No. 21-___

In the
Supreme Court of the United States

Charles Bryant,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Sentencing Act of 2010 increased the threshold amounts of crack cocaine – from 5 and 50 grams to 28 and 280 grams – needed to trigger two mandatory minimum penalties. The First Step Act of 2018 authorizes federal judges to "impose a reduced sentence" on certain defendants previously sentenced for 5- and 50-gram offenses "as if" the 28- and 280-gram thresholds were in force at the time of the offense. Pub. L. No. 115-391 § 404(b).

The question presented is whether a judge may impose a new sentence "as if" *only* that change to the crack thresholds applies: May the judge ignore other legal changes that have altered the defendant's statutory or Sentencing Guidelines ranges? This question has splintered the circuits into three camps. As one prominent jurist puts it, "the sooner the Supreme Court resolves the fractured views concerning [the Act], the better off we all will be." *United States v. Lancaster*, 997 F.3d 171, 177 (4th Cir. 2021) (Wilkinson, J., concurring).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 991 F.3d 452 and appears at Petitioner's Appendix ("Pet. App.") 1a-14a.

JURISDICTION

The District Court had jurisdiction under § 404(b) of the First Step Act of 2018, Pub. L. No. 115-391, and 18 U.S.C. § 3582(c)(1)(B). The Second Circuit had jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Section 404(b) of the First Step Act of 2018, Pub L. No. 115-391, provides:

> 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. 2372) were in effect at the time the covered offense was committed.

Section 2 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, provides:

> SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.
> (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". * * *

INTRODUCTION

In the Fair Sentencing Act of 2010, Congress increased the amounts of crack cocaine – from 5 and 50 grams to 28 and 280 grams – needed to trigger two mandatory minimum penalties in 21 U.S.C. § 841. Eight years later, in § 404(b) of

the First Step Act of 2018, Pub. L. No. 115-391, Congress authorized judges to "impose a reduced sentence" on certain already-sentenced crack offenders "as if" the 2010 change to the thresholds had been in force at the time of their offenses.

The question here is whether a § 404(b) resentencing may proceed "as if" *only* that change applies: May judges ignore other intervening legal changes that have altered a defendant's statutory or Sentencing Guidelines ranges?

Three circuits say no: a district judge imposing a new sentence per § 404(b) must do so in light of current law. *See United States v. Murphy*, 998 F.3d 549 (3d Cir. 2021); *United States v. Lancaster*, 997 F.3d 171 (4th Cir. 2021); *United States v. Lawrence*, 1 F.4th 40 (D.C. Cir. 2021).

Four other circuits say the opposite, forbidding judges from applying changes in the law besides the one to the crack thresholds. *See United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019); *United States v. Kelley*, 962 F.3d 470 (9th Cir. 2020); *United States v. Brown*, 974 F.3d 1137 (10th Cir. 2020); *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020).

Yet another four circuits leave it to judges to apply current law or not, case by case, as they see fit. *See United States v. Concepcion*, 991 F.3d 279 (1st Cir. 2021); *United States v. Bryant*, 991 F.3d 452 (2d Cir. 2021); *United States v. Fowowe*, 1 F.4th 522 (7th Cir. 2021); *United States v. Burnell*, 2 F.4th 790 (8th Cir. 2021).

And the last of the 12 circuits, the Sixth Circuit, has issued conflicting opinions on this question. *Compare United States v. Maxwell*, 991 F.3d 685, 692 (6th Cir. 2021) (Section 404(b) "permit[s] defendants to raise [] intervening

developments, such as changes to the career-offender guidelines, as grounds for reducing a sentence, and [] permit[s] (but do[es] not require) district courts to consider these developments."), *with United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) (The "language of § 404[,] and our cases that interpret it, stand for the proposition that the necessary review – at a minimum – includes an accurate calculation of the amended guidelines range at the time of resentencing.").

This discord needs to be resolved. First, "it cannot be doubted that there is an important need for uniformity in federal law," *Michigan v. Long*, 463 U.S. 1032, 1040 (1983), yet there's no uniformity in how § 404(b) is applied. Second, the question here is important and recurring: all 12 circuits have taken sides, thousands of § 404(b) motions have already been filed, and more will come given the lack of a deadline for seeking § 404(b) relief. As Judge Wilkinson has rightly said, "the sooner the Supreme Court resolves the fractured views concerning [the Act], the better off we all will be." *Lancaster*, 997 F.3d at 177 (Wilkinson, J., concurring).

STATEMENT OF THE CASE

1. Charles Bryant was charged with committing three crimes in 2005, all involving crack cocaine: (1) conspiring to sell 50 grams or more of crack in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846; (2) selling 24.5 grams of crack in violation of § 841(b)(1)(B); and (3) selling 49 grams of crack in violation of § 841(b)(1)(B). After one trial that ended in deadlock, a different jury convicted him.

At Bryant's sentencing in 2007, he initially faced mandatory minimums of 10 years for the first count and 5 years for the other counts. *See* § 841(b) (2005).

But those minimums were doubled – to 20 years and 10 years, respectively – given his having a prior conviction for a "felony drug offense." *See id.* Specifically, he had been convicted in 1983 of selling a $5 tab of LSD to an undercover police officer when he was 17 years old. *See* Pre-Sentence Report ¶¶ 40-41; S.D.N.Y. 06-cr-17, Docket Entry 21. Thus, Bryant's statutory sentence range was 20 years to life.

As to the Sentencing Guidelines, the judge determined Bryant was subject to the Career Offender Guideline and, given his statutory maximum of life in prison, that yielded a Guidelines range of 360 months to life. *See* U.S.S.G. § 4B1.1(b)(1). The judge sentenced Bryant to 300 months in prison.

2. The First Step Act of 2018, Pub. L. No. 115-391 ("FSA"), was enacted on December 21, 2018. Section 404 provides that, for someone previously sentenced for a pre-August 3, 2010, 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," a court may "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the [] offense was committed." FSA §§ 404(a)-(b) (citation omitted).

Bryant's offenses – violations of 21 U.S.C. § 841 – were committed in 2005, and § 841's penalties were modified by § 2 of the Fair Sentencing Act of 2010. Today, the 10-year minimum of § 841(b)(1)(A) is limited to crimes involving at least 280 grams, not 50 grams, of crack. And the 5-year minimum of § 841(b)(1)(B) is limited to crimes involving 28 grams, not 5 grams, of crack. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220 § 2; 21 U.S.C. § 841(b)(1). Thus, offenses like

Bryant's, which a jury found involved at least 28 grams of crack but not 280, are now subject to a mandatory minimum sentence of 5 years rather than 10 years.

And there is no longer a "felony drug offense" enhancement. Congress abolished it, in FSA § 401(a)(2), for violations of § 841(b)(1)(A) and § 841(b)(1)(B). It still exists in § 841(b)(1)(C), but it merely increases the statutory maximum – from 20 to 30 years – as § 841(b)(1)(C) has no mandatory minimum.

For a prior conviction to mandate extra punishment under § 841(b)(1)(A) or § 841(b)(1)(B) today, it must be for a "serious drug felony or serious violent felony." *See* § 841(b). As the District Court here determined, and the government did not dispute, "Mr. Bryant's prior felony offense" of selling a $5 tab of LSD when he was 17 years old "falls into neither of those categories." *United States v. Bryant*, 443 F. Supp. 3d 414, 417 (S.D.N.Y. 2020).

3. Bryant asked the District Court in 2019 to "impose a reduced sentence" pursuant to FSA § 404(b). Given the change to § 841's 5- and 50-gram thresholds, he said, his most serious crack offense now carried a minimum of 5 years, not 10. And given the removal of § 841's "felony drug offense" provision, he noted, his LSD conviction no longer mandated a doubling of his minimum sentence. Thus, he said, his statutory range was 5-40 years, *see* § 841(b)(1)(B), and his Guidelines range under the Career Offender Guideline was 262-327 months. *See* U.S.S.G. § 4B1.1(b).

The District Court found Bryant eligible for resentencing under § 404(b), but in calculating his statutory and Guidelines ranges, the court applied the "felony drug offense" enhancement that Congress repealed in FSA § 401(a)(2). The court

cited § 401(c), titled "APPLICABILITY TO PENDING CASES," which says: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." Bryant argued § 401(c) had no application to his case, which was not "pending" when the FSA was enacted; rather, he said, his request for a sentence reduction was governed by § 404(b), which concerns "DEFENDANTS PREVIOUSLY SENTENCED" and permits a court to "impose a reduced sentence" without imposing a sentence enhancement, such as the "felony drug offense" one, that no longer exists. The District Court was unmoved, saying "the FSA's 'express back-dating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 . . . supports that Congress did not intend that other [FSA] changes were to be made [in connection with FSA section 404(b) sentencing reductions] as if they too were in effect at the time of the offense.'" *Bryant*, 443 F. Supp. 3d at 417-18 (brackets in *Bryant*; quoting *Hegwood*, 934 F.3d at 418). Thus applying the "felony drug offense" enhancement, the court calculated Bryant's statutory range as 10 years to life, and his Guidelines range as 360 months to life. The court sentenced Bryant to "216 months of imprisonment . . . [t]o be followed by 8 years of supervised release." S.D.N.Y. 06-cr-17, Docket Entry 134.

4. The Second Circuit affirmed. Bryant "argues that when a district court reduces a sentence pursuant to Section 404(b) of the First Step Act, it must also apply any intervening statutory changes, including Section 401(a)'s changes to the ["felony drug offense"] sentencing enhancement. . . . We do not agree." Pet.

App. 9a-10a. "Section 404(b) of the First Step Act does not require consideration of changes other than those 'that flow from Sections 2 and 3 of the Fair Sentencing Act of 2010.'" *Id.* at 4a (quoting *United States v. Moore*, 975 F.3d 84, 92 (2d Cir. 2020)).

REASONS FOR GRANTING THE WRIT

I. The Circuits Have Splintered Over the Question Here

"Both the Constitution's Framers and Supreme Court Justices have long recognized the importance of nationally uniform interpretations of federal law." Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 849 (1994). Yet there is utterly no uniform view of how a § 404(b) resentencing works: "The courts of appeals now differ dramatically in their approaches to interpreting the scope of relief available under the First Step Act." *Lancaster*, 997 F.3d at 178 (Wilkinson, J., concurring).

In the Third, Fourth and D.C. Circuits, district courts that "impose a reduced sentence" on previously sentenced people "as if" the change to the crack thresholds always applied are not constrained to resentence "as if" *only* that change applies: rather, "district courts must consider 'all relevant factors,' including 'new statutory minimum or maximum penalties [and] current Guidelines.'" *Lawrence*, 1 F.4th at 47 (quoting *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020)). *See also Murphy*, 998 F.3d at 556-57 (holding that "a resentencing under § 404(b) 'includes an accurate calculation of the amended guidelines range *at the time of resentencing*,'" and rejecting the argument that "the First Step Act permits the resentencing court to alter only the 'single variable' of applying sections 2 and 3 of

the Fair Sentencing Act") (quoting, respectively, *Boulding*, 960 F.3d at 784, and *Kelley*, 962 F.3d at 475) (emphasis in *Murphy*); *Lancaster*, 997 F.3d at 175 (In resentencing under § 404(b), "the court must engage in a brief analysis that involves the recalculation of the Sentencing Guidelines in light of 'intervening case law.'") (quoting *United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020)).

Taking the opposite view, the Fifth, Ninth, Tenth and Eleventh Circuits hold a district court is strictly limited to "'placing itself in the time frame of the original sentencing [and] altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act.'" *Kelley*, 962 F.3d at 475 (quoting *Hegwood*, 934 F.3d at 418). *See also Brown*, 974 F.3d at 1144 (Under FSA § 404(b), a "court can only make the Fair Sentencing Act retroactive and cannot consider new law. It follows that the First Step Act also does not empower the sentencing court to rely on revised Guidelines instead of the Guidelines used at the original sentencing."); *Denson*, 963 F.3d at 1089 (In "ruling on a defendant's First Step Act motion, the district court (1) is permitted to reduce a defendant's sentence only on a 'covered offense' and only 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense, and (2) is not free to change the defendant's original guidelines calculations that are unaffected by sections 2 and 3 [or] to reduce the defendant's sentence on the covered offense based on changes in the law beyond those mandated by sections 2 and 3.").

The stark split above – current law must (or must not) be applied – has itself created stark disparities in how courts apply § 404(b). But Bryant was resentenced

in the Second Circuit, which, along with the First, Seventh and Eighth Circuits, has added a new dimension of inconsistency to the mix. In those jurisdictions, individual judges are free to apply current law or not as they please. *See* Pet. App. 4a ("Section 404(b) of the First Step Act does not require consideration of changes other than those 'that flow from Sections 2 and 3 of the Fair Sentencing Act of 2010.'") (quoting *Moore*, 975 F.3d at 92); *Moore*, 975 F.3d at 92 & n.36 (Though "the First Step Act did not obligate the district court to consider the impact of [new law] on Moore's Guidelines calculation," the "court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence."); *Concepcion*, 991 F.3d at 290 (A judge may "order the preparation of a new PSI report" reflecting current sentencing ranges or "may choose to forgo a new PSI report entirely."); *Fowowe*, 1 F.4th at 534 ("[W]e authorize a district court to apply intervening judicial decisions when exercising its discretion to reduce a petitioner's sentence under the First Step Act § 404(b). A district court, however, is not required and thus does not procedurally err by failing to apply intervening judicial decisions."); *Burnell*, 2 F.4th at 792-93 (Though defendant "argues that the district court incorrectly treated him as a career offender . . . , the problem with his argument is his unspoken premise that, in First Step Act resentencing, a district court is required to reassess earlier sentencing decisions unaffected by the Fair Sentencing Act. But § 404(b) only requires that a district court reassess the original sentence 'as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time [] the covered offense was committed.'") (citation omitted).

This hash the circuits have made of § 404(b) means that, based solely on geography (or who the district judge is), a § 404(b) resentencing either proceeds in light of current law or it does not. Thus, intervening changes besides the one to the crack thresholds – such as the narrowing of the Career Offender Guideline, *see* U.S.S.G. Amdt. 798, and the repeal of the "felony drug offense" enhancement here – are either applied or not. And if not, sentencing ranges are years higher than in the current-law jurisdictions.[1]

Such inconsistency is intolerable: "the application of federal legislation is nationwide." *Jerome v. United States*, 318 U.S. 101, 104 (1943). Do current statutory and Guidelines ranges apply at a § 404(b) resentencing or not? The answer cannot be the yes/no/maybe mélange that exists now.

II. This Divisive Question is Important and Recurring

The FSA has the "broadly remedial purpose to ensure 'greater justice' for those subject to 'a racially disparate sentencing scheme.'" *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021) (citation omitted). That scheme was made less disparate by the Fair Sentencing Act of 2010, but that Act's change to the crack thresholds "applied only to defendants who were sentenced after the law's enactment on August 3, 2010, leading us to comment that the Act might more accurately be known as 'The Not Quite as Fair as it could be Sentencing Act of 2010.' Congress eventually addressed this deficiency when it passed the First Step

[1] As detailed above, subjecting Bryant to the repealed "felony drug offense" enhancement at his § 404(b) resentencing raised his statutory minimum from 5 to 10 years and raised the low end of his Guidelines range from 262 to 360 months.

Act of 2018." *United States v. Shaw*, 957 F.3d 734, 737 (7th Cir. 2020). Indeed, the "First Step Act is an example of a long-overdue reform." *United States v. Gary*, 963 F.3d 420, 424 (4th Cir. 2020) (Wilkinson, J., joined by Niemeyer, Agee, Quattlebaum and Rushing, JJ., concurring in the denial of rehearing en banc).

The question here, over the extent of that reform, has splintered the circuits. In one camp, changes besides the one to the crack thresholds must be applied; in another, they must be ignored; and in yet another, it's up to the particular judge. This three-way split "means that defendants in one set of circuits will be sentenced under one set of ground rules, defendants in other circuits under another set of ground rules, and defendants in [others] under yet a third set of criteria. To repeat, arbitrariness now besets us from every angle." *Lancaster*, 997 F.3d at 180 (Wilkinson, J., concurring).

This discord will not go away on its own, and the split will only deepen. As of June 30, 2020, courts had imposed 3,363 new sentences pursuant to FSA § 404(b). U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, Table 1 (Oct. 2020). Those 3,363 grants were less than the number of § 404(b) motions filed, of course, and they occurred in just the first 18 months of the FSA's existence. Many more motions have since been filed and will continue to be filed, as there is no deadline for seeking § 404(b) relief.

In short, "the sooner the Supreme Court resolves the fractured views concerning [the FSA], the better off we all will be." *Lancaster*, 997 F.3d at 177 (Wilkinson, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, if the Court grants the petition in *Concepcion v. United States*, No. 20-1650, *Maxwell v. United States*, No. 20-1653, or another case presenting materially the same question as here, this petition should be held pending the disposition of that case.

Respectfully submitted,

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