. App. 1a. The court of appeals affirmed. 362 Fed. Appx. 571.

2. In the Fair Sentencing Act of 2010 (Fair Sentencing Act), Pub. L. No. 111-220, 124 Stat. 2372, Congress altered the statutory penalties for certain crack-cocaine offenses. Before those

amendments, a defendant convicted of trafficking 50 grams or more of crack cocaine, 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 supervised-release term of five years. 21 U.S.C. 841(b)(1)(A)(iii) (2006). A defendant convicted of trafficking five grams or more of crack cocaine, 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 supervised-release term 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 21 U.S.C. 841(b)(1)(A) from 50 grams to 280 grams, and in 21 U.S.C. 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, which allows a defendant sentenced for a "covered offense," defined in Section 404(a) 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," to seek a reduced sentence. 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), in turn, provides that Section 404 "shall [not] be construed to require a court to reduce any sentence," and prohibits a court from reducing 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.

3. a. In 2019, petitioners both moved for sentence reductions under Section 404. See Pet. App. 4a. The parties agreed that both of them were eligible for a sentence reduction under Section 404 because, after the Fair Sentencing Act, their offenses would not trigger the penalties prescribed in Section 841(b)(1)(A)(iii), but would instead be subject to lesser

penalties in Section 841(b)(1)(B)(iii). Ibid. The government, moreover, did "not oppose an award of some * * * relief." Ibid.

Petitioners argued that Section 404 entitled a defendant to "a complete in-person resentencing that includes an opportunity for the [d]efendant to challenge his career-offender status." Pet. App. 4a. The district court rejected that contention. The court observed that in Dillon v. United States, 560 U.S. 817 (2020), this Court rejected a similar argument concerning the scope of sentence-reduction proceedings under 18 U.S.C. 3582(c)(2) following retroactive amendments to the Sentencing Guidelines. Pet. App. 6a. In Dillon, the Court explained that Section 3582(c) authorizes "only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." Id. at 7a (quoting Dillon, 560 U.S. at 826). Citing the "strong textual and functional similarities between 18 U.S.C. 3582(c)(2) and Section 404," the district court reasoned that Section 404 is best understood to similarly not "contemplate a plenary resentencing." Ibid.

The district court then explained that it was choosing to "conduct[] these proceedings in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress, had authorized the sort of retroactive sentencing relief contemplated by Section 404." Pet. App. 7a. First, it would "recalculate each [petitioner's] advisory sentencing range under the United States Sentencing Guidelines, but only altering those

variables which depend on the statutory penalties that were amended by the Fair Sentencing Act and made retroactive by the First Step Act." Ibid. (citing Sentencing Guidelines § 1B1.10(b)(1)). Second, it would "decide whether to award each [petitioner] a reduction from his previously-imposed term of imprisonment, but in no event w[ould] the [c]ourt reduce a [petitioner's] term to an amount that is less than the minimum of the recalculated sentencing range." Ibid. (citing Sentencing Guidelines § 1B1.10(b)(2)(A)).

The district court recognized that Section 404 did not "require[] it to conform these proceedings to the process described in [Sentencing Guidelines §] 1B1.10(b)" for sentence reductions under 18 U.S.C. 3582(c)(2) that follow retroactive Guidelines amendments. Pet. App. 7a-8a. But it reasoned that such a two-step process would "avoid at least two potential arbitrary sentencing disparities." Id. at 7a. First, it would avoid granting "career offenders with underlying crack-cocaine convictions a unique opportunity for collaterally attacking their career-offender designations while leaving career offenders with underlying convictions for other drugs out in the cold." Ibid. Second, it would avoid arbitrarily providing such an opportunity only to those crack-cocaine offenders who committed their offense before August 3, 2010. Id. at 7a-8a.

The district court subsequently reduced petitioners' sentences from 262 months to 188 months -- "the bottom of their respective recalculated guideline ranges." Pet. App. 10a; see 07-

cr-50037 D. Ct. Doc. 128 (Aug. 22, 2019) (Davis Order); 08-cr-50060 D. Ct. Doc. 93 (Sept. 4, 2019) (Franklin Order). The court's orders explained that, in reaching its decisions, it had "tak[en] into account the policy statement set forth at [Section] 1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable." Davis Order 1; Franklin Order 1.

b. Petitioners moved for reconsideration, seeking "to supplement the record with, inter alia, information about their conduct while at the Bureau of Prisons, and to argue on that basis for downward variances from their recalculated guideline ranges under 18 U.S.C. § 3553(a)." Pet. App. 10a-11a. The district court declined to reconsider its orders. Id. at 13a. The court agreed that the new information was "relevant to determining the extent to which [petitioners'] sentences should be reduced." Id. at 11a (citing 18 U.S.C. 3553(a)(1), (a)(2)(B), and (D)). "But," the court explained, "since the Court has already sentenced [petitioners] at the bottom of their recalculated guidelines ranges, consideration of this additional information cannot benefit them any further unless the Court is willing to consider granting them a variance below those recalculated ranges." Ibid. And although the court recognized its discretion to grant such a variance, it adhered to its previously chosen approach. Id. at 11a-13a.

4. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1a-2a. The court rejected petitioner's argument that the district court "misunderstood its discretion under Section 404" when it conducted the proceedings "in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress, had authorized the sort of retroactive sentencing relief contemplated by Section 404." Ibid. (citation omitted). The court of appeals observed that the district court had "expressly recognized that * * * Section 404 did not require it to follow the Guidelines when imposing a reduced sentence." Id. at 2a. And it found no abuse of discretion in the district court's discretionary decision to look to Sentencing Guidelines § 1B1.10(b) for guidance in an effort to "avoid arbitrary and unwarranted sentencing disparities." Ibid. (quoting 18 U.S.C. 3553(a)(6)).

ARGUMENT

Petitioners contend (Pet. 7-16) that the district court abused its discretion by "tether[ing] itself to the United States Sentencing Guidelines" in resolving their motions for sentence reductions under Section 404 of the First Step Act. Pet. 7 (emphasis omitted). The court of appeals correctly rejected that contention. Petitioners do not claim that the court's unpublished and nonprecedential decision conflicts with any decision of this Court or of another court of appeals, and its practical reach may largely be limited to the "unique approach" (Pet. 7) that the

particular district court here exercised its discretion to employ. The petition for a writ of certiorari should be denied.

1. Under 18 U.S.C. 3582(b), 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 provides that a court "may" reduce a previously imposed sentence in certain circumstances, § 404(b), 132 Stat. 5222, is such a statute. But its express authorization is narrowly drawn, permitting the district court only to "impose a reduced sentence" for defendants previously sentenced for a "covered offense" and only "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." Ibid. Section 404 does not expressly authorize other changes to a sentence for a covered offense. And Section 404 further makes clear that it "shall [not] be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222.

Every court of appeals to consider the question has accordingly recognized that Section 404 does not create any

entitlement to a plenary resentencing. See United States v. Concepcion, 991 F.3d 279, 289-290 (1st Cir. 2021), petition for cert. pending, No. 20-1650 (filed May 24, 2021); United States v. Moore, 975 F.3d 84, 90 (2d Cir. 2020); United States v. Easter, 975 F.3d 318, 326 (3d Cir. 2020); United States v. Wirsing, 943 F.3d 175, 181 & n.1 (4th Cir. 2019); United States v. Hegwood, 934 F.3d 414, 415 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019); United States v. Smith, 958 F.3d 494, 498 (6th Cir.), cert. denied, 141 S. Ct. 907 (2020); United States v. Kelley, 962 F.3d 470, 475-476 (9th Cir. 2020), cert. denied, No. 20-7474 (June 28, 2021); United States v. Brown, 974 F.3d 1137, 1144 (10th Cir. 2020); United States v. Denson, 963 F.3d 1080, 1089 (11th Cir. 2020); see also United States v. Brewer, 836 Fed. Appx. 468, 468-469 (8th Cir. 2021) (per curiam). Rather, as the district court recognized, Section 404 allows courts to grant a cabined class of eligible defendants a limited modification of an existing sentence, with discretion as to the extent of any such reduction or "whether even to award any relief at all." Pet. App. 7a. The district court acted well within that discretion in deciding to grant each petitioner some, but not all, of the sentencing relief he sought under Section 404.

2. In this Court, petitioners appear to recognize that Section 404 does not entitle them to plenary resentencing, but instead vested the district court with broad discretion to determine whether and to what extent to reduce their sentences.

They contend (Pet. 7-16), however, that the district court abused that discretion by declining to reduce their sentences below the advisory guidelines range that the court recalculated in light of the amended statutory penalties in the Fair Sentencing Act. That contention is misplaced.

Petitioners principally suggest, in various ways, that the district court "misunderstood" the scope of its discretion under the First Step Act and erred by treating the Guidelines as mandatory. Pet. 7; see, e.g., Pet. 9 ("[T]he restrictions of § 3582(c)(2) and related Commission policy statements simply do not apply to the First Step Act."); Pet. 12 ("If Congress had intended to restrict courts' discretion to the minimum of the recalculated guideline range, as under § 3582(c)(2) and § 1B1.10(b), it knew how to do so."); Pet. 13 (suggesting that the court "treat[ed] the guideline range as mandatory under the First Step Act"). The district court, however, made clear its understanding that its approach was not dictated by anything in Section 404 or Section 3582(c), and that it had discretion to reduce petitioners' sentences below the recalculated guidelines range. See Pet. App. 12a ("To be clear, this Court agrees that Section 404 of the First Step Act does not prohibit judges from varying all the way down to the statutory minimum when imposing a reduced sentence."); see, e.g., id. at 1a, 4a, 7a-8a (correctly referring to the Guidelines as "advisory"). But it did not view such an exercise of its discretion to be warranted.

Petitioners also argue (Pet. 9) that the district court erred in failing to consider "the applicable statutory limits, the advisory guideline range, and all relevant § 3553(a) factors, including post-sentencing conduct and the need to avoid unwarranted disparities." But the court did, in fact, consider those factors. See Pet. App. 7a (describing its recalculation of each petitioner's advisory guidelines range based on the post-Fair Sentencing Act statutory penalties); id. at 11a (agreeing that petitioners' post-sentencing conduct "is relevant to determining the extent to which [their] sentences should be reduced") (citing 18 U.S.C. 3553(a)(1), (a)(2)(B), and (D)); Davis Order 1 ("taking into account * * * the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable"); Franklin Order 1 (same). Indeed, the court's approach was driven largely by "the need to avoid arbitrary and unwarranted sentencing disparities among defendants" with similar records who have been found guilty of similar conduct, reflected in 18 U.S.C. 3553(a)(6). See Pet. App. 7a. Petitioners appear to disagree with the court's balancing of that factor against other Section 3553(a) factors. But "[i]t is not abuse of discretion for the district court to consider one of the § 3553(a) sentencing factors when deciding whether to reduce a sentence pursuant to Section 404." Id. at 2a.

Finally, petitioners criticize (Pet. 14-16) the district court for failing to "identify any specific disparity" that its approach would avoid. But the court identified two. "One such

disparity would be between career offenders who were sentenced for crack[-cocaine] offenses[] and all other career offenders." Pet. App. 7a. As the court observed, the career-offender guideline that informed petitioners' advisory guidelines range does not distinguish between crack-cocaine offenders and other offenders. Ibid. Yet under petitioners' approach, only career offenders convicted for crack-cocaine offenses would have a second opportunity to convince the sentencing court to consider a below-Guidelines sentence or, as petitioners argued in the district court, to "collaterally attack[] their career-offender designations" themselves. Ibid.

"Another such disparity would be within the set of career offenders who were sentenced for crack[-cocaine] offenses." Pet. App. 7a. Under petitioners' approach, only career offenders sentenced for such offenses committed before August 3, 2010, would have a second opportunity to convince the sentencing court to consider a below-Guidelines sentence based on post-sentencing conduct or, as petitioners argued in the district court, would be permitted to collaterally attack their career-offender designations based on "subsequent developments in caselaw" unrelated to the Fair Sentencing Act. Ibid.; see First Step Act § 404(a), 132 Stat. 5222 (defining a "covered offense" 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"). Yet

"[d]oubtless there are individuals" who committed their crack-cocaine offenses after August 3, 2010, who would also like "the benefit of [such] subsequent developments." Pet. App. 7a.

The district court found no indication that Congress enacted the First Step Act to provide a subset of crack-cocaine offenders such unique benefits. Pet. App. 7a-8a. And it reasonably concluded that, by adjusting defendants' advisory guidelines range based only on the changes in the Fair Sentencing Act, it could implement Congress's purpose in the Fair Sentencing Act and First Step Act of eliminating the unwarranted sentencing disparities caused by the now-discredited 100-to-1 ratio in the treatment of powder and crack cocaine, without creating new unwarranted disparities. Section 404 does not preclude a court from taking that approach. And in any event, petitioners identify no basis for concluding that the district court's adoption of such an approach here, or the court of appeals' unpublished affirmance of it, have the sort of widespread significance that might warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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