NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

CARLTON POTTS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, when deciding if it should "impose a reduced sentence" on an eligible defendant under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal and factual developments.

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Carlton Potts ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming the district court's denial of Petitioner's motion to reduce sentence pursuant to Section 404 of the First Step Act, *United States v. Potts*, 997 F.3d 1142 (11th Cir. 2021) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the district court's denial of Petitioner's motion to reduce sentence pursuant to Section 404 of the First Step Act, was entered on May 19, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1, as extended by this Court's March 19, 2020 order due to the COVID-19 pandemic.

STATUTORY PROVISIONS INVOLVED

The First Step Act of 2018

Section 404 of the First Step Act, entitled "Application of the Fair Sentencing Act," 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. 2374) 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 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.

The Fair Sentencing Act of 2010

Section 2 of the Fair Sentencing Act, entitled "Cocaine Disparity Reduction," provides in pertinent part:

(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".

21 U.S.C. § 841. Prohibited Acts A

As amended by the Fair Sentencing Act of 2010, § 841 provides, in pertinent part:

(a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful for any person knowing or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

* * *

(b) Penalties. Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

(iii) 280 grams or more of a substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

Such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced

to a term of imprisonment of not less than 15 years and not more than life imprisonment . . Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall . . . if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. . . .

(B) In the case of a violation of section (a) of this section involving –

(iii) 28 grams or more of a substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

Such person shall be sentenced to a term of imprisonment which may not be less than 5 years or more than 40 years . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 10 years and not more than life imprisonment . . . Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years, in additional to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 8 years in addition to such term of imprisonment. . . .

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;

(5) any pertinent policy statement—

> (A) issued by the Sentencing Commission . . . ;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT OF THE CASE

The Conviction and Original Sentence

In 2006, Petitioner was charged in two separate indictments in the Southern District of Florida with, *inter alia*, possessing with intent to distribute at least 50 grams of crack cocaine, and conspiring to distribute at least 50 grams of crack cocaine in violation of 21 U.S.C. § 841(b)(1)(A) and 21 U.S.C. § 846. In Case No.06-80070-cr-DMM (the 80070 case), the government filed an § 851 information notifying Petitioner that it would seek the enhanced penalty of life imprisonment based upon a prior conviction for a felony drug offense. In Case No. 06-80081-cr-DMM (the 80081 case), the government also charged Petitioner with violating 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e). Petitioner pled guilty to Count 1 of the 80070 case (conspiracy to distribute at least 50 grams of crack), Count 1 of the 80081 case (conspiracy to possess with intent to manufacture, possess with intent to distribute, and distribution of 50 grams of crack and at least 5 kilos of cocaine), and Count 25 of the 80081 case (the §922(g)/§924(e) count).

These two cases were consolidated for sentencing. In the interim, Petitioner testified as a government witness against multiple co-defendants including some relatives. His testimony helped convict not only co-defendants who went to trial; others pled guilty based on his testimony. The government rightly filed a U.S.S.G. § 5K1.1 motion on his behalf, in recognition of his valuable cooperation.

In the 2007 pre-sentence investigation report, the Probation Office determined that Petitioner qualified as a Career Offender as well as an Armed Career Criminal.

However, his unenhanced guideline range based upon 1.5 kilos of crack, together with a 4-level enhancement for being an organizer/leader was greater – a level 44. With a 3-level reduction for acceptance of responsibility, his total offense level was 41. At a criminal history category of VI, his advisory Guideline range was 360-life. His statutory penalty on the 80070 case was 20 years-life under § 841(b)(1)(A), and a minimum of 10 years supervised release; on the 80081 case, he faced 10-life on the crack count, 15-life on the § 922(g)(1)/§ 924(e) count, and 5 years supervised release.

At the consolidated sentencing on February 1, 2007, the district court granted the government's U.S.S.G. § 5K1.1 motion. However, the court sentenced Petitioner below the 22 years requested by the government – to the mandatory minimum of 20 years on all counts concurrent for both cases, followed by 10 years supervised release on Count 1 in the 80070 case, and 5 years supervised release on the crack and § 922(g)(1) counts in the 80081 case.

The Court's written statement of reasons indicated that the sentence chosen was based on the § 5K1.1 motion and the mandatory minimum.

The Fair Sentencing Act of 2010

The Anti-Drug Abuse Act of 1986, which governed when Petitioner was sentenced, treated each gram of crack cocaine as the equivalent of 100 grams of powder. On August 3, 2010, in light of the longstanding and widespread recognition that penalties for crack cocaine under the Anti-Drug Abuse Act were far too harsh and had a disparate impact on African Americans, Congress enacted the Fair Sentencing Act of 2010 ("FSA"). *See Kimbrough v. United States*, 552 U.S. 85, 97-99

(2007); *Dorsey v. United States*, 567 U.S. 260, 268-69 (2012). Section 2 of the FSA modified the statutory penalties for crack offenses by increasing the amount of crack necessary to support the statutory ranges for convictions under § 841(b)(1)(A) from 50 to 280 grams, for convictions under § 841(b)(1)(B) from 5 to 28 grams, and for convictions under § 841(b)(1)(C) from less than 5 to less than 28 grams. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010).

The purpose of the FSA was to "restore fairness to Federal cocaine sentencing." *Id*. "The change had the effect of lowering the 100–to–1 crack-to-powder ratio [underlying the penalty scheme in § 841(b)] to 18–to–1." *Dorsey*, 567 U.S. at 269. But that change applied only to defendants sentenced on or after August 3, 2010. *Id*. at 264, 281. It did not apply retroactively to defendants like Petitioner sentenced before its enactment.

The First Step Act of 2018

On December 21, 2018, Congress enacted the First Step Act of 2018. Pub. L. No. 115-391. Section 404 of the First Step Act made sections 2 and 3 the Fair Sentencing Act fully retroactive to offenders like Petitioner who were sentenced before its enactment. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841).

Under Section 404 of the First Step Act, eligibility for retroactive application of the FSA turns on whether the defendant was previously sentenced for a "covered offense." Congress defined a "covered offense" 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 of 2010 [] that was committed before August 3, 2010." In Section 404(b), Congress authorized any court that "imposed a sentence for a covered offense" to now "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 [] were in effect." Finally, in Section 404(c), Congress clarified that while section 404 gave the sentencing court discretion to grant a reduction if the defendant was eligible, a reduction was not required. *See* Section 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."). However, Congress was also clear in Section 404(c) that a reduction could only be denied "after a complete review on the merits."

Petitioner's Motion for Sentence Reduction Pursuant to the First Step Act

On March 11, 2019, Petitioner filed a *pro se* motion in the 80070 case for appointment of counsel and for a sentence reduction pursuant to the First Step Act. The court issued a paperless order requiring responses from the government and the Probation Office.

On April 16, 2019, the Probation Office filed a confidential memorandum with the court (not provided to Petitioner), advising that Petitioner would be "eligible for relief at the Court's discretion." Under the Fair Sentencing Act, Probation advised, Petitioner would face a revised penalty of 10 years to life, and a reduced term of 8 years supervised release on the 80070 case, and 5 years supervised release[1] on the 80081 case. Probation noted that Petitioner had had 5 disciplinary incidents – all involving either refusing to obey an order, being insolent to staff members, or being

[1] That was an error, as the supervised release term on the 80071 case would be 4 years under the FSA.

in an unauthorized area. The last of these incidents (for refusing to obey an order and being insolent) occurred on 9/05/2016. He had not had any disciplinary issue since then, and had never had an incident involving drugs, other contraband, or violent behavior.

On April 17, 2019, the government filed a memorandum in opposition to Petitioner's request for a reduction – disagreeing with Probation's determination that he was eligible for a reduction. To the contrary, the government argued, Petitioner was "legally ineligible for the sentence reduction he has requested, because his offense actually involved more than 1.5 kilos of crack." And if based on that amount, the government argued, his statutory penalties would be the same under the Fair Sentencing Act. As such, the government argued, Petitioner's offenses were not "covered offenses" within the meaning of Section 404.

But even "if" Petitioner were eligible for a reduction, the government argued, "a sentence reduction is unwarranted under the facts and circumstances of this case." According to the government, its "examination of the factors set forth in 18 U.S.C. § 3553(a)" demonstrated that the sentence previously imposed remained necessary to reflect the seriousness of Petitioner's offenses, promote respect for the law, provide just punishment for his offenses, protect the public from further crimes by Petitioner, and avoid unwarranted sentence disparities among defendants with similar records who had been found guilty of similar conduct. But beyond these generalities, when the government discussed specifics, it mentioned only Petitioner's pre-offense criminal history, the fact that he qualified as both a Career Offender and Armed

Career Criminal, and the fact that he would face an unchanged guideline range today of 360-life imprisonment. The government did not acknowledge Petitioner's positive disciplinary history, or that any other fact about him – including his health status – had changed since he was sentenced.

On May 7, 2019, the district court denied Petitioner's motion to appoint count and for a sentencing reduction under Section 404. In denying Petitioner any relief, the court stated – without further elaboration:

> After consideration of the government's and probation's responses, the defendant was not sentenced for a "covered offense" within the meaning of the First Step Act. He is therefore ineligible for a sentence reduction pursuant to Section 404 of the Act. Moreover, even if legally eligible for a sentence reduction pursuant to the First Step Act, the factors set forth in 18 U.S.C. § 3553(a) indicate that a sentence reduction is unwarranted under the facts and circumstances of this case.

On May 10, 2019, unware that his motion had already been summarily denied, Petitioner filed a *pro se* reply to the government's response in opposition, stating that "the question is not whether the Court must grant the motion," but rather "whether the Court should grant some relief." He disputed the government's assessment that a reduction was unwarranted based upon the factors set forth in 18 U.S.C. § 3553(a). One factor he noted in particular since he was disabled, wheelchair bound, and HIV positive, was that BOP overcrowding at the present time had compromised its ability to provide "adequate medical care."

The Appeal and Affirmance of the District Court

Petitioner appealed to the Eleventh Circuit, arguing in a 4-page *pro se* brief that the district court had erred in determining that he was not sentenced for a

"covered offense" under Section 404. In response, the government filed a 59-page Answer Brief, restating the issue as whether the district court properly considered the actual drug amount in determining Petitioner's eligibility for sentencing relief, and alternatively, whether the court acted within its discretion in denying a reduction of his sentence. The government reiterated its position before the district court that Petitioner was ineligible for relief, and argued alternatively that if he had been eligible, the court had still properly exercised its discretion in denying his motion to reduce his sentence.

Petitioner filed a one-paragraph *pro se* reply that was not responsive to the government's arguments or authorities. Thereafter, the Federal Public Defender moved the Eleventh Circuit to allow the filing of a replacement reply brief on Petitioner's behalf. And, over the government's opposition, the court granted that request. In that counseled reply brief, Petitioner argued consistent with the views of other circuits that because he committed his crack offense prior to August 2010 and the FSA modified the statutory penalties (the minimum mandatory terms and range of both imprisonment and supervised release) for his offense of conviction, he had a "covered offense" and was eligible for relief under Section 404(a). In particular, he emphasized, he now faced a reduced minimum mandatory term of 10 rather than 20 years imprisonment and 8 rather than 10 years supervised release in the 80070 case – which is what drove the concurrent sentences at the original sentencing.

With regard to the court's alternative "discretionary" ruling under Section 404(b), Petitioner argued in his counseled reply that a mere recital that "the factors

set forth in § 3553(a) indicate that a sentence reduction is unwarranted under the facts and circumstances of this case" provided no assurance that the court adequately and properly considered all of the relevant factors; indeed, it was impossible to determine whether the court properly exercised its discretion or abused it. In particular, Petitioner argued, there was no assurance on the record that the court correctly understood and considered *inter alia*, "the kinds of sentences [now] available" as mandated by § 3553(a)(3); that he now faced a reduced minimum term of 10 years as well as reduced term of supervised release on the 80070 case; or that only 5 minor disciplinary incidents over 14 years was a positive factor for him since he had had no incidents involving drug use, violence, or other illegal activity. Petitioner pointed out that Section 404 reductions had been granted to both Career Offenders and Armed Career Criminals with far worse prison disciplinary records than he. Therefore, he argued, the district court should have compared his case to others to assure that the current sentence avoided unwarranted sentencing disparities. And, he emphasized, there was no evidence that the court engaged in any such comparison or considered his post-sentencing rehabilitation here. Finally, Petitioner argued, the "complete review of the motion on the merits" requirement in § 404(c) necessitated at least some explanation from the court as to why it believed that the sentence imposed in 2007 was still "sufficient but not greater than necessary" to comply with the purposes of sentencing, notwithstanding the changes made by the FSA and the changes in himself (his good conduct) since 2007.

Thereafter, Petitioner filed Rule 28(j) letters of supplemental authority citing *inter alia* *United States v. Shaw*, 957 F.3d 734 (7th Cir. 2020) and *United States v. Boulding*, 960 F.3d 774 (6th Cir. 2020); and *United States v. Johnson*, 961 F.3d 181 (2nd Cir. 2020), as support not only for his position that he had a "covered offense" and was eligible for a sentencing reduction under Section 404(a), but also that the district court abused its discretion in its alternative denial under Section 404(b) which failed to consider his favorable post-sentencing record.

When the Eleventh Circuit issued its decision in *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), which confirmed that he indeed had a "covered offense" under Section 404(a) given his statute of conviction, and rejected the government's position that eligibility for relief turned upon the actual amount of crack involved, Petitioner filed *Jones* with the court as supplemental authority as well. In the Rule 28(j) letter on *Jones*, Petitioner noted that in that decision the Eleventh Circuit had clarified that a district court indeed "has the authority" under Section 404(b) to reduce an eligible defendant's sentence below the Guideline range down to the new statutory minimum. Petitioner additionally argued that it was unclear from the court's single statement that "even if" he were eligible a reduction was "unwarranted under the facts and circumstances of this case," whether the court had considered all of the relevant factors at this time. And, since the court was writing with a fundamental misunderstanding of eligibility under Section 404(a), it could not be presumed that the court properly understood the full extent of its authority under

Section 404(b) to reduce both his previously-imposed term of imprisonment and term of supervised release.

Thereafter, while his Section 404 appeal remained pending, Petitioner separately moved the district court under 18 U.S.C. § 3582(c)(1)(A)(i) for compassionate release based upon long-standing as well as new medical issues that put him at heightened risk for severe consequences or death if he contracted COVID-19. On September 14, 2020, the district court agreed that Petitioner had indeed established extraordinary and compelling reasons for release, and reduced his terms of imprisonment in both cases to "time served." At the same time, however, and pursuant to its authority in § 3582(c)(1)(A), the court added an additional term of supervised release equal to the unserved portion of Petitioner's original term of imprisonment to be served on home confinement – after which he would begin his original, 10-year term of supervised release on the 80070 case, and concurrent 5 year term on the 80081 case.

Notably, before so ruling, the district court considered (pursuant to U.S.S.G. § 1B1.13(2)) whether Petitioner posed "a danger to the safety of any other person or the community," and rejected the government's suggestion that his prior criminal record was "*per se* disqualifying." The court noted with significance that Petitioner "does not appear to have had any significant disciplinary record during the course of his incarceration over the past 14 years." While not discounting Petitioner's criminal past," the court emphasized that it "attribute[d] great weight to [his] recent good conduct," and – consistent with *Pepper v. United States*, 562 U.S. 476 (2011) – viewed

"that as a more reliable indicator of his likelihood to recidivate." In addition, the court found that Petitioner's advancing age, the fact that (as U.S. Sentencing Commission data confirmed) "recidivism rates typically decline with age," as well as the fact that Petitioner's health was "severely failing" and he was in a "weakened physical state all weigh[ed] in favor of a finding that he is not likely to reoffend and pose a danger to the community if released." Any risk that might exist in that regard, the court found, could be abated through the period of home confinement it was imposing.

Finally, as directed by § 3582(c)(1)(A), the court also considered whether a reduction of Petitioner's term of imprisonment to time served was consistent with the applicable § 3553(a) factors. In that regard, and unlike the one-line, broad-brush alternative ruling denying Petitioner's Section 404 motion, the court specified:

> I have considered the nature of the offense and the history and characteristics of this defendant. Defendant's crimes of conviction were serious, but he accepted responsibility, pled guilty and cooperated with the government. His criminal history is remarkable in its breadth, however as previously discussed, his more recent conduct suggests some degree of meaningful rehabilitation. With respect to the need for the sentence to be sufficiently punitive, I note that Defendant has already served a significant amount of time in custody, around 14 years, and in my view this goes a long way towards just punishment for his crimes. Although I have determined that Defendant should be permitted to serve the remainder of his sentence outside prison walls for the sake of his own protection, he will continue to serve a lengthy term of home confinement, which is also a form of punishment. In this sense, Defendant will continue to repay the debt he owes to society. On balance, I find that granting Defendant's motion and reducing his incarceration term to time served will result in an overall sentence that is sufficient but not greater than necessary to achieve the goals of sentencing as set forth in § 3553.

Petitioner thereafter notified the Eleventh Circuit in a Rule 28(j) letter that the district court had granted him compassionate release, and attached the order. Petitioner explained, however, that reducing his term of imprisonment to time served had not mooted his Section 404 appeal because his term of supervised release remained above the now-applicable minimum term for his offense under the Fair Sentencing Act. He asked the Eleventh Circuit to remand his case to the district court to permit that court to exercise its discretion under Section 404(b) to reduce his original 10-year term of supervised release on the 80070 case to 8 years under § 841(b)(1)(B).

Since the government had not responded to any of the Rule 28(j) letters Petitioner filed, on February 19, 2021, the Eleventh Circuit specifically directed the government to file a supplemental letter brief addressing those letters as well as (1) what impact, if any, the district court's grant of compassionate release had on his appeal, and (2) what impact, if any, the district court's analysis of the § 3553(a) factors in its order granting compassionate release had on the appeal. The court permitted Petitioner to file a supplemental letter brief replying to the government's position on those issues.

In its supplemental letter brief, the government conceded that its prior position contesting Petitioner's eligibility for a reduction was incorrect; that under *Jones*, Petitioner indeed had "covered offenses" since he had not received the "lowest statutory penalty that would be available to him under the Fair Sentencing Act;" and that although his appeal from the denial of his motion for a sentence reduction was

now moot as to his term of imprisonment, it was not moot as to his term of supervised release since the minimum term under the FSA on the 80070 case was 8 rather than the 10 years imposed. Nonetheless, the government argued, the court did not abuse its discretion in declining to reduce Petitioner's original term of supervised release to the new statutory minimum because *Jones* did not require the district court to consider all of the § 3553(a) factors; it merely held that the district court "may" consider the relevant factors; and the district court acknowledged its review of the government's opposition memo which had discussed some § 3553(a) factors.

In his supplemental reply letter brief, Petitioner urged the court to reverse and remand his case to the district for specific consideration of whether to reduce his supervised release term since there was no indication on the record of the Section 404 proceeding that the district court understood that it had the authority to do so. Indeed, he argued, the government had not mentioned that the term of supervised release could be reduced, and the court had rejected the Probation Office's position stating that it could do so. Moreover, Petitioner argued, there was no assurance on the record that the court's § 3553(a) ruling was not impacted by its threshold mistake on eligibility (crediting the government's wrong view). And finally, there was no assurance either that the court considered all of the relevant § 3553(a) factors since the government's § 3553(a) argument had focused exclusively on the nature of the offense and his criminal history. While the court's actual thought process was unknowable from its one-sentence alternative ruling, Petitioner argued, the mere fact that the court "reviewed" the government's argument under § 3553(a) did not confirm

proper consideration of all of the applicable § 3553(a) factors since the government had not acknowledged any of his changed personal facts and circumstances, which included a positive disciplinary record.

After hearing oral argument, on May 19, 2021 the Eleventh Circuit issued a published decision affirming the district court's denial of any Section 404 relief to Petitioner. *United States v. Potts*, 997 F.3d 1142 (11th Cir. 2021). The court of appeals agreed with both parties that the appeal from the order denying Section 404 relief was not moot as to Petitioner's supervised release term which could have been reduced from 10 to 8 years under the FSA. *Id.* at 1144-45. However, the court found that the district court did not abuse its discretion under Section 404(b) in declining to reduce his term of supervised release. *Id.* at 1145-46.

The Eleventh Circuit reaffirmed at the outset its then-recent holding in *United States v. Stevens*, 997 F.3d 1307, 1316 (11th Cir. 2021) that "a district court may, but is not required to, consider the § 3553(a) factors in deciding whether to exercise its discretion and reduce a sentence under the First Step Act." *Potts*, 997 F.3d at 1145. However, the court held (also following *Stevens*) that a district court must sufficiently explain its decision to deny Section 404 relief, to allow for meaningful appellate review. *Id.* While the order in *Stevens* provided no indication that the district court considered any § 3553(a) factors and thus warranted a remand, the court found Petitioner's case was different and "adequate for meaningful appellate review." *Id.* at 1147. In particular, the court noted with significance the district court's statement that "it had reviewed the government's response." Although "brief," the court found

that statement "sufficient" because – it stated – the government's response in opposition had itself "set out and addressed the § 3553(a) factors." *Id.* at 1146. Specifically, the court stated, in that pleading the government had itself "reviewed the facts and circumstances of [Petitioner's] case, addressed the § 3553(a) factors, and stressed his extensive criminal history and the seriousness of his offenses." *Id.* at 1146-47. Given that type of pleading in the record, the Eleventh Circuit held, this case was different from *Stevens*, and a remand for specific consideration of a reduction in Petitioner's supervised release term was not required. *Id.* at 1147.

REASON FOR GRANTING THE WRIT

In *Conception v. United States* the Court has Granted Certiorari to Resolve the Very Question Presented Herein

In *Conception v. United States*, ___ S Ct. ___, 2021 WL 4464217 (Sept. 30, 2021) (No. 20-1650), this Court granted certiorari to resolve the following question, given a three-way circuit conflict:

> Whether, when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, 21 U.S.C. § 841 note, a district court must or may consider intervening legal and factual developments.

And notably, this exact question is raised by the Eleventh Circuit' ruling in the decision below as well.

In its precedential decision in Petitioner's case, the court of appeals first reaffirmed its holding in *United States v. Stevens*, 997 F.3d 1307 (11th Cir. 2021) that "the First Step Act does not mandate consideration of the statutory sentencing factors set forth in [18 U.S.C. § 3553(a)], and therefore, a district court "may but is not

required to consider the § 3553(a) factors" – at all – "in deciding whether to exercise its discretion and reduce a sentence under the First Step Act." *United States v. Potts*, 997 F.3d 1142, 1145 (11th Cir. 2021) (citing *Stevens*, 997 F.3d at 1316). But the court actually went much further than *Stevens*, and in fact beyond any prior Eleventh Circuit First Step Act decision, in holding additionally that a district court does not abuse its discretion under Section 404(b), and fulfills its duty to adequately explain a denial of all relief to an eligible defendant, if it simply states in the order of denial that it considered the government's response in opposition to the defendant's motion. *Id.* at 1146.

That ruling by the court of appeals in Petitioner's case confirms that in the Eleventh Circuit there is *no* requirement that a district court consider either intervening legal or factual developments in denying an eligible defendant a reduction in his sentence. For indeed, the government's response in opposition here did not mention either intervening legal developments such as the reduced penalties under the FSA, or intervening factual developments such as changes in Petitioner himself, as having *any* relevance to the court's exercise of its discretion under Section 404(b). To the contrary, all that the government argued was relevant for a discretionary ruing under Section 404(b) were "the facts and circumstances of this case," including Petitioner's criminal history that qualified him as both a Career Offender and Armed Career Criminal, which – the government noted – would result in the same Guideline range even under the FSA. The government did *not* mention (as having any relevance to a proper exercise of discretion under Section 404(b)) that

at the original sentencing the court had chosen to vary even further below the Guideline range than the government had urged under U.S.S.G. § 5K1.1; that as indicated in its "statement of reasons," the court had in fact chosen to impose the minimum mandatory terms of both imprisonment and supervised release; and that Congress had lowered both the minimum terms of imprisonment and supervised release for Petitioner's offense in Section 2 of the FSA. Nor did the government advise the court that it should (or even could) consider in exercising its discretion under Section 404(b), that Petitioner had maintained a good disciplinary record for the past 14 years which demonstrated rehabilitation.

Essentially, the government urged the court to exercise its "discretion" to deny relief to Petitioner based on the law as it existed, and the person that he was, on the date of sentencing – as if nothing significant had changed in the fourteen years since then. And, on this record, it cannot be assumed that the court considered anything beyond what the government argued. Indeed, from the court's reference to having reviewed the government's response and its denial of all relief based upon the "facts and circumstances of the case" (precisely as the government had argued), it should be assumed that the court agreed with the government's position here that neither intervening legal nor factual developments had any relevance for Petitioner under Section 404(b).[2] And, according to the published decision in Petitioner's case, a

[2] Although the Probation Memo (provided to the court and government, but not to Petitioner) set forth Petitioner's disciplinary history, Probation did not opine on what facts and circumstances were relevant under Section 404(b). And, since the court clearly rejected Probation's position on eligibility under Section 404(a), it cannot be assumed that the court took into account anything in the Probation Memo under Section 404(b).

district court's statement embracing a government argument that disregarded both intervening legal and factual developments is now "sufficient" as a matter of law. In the Eleventh Circuit, disregard of such developments is not an abuse of discretion by the district court.

Notably, as pointed out in the certiorari stage briefing in *Conception*, the rule in at least four other circuits is decidedly different. Specifically, the Third, Fourth, Tenth, and D.C. Circuits have held that consideration of updated law (including a revised Guideline calculation) and/or facts (such as post-sentencing conduct) is mandatory under Section 404(b). *See* Petition for Writ of Certiorari, *Concepcion v. United States*, 2021 WL 2181524, at **13-20 (U.S. May 24, 2021) (No. 20-1650) (discussing *United States v. Easter*, 975 F.3d 318, 325-26 (3d Cir. 2020); *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020); and *United States v. Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020); and *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020)); Petitioner's Reply to the Brief in Opposition, *Concepcion v. United States*, 2021 WL 4197266, at **3-5 (U.S. Sept. 8, 2021) (No. 20-1650).

And indeed, although the Petition and Reply in *Conception* correctly note that two other circuits besides the Eleventh – namely, the Fifth and the Ninth – forbid district courts from considering updated case law or updated Guidelines unrelated to Section 2 of the FSA under Section 404(b), neither of these circuits has gone so far as the Eleventh did in the instant case, in upholding a denial of all relief under Section 404(b) when the district court – in exercising its "discretion" under that provision –

did not even consider Congress' changes to the minimum mandatory statutory penalties made in Section 2 of the FSA.

The Eleventh Circuit, plainly, did *not* go that far in *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020). *See id.* at 1089 (emphasizing that under Section 404(b) a district court must consider whether to reduce a defendant's sentence "as if" section 2 of the Fair Sentencing Act were in effect when he committed the offense, even if it may not change a Guideline calculation "unaffected" by Section 2). Nor did the Fifth Circuit uphold a district court's complete disregard of reduced statutory penalties under Section 404(b) in *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019). To the contrary, the district court in *Hegwood* – unlike the district court here – clearly understood the relevance of the reduced statutory penalties under Section 404(b), because the court did in fact reduce the defendant's sentence based on the "congressional change." *Id.* at 416.

And notably, the Ninth Circuit has just recognized in the related 18 U.S.C. § 3582(c)(2) context, that intervening legislative developments in the First Step Act affecting mandatory statutory minimums are not only "relevant" but must be considered in the "step two" discretionary determination under §3553(a). *See United States v. Lizarraras-Chacon*, ___F.4th ___, 2021 WL 4314793, at **5-6 (9th Cir. Sept. 23, 2021) (reversing and remanding where it was not clear from the record that the district court recognized that intervening legislative changes were indeed relevant to the exercise of its discretion). Unlike the government, district court, and Eleventh Circuit here, in *Lizarraras-Chacon* the Ninth Circuit rightly recognized that

"[s]ubsequent developments affecting a mandatory minimum are relevant, for example, to the 'nature and circumstances of the offense,' the 'seriousness of the offense,' the needs 'to provide just punishment for the offense,' and 'to afford adequate deterrence to criminal conduct.'" *Id.* at *5. Indeed, the Ninth Circuit explained:

> Subsequent legislation, such as the reduction of the mandatory minimum in the First Step Act, is a legislative reassessment of the relative seriousness of the offense. Legislative changes or guideline changes do not happen in a vacuum. They represent a societal judgment that it is necessary, from time to time, to reconsider and adjust what is an appropriate sentence consistent with the goals of the criminal justice system. Congress's legislative action through the First Step Act, reducing the mandatory minimum [] reflects a decision that prior sentences were greater than necessary.

Id. See id. at n. 3 (citing as support *United States v. Shaw*, 957 F.3d 734, 742 (7th Cir. 2020), a Section 404(b) case Petitioner likewise cited as support for his position below, which had recognized that "a statutory minimum and maximum often anchor a court's choice of a suitable sentence").

The Eleventh Circuit's decision in this case – approving a district court's complete disregard under Section 404(b) of an intervening act of Congress reducing the mandatory minimum sentence for the offense of conviction, as well as positive changes in the defendant himself throughout his lengthy incarceration – is thus even at odds with the approaches of the Fifth and Ninth Circuits. And notably, subsequent panels of the Eleventh Circuit now routinely cite *Potts* as authority for affirming "discretionary" denials of relief by other district judges who have likewise failed to consider – as relevant in any way under Section 404(b) – either Congress' decision to reduce previously-applied mandatory minimums terms of imprisonment or

supervised release for crack offenses under § 841, or intervening offender-specific facts such as demonstrated post-sentencing rehabilitation, and instead based their denials entirely on the nature and circumstances of the offense and the defendant's pre-offense criminal history. *See, e.g., United States v. Johnson*, 859 F. App'x 500, 501 (11th Cir. June 1, 2021); *United States v. Langdon*, ___ F. App'x ___, 2021 WL 4059955, at **2-3 (11th Cir. Sept. 7, 2021) (noting that even if the court had not considered *any* § 3553(a) factors anew or at all, "we cannot say that the district court erred").

As described by one judge on the court, the rule applied in the Eleventh Circuit after the decision in *Potts* amounts to nothing more than "unbridled discretion." *United States v. Gonzalez*, 9 F.4th 1327, 1337-40 (11th Cir. 2021) (Tjoflat, J. concurring) (noting that the Eleventh Circuit has "never actually found that a district court abused its discretion under Section 404(b);" "it's not at all apparent how meaningful review could hinge on a mere statement from the district court that it 'consider[ed] [] the government and probation responses;'" and the so-called "review" now exercised by the court is completely "unanchored").

Accordingly, if this Court holds in *Conception* that a court's discretion under Section 404(b) is neither "unbridled" nor "unanchored," and indeed, that a proper exercise its discretion under Section 404(b) *requires* courts to at least consider directly applicable legal developments (such as changes made by Section 2 of the FSA), as well as intervening factual developments such as a defendant's post-offense conduct, Petitioner's Section 404 case should be remanded to the district court. And indeed, if

the district court is directed to specifically consider Petitioner's request for a reduction in his supervised release term to the new statutory minimum of 8 years under Section 404(b) in light of intervening law and Petitioner's changed personal "facts," there is every reason on this record to believe such a remand would not be futile.

Indeed, the district court made eminently clear in its "statement of reasons" after Petitioner's original sentencing that because of his substantial cooperation, it wished to impose the minimum sentence required by law. And, given that clearly-expressed intent in crafting Petitioner's original sentence, there is no logical reason why the court would not give serious consideration to reducing his supervised release term to the new FSA minimum – particularly when Petitioner will now serve so many additional years on home confinement/supervision as a result of the court's compassionate release order. Finally, with regard to intervening factual developments, the district court was unmistakably clear in its compassionate release order that it views Petitioner's disciplinary record during 14 years of incarceration as a positive, and that his advancing age and declining health are likewise factors that together weigh in favor of a reduced sentence. The court has already opined that Petitioner poses little risk of recidivism in light of these new factual circumstances. A different ruling under Section 404(b) would be difficult to justify.

This Court appears to have held several petitions, including *Maxwell v. United States*, No. 20-1653 and *Houston v. United States*, No. 20-1479, pending resolution of the circuit conflict in *Concepcion*. It should do so with the petition in this case as well.

A reversal in *Conception* will most definitely necessitate a reversal and remand for reconsideration here.

CONCLUSION

The Court should hold this case pending its decision in *Conception*, and grant certiorari, vacate the decision below, and remand this case in light of that decision.

Respectfully submitted,

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