

No. 20-

IN THE
**SUPREME COURT
OF THE UNITED STATES**

MICHAEL D. FORBES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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September 1, 2021

QUESTION PRESENTED

Appellate courts review criminal sentences for reasonableness. And major variances or departures from the advisory guideline range must be supported by a more significant justification than a minor one. As a result of the First Step Act of 2018, Petitioner's original sentence is now well above the guideline range. Should the reasonableness standard apply on appellate review of a ruling on a motion under Section 404 of the First Step Act?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Michael D. Forbes.

The Respondent, the appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Michael D. Forbes, petitions this Court for a writ of certiorari to review the final order of the Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit is reported at *United States v. Forbes*, 842 F. App'x 764 (3d Cir. 2021) and reproduced at Petition Appendix ("Pet. App.") 1a-4a. The district court's opinion is available at *United States v. Forbes*, No. 1:03-CR-250, 2021 WL 1911539 (M.D. Pa. Apr. 20, 2020) and reproduced at Petition Appendix 7a-18a.

JURISDICTION

The court of appeals entered judgment on April 8, 2021, Pet. App. 5a-6a. This Court has jurisdiction over this timely filed petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 404 of First Step Act of 2018 provides:

(a) **DEFINITION OF COVERED OFFENSE.**—In this section, the term “covered offense” means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) **DEFENDANTS PREVIOUSLY SENTENCED.**—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) **LIMITATIONS.**—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018).

INTRODUCTION

Following *United States v. Booker*, 543 U.S. 220 (2005), the courts of appeal review criminal sentences for procedural and substantive reasonableness under an abuse of discretion standard. This standard requires that a court balance the factors in Section 3553(a) of Title 18 of the Sentencing Reform Act of 1984. It also requires that a district court support a major departure or variance from the advisory guideline range with a more significant justification than if the sentence were imposed within the range. When, as here, the advisory guideline range is lowered following an Act of Congress and the sentence now represents a significant upward variance, it should be reviewed for reasonableness based on the factors in Section 3553(a).

But the courts of appeal are divided over whether the Section 3553(a) factors apply in proceedings under Section 3582(c)(1)(B) of Title 18 and Section 404 of the First Step Act. Compare *United States v. Hoskins*, 973 F.3d 918, 921 (8th Cir. 2020) with *United States v. Easter*, 975 F.3d 318, 322 (3d Cir. 2020). Indeed, this issue is pending certiorari in *Houston v. United States*, No. 20-1479. And the courts have not settled on a review standard. See (Pet. App. at 2a n.1). This division and lack of clarity respecting the proper review standard will also affect future legislative changes to crack cocaine sentence, such as those contemplated by Congress with the Eliminating a Quantifiably Unjust Application of the Law Act (“EQUAL Act”), which advanced from the House Judiciary Committee on a 36 to 5 vote. See H.R. 1693, 117th Cong. (March 2021).

A writ of certiorari should thus be granted so that this Court may address the appropriate standard of review in a proceeding under Section 3582(c)(1)(B).

STATEMENT OF THE CASE

A.

Preliminary background statement

Petitioner, Michael D. Forbes, requested a reduction of his effective life sentence in 2006 as a result of *United States v. Booker*, 543 U.S. 220 (2005), which the district court denied. And then in 2016, he sought a reduction of sentence under Guideline Amendment 782, which the district court also denied. Finally, Mr. Forbes moved for a reduction of sentence under Section 404 of the First Step Act of 2018. The district court denied that request too, even though the original sentence now represents a significant upward departure from the career-offender guideline.

B.

The charges, trial, and conviction

Mr. Forbes, moved to Lewistown, Pennsylvania in the spring of 2003. Once there, Mr. Forbes, along with several other individuals, distributed crack cocaine from the homes of Lewistown residents, who were drug users. Ultimately, a grand jury indicted Mr. Forbes and 24 others. Except for Mr. Forbes, they pleaded guilty, accepted deals and, for the most part, cooperated against him. Pet. App. at 7a-8a. In the final superseding indictment, the government charged Mr. Forbes with:

Count I	the manufacture, distribution, and possession with the intent to distribute 100 grams or more of heroin and 50 grams or more of crack cocaine and cocaine
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hydrochloride, and aiding and abetting such conduct;

Count III interstate travel to facilitate drug trafficking;

Count IV use of a communication facility in connection with drug trafficking;

Count VI using, carrying and discharging a firearm during a drug trafficking offense;

Count VII and conspiring to distribute and possess with the intent to distribute 100 grams or more of heroin and 50 grams or more of crack cocaine and cocaine hydrochloride.

Pet. App. at 8a.

The jury acquitted Mr. Forbes of using a communication facility during drug trafficking. Pet. App. 8a. But they found him guilty of the remaining counts. *See id.* The jury also answered several special interrogatories directed at sentencing enhancements. *See id.* In those they found that Mr. Forbes was responsible for 500 grams, but less than 1.5 kilograms of crack cocaine. *Id.* On the heroin, the jury rejected the amount alleged in the indictment, finding more than five grams, but less than ten grams. *See* CA at 54.¹ They also found that he brandished and discharged a firearm during drug trafficking, and that he was an organizer or leader of criminal activity involving five or more participants. *See* Pet. App. 8a. But on the conspiracy count, the jury determined that it involved crack cocaine, not heroin. *See* CA at 57. Following the verdict, the probation office prepared a presentence report.

¹ “CA” refers to the appendix filed in the court of appeals.

C.

The presentence report and the sentencings

The presentence report included this guideline calculation:

Base Offense Level: 36

Role in the Offense (organizer or leader): +4

Obstruction of Justice: +2

Total Offense Level: 42

Firearm Offense - Section 924(c): 10-year mandatory

Criminal History: VI

Custody Range: 360 months to Life

See Pet. App. 9a.

Counsel for Mr. Forbes filed a sentencing memorandum, challenging the constitutionality of the Sentencing Guidelines and requesting a downward departure because of the disparity between the sentencing range for Mr. Forbes and the co-defendants. *See* (M.D. Pa. No. 1:CR-03-250 at Doc. 872). And counsel challenged the government's arguments over Mr. Forbes' role in certain incidents of violence. *See id.* For example, counsel highlighted the fact that one of the co-defendants, Otis Grayson, was equally, if not more culpable, than Mr. Forbes, and yet the government had limited his sentencing exposure through a lesser charge and had moved for a downward departure. *See id.* Finally, counsel objected to the two-point enhancement for obstruction of justice. *See id.*

For its part, the government argued that Mr. Forbes had engaged in other-uncharged-incidents of violence, and that a term of years could not protect the public.

See (M.D. Pa. No. 1:CR-03-250 at Doc. 854). The government thus asked the court to impose a life term. *See id.*

At sentencing, counsel for Mr. Forbes reiterated his objection to the obstruction of justice enhancement, emphasizing that it was not part of the special interrogatories found by the jury, and that it may have impact with the Bureau of Prisons. *See* CA at 68. Counsel also addressed—in some detail—the argument for a downward departure based on the substantial disparity between Mr. Forbes’ sentencing exposure and that of his co-defendants. *See* CA at 68-69.

The government maintained that the disparities were permissible because the co-defendants pleaded guilty and cooperated by providing testimony and evidence against Mr. Forbes. *See* CA at 69-70. The government recounted the uncharged conduct in its sentencing memorandum and concluded by asking for a life sentence. *See* CA at 69-70, 72.

The district court summarily denied Mr. Forbes’ challenge to the constitutionality of the Sentencing Guidelines and declined to rule on the obstruction of justice enhancement, observing that it did not affect the guideline custody range. *See* CA at 70. As to the request for a departure based on disparity, the court declined to grant it, finding that the disparity was justified for Mr. Forbes’ role, culpability, criminal history, and because the co-defendants pleaded guilty. *See* CA at 71-72. The court declined the government’s request for a life sentence, imposing instead, a 50-year term of imprisonment comprised of 480 months for the drug, conspiracy, and

interstate travel counts, followed by 120 months for the Section 924(c) count. *See* Pet. App. 9a.

Mr. Forbes appealed. The Court of Appeals for the Third Circuit affirmed the conviction but remanded for a new sentencing based on the then recent decision in *Booker*. *See United States v. Forbes*, 164 F. App'x 251, 252 (3d Cir. 2006). At the re-sentencing, counsel for Mr. Forbes argued that the 100 to 1 sentencing ratio between crack and powder cocaine created an unwarranted disparity in the guidelines and was not reasonable given the factors in Section 3553(a) of the Sentencing Reform Act of 1984. *See* CA at 88. Counsel reiterated the sentencing disparity argument among the co-defendants, pointing out that Mr. Forbes' sentence was triple of that of Otis Grayson and ten times greater than the remaining co-defendants. *See id.* Finally, counsel emphasized that Mr. Forbes would be 80 years old upon release, and that the Sentencing Commission's own statistics have shown that, by and large, those released after the age of fifty do not re-offend. *See id.*

As before, the government maintained that a life sentence was warranted, but conceded that the 50-year term was adequate. *See* CA at 89. The district court re-imposed the same sentence, explaining that Mr. Forbes was a ringleader of a large-scale crack and heroin distribution organization, and that he had exercised control through incidents of violence and intimidation. *See* CA at 89-90. Mr. Forbes again appealed. And the Third Circuit affirmed. *See United States v. Forbes*, 258 F. App'x 417, 418-19 (3d Cir. 2007).

The Amendment 782 proceedings

In February 2016, Mr. Forbes moved for a reduction of sentence based on Guideline Amendment 782. *See* CA at 108. In his motion, Mr. Forbes asserted that his base offense level under Amendment 782 was now a 30, and that adding four levels for his role in the offense placed him at 34. With his criminal history category remaining at VI, and without applying the obstruction of justice enhancement because it was not ruled on at the sentencings, the new custody range could be 262-327 months.

The government opposed a reduction for the same reasons it emphasized at the resentencing. *See* CA at 114. In March 2016, the district court issued a memorandum opinion and order, denying Mr. Forbes' motion. *See United States v. Forbes*, No. 1:03-CR-250, 2016 WL 1182249, at *5 (M.D. Pa. March 38, 2016). In so doing, the court acknowledged that Mr. Forbes was eligible for a sentence reduction. But based on the uncharged incidents cited at his sentencings and the post-sentencing institutional infractions, the court declined to exercise its discretion. *See id.* 2016 WL 1182249 at *6.

The First Step Act motion

Mr. Forbes moved for a reduction of sentence based on Section 404 of the First Step Act. *See* Pet. App. 3a, 20a. The district court found that Mr. Forbes was eligible for a reduction. Pet. App. at 7a, 21a. In so finding, the court observed that it had not instructed the jury on drug weights, and that the statutory weights alleged in the indictment controlled. *See* Pet. App. at 21a n.1. The court also noted that there was

an issue over whether the more recent constitutional and statutory rulings since Mr. Forbes' sentencing, such as *Alleyne v. United States*, 570 U.S. 99 (2013), altered his statutory sentencing exposure. See Pet. App. at 22a n.3. The court thus directed the parties to file sentencing memoranda addressing the legal issues and the Section 3553(a) factors.

The government agreed that Mr. Forbes was entitled to a reduction to 525 months. But it disputed that *Alleyne* had any role to play, because the jury's special verdict slip reflected a finding of drug quantities beyond a reasonable doubt. See CA at 307-08. Mr. Forbes contended that drug quantity and type—as elements of the offenses—had to be both alleged in the indictment and proven beyond a reasonable doubt. But here, the court had not instructed the jury on this element. See CA at 277-79. And this was also true for the discharging of the firearm element for the Section 924(c) offense. See CA at 281-82. For these reasons, Mr. Forbes challenged the statutory penalties. And he argued against the obstruction of justice enhancement. See Appx282-85. Finally, based on the Section 3553(a) factors and the context surrounding his post-sentencing behavior, he sought a sentence below the advisory range.

The district court began its ruling by taking the government to task for stating a recommendation that encroached on judicial discretion. See Pet. App. at 11a n.1. Then the court declined to resolve the objections to the advisory range because it declined to exercise discretion to reduce the sentence. See Pet. App. at 13a n.2. For the same reason, the court avoided resolution of the applicable statutory penalty

issues. But on this point, it shared an inclination to side with the government. *See id.* Turning to the reasons for its ruling, the court held that the 50-year sentence was based not on the drug quantity but on Mr. Forbes' violent nature, incorrigibility, and danger to the public. Pet. App. at 14a. The court quoted from the earlier sentencings and the Amendment 782 denial, rejecting along the way that anything about Mr. Forbes had changed. *See* Pet. App. 10a-18a.

D.

The Third Circuit's opinion

On appeal, the Third Circuit affirmed. In so doing, the Court observed that it had not yet determined the standard of review for a district court's denial of a motion for a reduction of sentence under the First Step Act. Pet. App. at 2a n.1. But the Court acknowledged that a district court must consider the factors under 18 U.S.C. § 3553(a) anew in evaluating a motion for reduction of sentence under the First Step Act. Here, the Court held that the district court did not abuse its discretion in declining to reduce Mr. Forbes' effective life sentence. Pet. App. 4a & n.2. The Court did not, however, review for reasonableness.

REASONS FOR GRANTING THE PETITION

A. By failing to review the original sentence for reasonableness under the new statutory scheme, the Court of Appeals rendered a decision in conflict with this Court’s rulings.

In enacting Section 404 of the First Step Act, Congress sought to remediate the racially disparate consequences resulting from the treatment of crack versus powder cocaine offenses. *See United States v. White*, 984 F.3d 76, 89 (D.C. Cir. 2021). In other words, “persons who are eligible for sentence reductions under the First Step Act were likely victims of unfair and racially discriminatory treatment in our criminal justice system.” *Id.* at 90. For this reason, courts emphasized the need to consider all relevant factors when evaluating an individual for relief under Section 404. *Id.*

As important, Section 404’s language addresses a district court’s discretion to “*impose* a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.” Pub. L. No. 115-391, §404(b), 132 Stat. 5194, (2018) (emphasis added). Because Section 404 uses the term “impose” regarding a reduced sentence, a court’s discretion is channeled through those factors in 18 U.S.C. §§ 3553(a) & 3582(a), which address imposing sentence. *See Easter*, 975 F.3d at 324-25.

That framework tracks how this Court has directed the courts of appeal to review sentences. Beginning with *Booker*, this Court emphasized that courts review sentences for unreasonableness in relation to the factors in Section 3553(a). *See Booker*, 543 U.S. at 261-22. In *Booker*’s wake, this Court clarified a presumption of reasonableness may be applied on appellate review to sentences within the advisory guideline range. *See Rita v. United States*, 551 U.S. 338, 347-49 (2007). But when

there is a departure or variance from the advisory range, appellate courts must take the degree of the departure into account, requiring a significant justification based on the Section 3553(a) factors. *See Gall v. United States*, 552 U.S. 38, 50-51 (2007).

This review standard should apply when, as here, Congress has changed a statute and made it retroactive under Section 3582(c)(1)(B). But the Third Circuit did not review Mr. Forbes' case under a reasonableness standard. *See* Pet. App. 2a & n.1. And the district court's explanation for his original within guidelines 60-year sentence now must support a departure or variance. As a result, the justification must be greater than what applied to the original within guideline sentence. *See Gall*, 552 U.S. at 50. But the court provided no more justification, other than its rationale for previously denying reductions. *See* (Pet. App. 15a-16a). Finally, this omission has added import because Congress' remedial efforts sought to ameliorate a sentencing structure that was racially discriminatory.

The Third Circuit's opinion, therefore, conflicts with this Court's decisions about appellate review of criminal sentences.

B. The Courts of Appeal are divided over the role that the Section 3553(a) factors have under a First Step Act resentencing.

As noted, the Section 3553(a) factors inform a courts discretionary determination of a sentence and reasonableness review on appeal. But the First, Eighth, Ninth, and Tenth Circuits have held that those factors are not mandatory considerations under Section 404 of the First Step Act. *See United States v. Concepcion*, 991 F.3d 279, 288-89 (1st Cir. 2021); *United States v. Hoskins*, 973 F.3d

918, 921 (8th Cir. 2020); *United States v. Houston*, 805 F. App'x 546, 547 (9th Cir. 2020); *United States v. Mannie*, 971 F.3d 1145, 1158, n.18 (10th Cir. 2020).

On the other side of this divide are the Third, Fourth, and Sixth Circuits. *See Easter*, 974 F.3d at 322; *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020); *United States v. Smith*, 959 F.3d 701, 702 (6th Cir. 2020) (per curiam). And resolution of this issue is pending certiorari in *Houston v. United States*, No. 20-1479. Thus, this Court should grant review to resolve the circuit split and clarify the appropriate review standard.

C. The issue presented is important.

The issue has significant import in two ways. First, the division among the circuits has created a patchwork of standards on both an initial consideration of a motion under Section 404 of the First Step Act and on appeal. This leads to some defendants receiving a reduction based on considerations under Section 3553(a), while others are confined to a much narrower set of criteria. And this patchwork undermines consistent appellate review.

But the lack of a consistent standard for Section 3582(c)(1)(B) will likely have future implications. The House Judiciary Committee recently advanced (by 36 to 5) the EQUAL Act, H.R. 1693, 117th Cong. (March 2021), for a full vote in the House. The EQUAL Act would eliminate any disparity between crack and powder cocaine. And, like Section 404 of the First Step Act, it contains a retroactivity provision. So the issue presented here will likely reoccur.

CONCLUSION

For all of these reasons, this Honorable Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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September 1, 2021