NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

THOMAS JOHNSON,

***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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Thomas Johnson ("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 order denying Petitioner's motion to reduce his term of imprisonment pursuant to Section 404 of the First Step Act, *United States v. Johnson*, 859 F. App'x 500 (11th Cir. June 14 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 order denying Petitioner's motion to reduce his term of imprisonment pursuant to Section 404 of the First Step Act, was entered on June 14, 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. . . .

(C) In the case of a controlled substance in schedule I or II . . ., except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . . Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, . . . if there was such a prior conviction, impose a term of supervised release of at least 6 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 Charges, Verdict, and Original Sentencing

On March 6, 2008, Petitioner was charged with possessing a firearm and ammunition as a felon, in violation of 18 U.S.C. § 922(g)(1) and § 924(e) (Count 1); possessing with intent to distribute more than 5 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B) (Count 2); possessing with intent to distribute a detectable amount of powder cocaine in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(C) (Count 3); and knowingly possessing, using and carrying a firearm during and relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) (Count 4). (DE 1). On June 30, 2008, the government filed a notice pursuant to that it intended to seek enhanced penalties if Petitioner were convicted based upon his prior drug convictions.

On July 17. 2008, a jury found Petitioner guilty of Counts 1, 2, and 3, but not guilty on Count 4. In the Pre-Sentence Investigation Report (PSI), the Probation Office found that he faced a statutory range on Count 1 of 15 years-life and a maximum term of 5 years supervised release; on Count 2, he faced 10 years-life under §841(b)(1)(B) and § 851, and a minimum term of 8 years supervised release; and on Count 3, he faced 0-30 years under § 841(b)(1)(C) and § 851, and a minimum term of 6 years supervised release.

In calculating his advisory guideline range, the Probation Office grouped Petitioner's three counts. Then, using the very small amounts of crack and powder in his case (10.4 grams of crack and 8.8 grams of powder), the Probation Office

determined that his base offense level under U.S.S.G. § 2D1.1 was 24. With a 2-level increase for possession of a weapon, his total offense level – before Chapter Four Enhancements – was a level 26. Ultimately, however, because Petitioner qualified as a Career Offender, his guideline range was dictated by U.S.S.G. § 4B1.1. Since he faced a maximum statutory term of life on Count 2, his Career Offender Guideline range was 37. With a Criminal History Category of VI as a Career Offender, Petitioner faced an enhanced advisory guideline range of 360 months-life.

On September 29, 2008, the district court sentenced him to the guideline minimum of 360-months imprisonment on all counts to be served concurrently, followed by 8 years supervised release.

The Presidential Commutation

On January 20, 2017, President Obama commuted Petitioner's term of imprisonment to 240 months, but left intact his 8 year term of supervised release term.

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 First Step Act Motion

After the enactment of the First Step Act, Petitioner filed a motion to reduce his sentence pursuant to the Act. The government opposed relief on grounds that he had received a commutation, was a Career Offender, and his 240-month commuted term of imprisonment fell below the reduced Career Offender range under the Fair Sentencing Act (262-327 months imprisonment).

On July 10, 2019, the district court found Petitioner eligible for relief despite being a Career Offender, and despite having received a commutation. Nonetheless, the court denied him any relief, stating that since his commuted sentence of 240 months was below the bottom of the now-reduced Career Offender range, "the First Step Act affords no further relief … in this case."

Petitioner's First Appeal of the Denial of his First Step Act Motion, and the Decision in *Jones*

Petitioner appealed that ruling, arguing that the district court had misunderstood its authority under Section 404(b). On April 24, 2020, the Eleventh

Circuit heard oral argument in his case together with the cases of three other defendants whose First Step Act motions had been denied on a variety of grounds. On June 16, 2020, the Court issued a published decision clarifying eligibility for relief under Section 404(a) of the Act, as well as the extent of the court's discretion under Section 404(b). *United States v. Jones, et al.*, 962 F.3d 1290 (11th Cir. June, 16, 2020).

As a threshold matter, the Eleventh Circuit confirmed in *Jones* that the district court had correctly found Petitioner was convicted of a "covered offense" and eligible for relief under Section 404(a) of the Act because the Fair Sentencing Act had "modified the statutory penalties for Johnson's offense," and he had not received the "lowest possible statutory penalty available to him under the Fair Sentencing Act." *Id.* at 1303. Indeed, the court recognized, his statutory range of imprisonment under the Fair Sentencing Act was now zero to 30 years imprisonment under 21 U.S.C. § 841(b)(1)(C), rather than 10 years to life under § 841(b)(1)(B) as calculated at the time of sentencing. *Id.* And his 240-month sentence was plainly above the new statutory minimum of "zero" months imprisonment.

The court found, however, that the order denying relief to Petitioner was "ambiguous" as to whether the court in fact understood its authority to further reduce his sentence down to the new statutory minimum. *Id.* at 1305. The ambiguity arose from the court's final statement that "the First Step Act '*affords no further relief.*'" The italicized language left the Eleventh Circuit "unsure of the grounds for the ruling." *Id.* Either the district court "understood that it *could* reduce Johnson's sentence but *chose* not to because Johnson's commutation already afforded him what

it believed to be sufficient relief," the court stated, or the court simply "ruled that it could not grant Johnson's motion" because his sentence was already below the reduced guideline range. If the latter, the court held, that would be erroneous because the First Step Act did not bar the district court from reducing Johnson's sentence below the guideline range. *Id.*

Since the court could not "tell which of [the above] readings" of the district court's order was correct, it vacated the order and remanded to allow the district court to revisit Petitioner's request for reduction, *id.*, in light of the clarification of the law in its decision.

The Proceedings Upon Remand

Once the mandate issued and jurisdiction returned to the district court, Petitioner filed a motion for order on the mandate, asking the district court to exercise its now-clarified discretion under Section 404(b) to further reduce his term of imprisonment from 240 to 180 months, and to reduce his term of supervised release from 8 to 6 years, the new statutory minimum under § 841(b)(1)(C).

As support for both reductions, he pointed out that in *Jones* the court had provided guidance as to some factors that should be considered under Section 404(b). That guidance included first, the Court's recognition that in deciding whether to exercise its discretion to reduce an eligible defendant's sentence,

> the actual quantity of crack involved in a violation is a key factor for a sentence modification just as it is when a district court imposes a sentence. *See* 18 U.S.C. § 3553(a)(1) (instructing district courts to consider the nature and circumstances of the offense when imposing a sentence).

962 F.3d at 1301. And here, Petitioner argued, "[b]y any measure – comparison to all crack cases prosecuted nationwide, crack cases in the district, or simply the four crack cases considered in *Jones* – [his] 'actual quantity of crack' (10.4 grams) was extremely small."

Second, he noted with significance, the *Jones* court stated that "[i]n exercising their discretion, [district courts] may consider all the relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a). *See United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020)." *Jones*, 962 F.3d at 1304. In *Allen*, he pointed out, the Sixth Circuit held that the district court reversibly erred in believing its authority under Section 404 was limited to considering the defendant at the time he committed the "covered offense," and that "any good behavior that occurred after the covered offense is immaterial" to a reduction in the term of imprisonment. Rather, the Sixth Circuit had clarified – and Petitioner emphasized – a district court indeed "has the authority under Section 404 to reduce a clearly-eligible defendant's term of imprisonment below his Guideline range based on post-sentencing conduct and other § 3553(a) factors."

Based upon *Jones*' favorable citation of *Allen*, and this Court's own recognition in *Pepper v. United States*, 462 U.S. 476 (2011) that post-sentencing conduct was not only "relevant" to many of the § 3553(a) factors, but "the most accurate indicator of '[the defendant's] present purposes and tendencies'" with direct impact upon "the period of restraint and the kind of discipline that out to be imposed on him," *id.* at 492-493 (citation omitted), Petitioner argued that the district court should consider

his demonstrated post-sentencing rehabilitation in reducing both his term of imprisonment and his term of supervised release under Section 404(b) here.

In that regard, he emphasized his perfect disciplinary record for 12 straight years of incarceration, his dedication to improving himself educationally by earning his GED, his other significant coursework, and the fact that he had volunteered for a transfer to FCI Marianna (separating himself from his family in South Florida) in order to help rebuild the prison after its devastation by Hurricane Michael. Such post-sentencing conduct, he argued, was not only relevant to evaluating his full "history and circumstances" under 18 U.S.C. § 3553(a)(1). It was directly relevant to determining the need for the sentence at the current time to afford adequate deterrence, protect the public, and provide opportunities for rehabilitation—mandated considerations under 18 U.S.C. § 3553(a)(2)(B), (C), and (D).

A final § 3553(a) factor "relevant" to the proper exercise of the court's discretion under Section 404(b) here, he argued, was "the need for the sentence imposed "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"—which was likewise a mandated consideration under § 3553(a)(6). On that point, he noted with particular significance that in *United States v. Stilling*, No. 8:08-cr-240-T-24SPF, DE 112:2-3 (M.D. Fla. Mar. 15, 2019) the defendant similarly qualified as a Career Offender; he similarly received a commuted sentence to a term below the reduced Career Offender range; and the court nonetheless further reduced his term of imprisonment as well as his term of supervised release, based upon the fact that his offense conduct involved only 12.6

grams of crack and his "good conduct while incarcerated." While *Stilling* was an exact comparator to his case in every respect including the very small crack amount (which *Jones* described as a "key" factor for reduction), Petitioner noted that multiple other courts had granted further reductions under Section 404(b) to Career Offenders who had received commutations to terms below the revised Career Offender range, based on some degree of post-sentencing rehabilitation. As support, he cited *United States v. Cook*, No. 05-258, DE 173 & DE 179 (E.D. Mo. 2019); *United States v. Barber*, 2019 WL 3771754 (W.D. Va. Aug. 9, 2019); *United States v. Garrett*, 2019 WL 2603531 (S.D. Ind. June 25, 2019); and *United States v. Biggs*, 2019 WL 2120225 (N.D. Ill. May 15, 2019).

All of these courts, he noted had applied *Pepper*'s guidance in exercising their discretion under Section 404(b). And indeed, he urged the district court to consider these comparable cases in reducing both his term of imprisonment and supervised release so his sentence, as *per* the dictate in § 3553(a), would be "sufficient but not greater than necessary" to comply with all of the purposes of sentencing in § 3553(a)(2) at this time.

In response, the government ignored every comparator case Petitioner had cited. In fact, it ignored § 3553(a)(6) entirely, as well as *Allen*, *Pepper*, Petitioner's perfect disciplinary record, his UNICOR work, and indeed, every factor suggesting that a further reduction was warranted because the current sentence was greater than necessary to further the deterrent, protective, or rehabilitative purposes listed in § 3553(a)(2). Instead, the government argued without authority that the § 3553(a)

factors "cut against" granting Petitioner relief on the § 404 motion simply because of his § 922(g)(1) conviction in this case. According to the government, Petitioner's gun possession 12 years ago meant that a further reduction in his sentence at this time would "undermine the safety of the community."

In reply, Petitioner argued that having a § 922(g)(1) conviction in addition to a crack conviction did not materially distinguish his case from the comparators he had cited. Indeed, he noted, the defendants in *Biggs*, *Cook*, and *Garrett* were also convicted of firearm offenses, the government similarly argued "danger to the community," and the courts in each of those cases nonetheless reduced those defendants' sentences. In *Biggs* he noted, the defendant had multiple firearms, but the court found he did not wield or discharge them during the offense, and he had been a model inmate. In *Cook*, the defendant received a reduction despite some "poor conduct" in prison. And in *Garrett*, the defendant received a further reduction even though the defendant possessed a loaded firearm, and was convicted of a § 924(c) offense, because he had "shown both that he is capable of rehabilitation and the he is dedicated to doing so."

He argued:

> [U]nlike *Garrett*, the gun Mr. Johnson possessed was not loaded. He was not convicted of a § 924(c) offense, because there was no evidence that the gun was possessed to "further" a drug crime in any way. Like *Biggs*, he was convicted merely for possessing a gun as a felon; he did not brandish it, or even mention it during his crack deal. Contrary to the government's mistaken suggestion, his crack offense was in no sense "violent." And indeed, as the PSI shows, he has not been involved in any violent act in his life.

> Like the defendants in both *Biggs* and *Garrett*, Mr. Johnson has shown himself at every step of the way through his lengthy incarceration to be a "model prisoner." Unlike the defendant in *Cook*, he has not had even one disciplinary infraction – ever. The government ignores his exemplary record of conduct in prison for the last 12 years, because it cannot dispute that he is a changed person. But while the government tries to ignore this irrefutable fact and governing law, namely, *Pepper v. United States*, 462 U.S. 476 (2011) where the Supreme Court rightly recognized that post-sentencing conduct is the best evidence possible of the need for a sentence to deter, protect, and further rehabilitate a defendant, *see id.* at 489-93, the Court cannot ignore these considerations; Congress mandates their consideration.

The Court's Order Reducing the Term of Supervised Release, But Denying any Reduction in the Term of Imprisonment

On August 12, 2020, the district court issued an order granting Petitioner's motion for reduction "in part." Specifically, the court granted his request to reduce his supervised release term from 8 to 6 years. However, the court denied his request for any further reduction in his term of imprisonment. .

Before explaining its decision in that regard, the district court responded to the Eleventh Circuit's questions as to the basis for its prior denial. Specifically, the court clarified, in stating in its original order that the First Step Act "affords no further relief … in this case," it "understood that it *could* reduce Johnson's sentence but *chose* not to because Johnson's commutation already afforded him what [this Court] believed to be sufficient relief." It simply "declined to exercise its discretion in this particular case."

The court then explained, in the following way, why it had chosen to reduce Petitioner's supervised release term based on his post-sentencing conduct, but would *not* reduce his term of imprisonment:

> As the Eleventh Circuit recognizes, district courts are not required to reduce a sentence under the First Step Act and "have wide latitude to determine whether and how to exercise their discretion in this context." [*Jones*, 962 F.3d] at 1304. Considering the relevant § 3553(a) factors, and Johnson's arguments regarding them, including his conduct while in prison, the Court would have found that a revised sentence at the bottom range of the revised guideline would have been appropriate: 262 months. Johnson, however, is already serving a lower sentence of 240 months. Thus, the Court declines to reduce his sentence further.
>
> To be clear, the Court is not holding that Johnson's commutation makes him ineligible for a reduction under the First Step Act. He is eligible, as this Court already found. What the Court is saying is that the facts of this case do not merit a revised sentence below the 240 months that Johnson is already serving. Although the Court recognizes and commends Johnson's rehabilitative efforts and positive disciplinary history, those accomplishments do not warrant a further reduction in his sentence – and certainly not the 180 months Johnson seeks, which is almost seven years below the revised minimum. Moreover, the relatively small amount of crack cocaine Johnson was convicted of possessing was not insignificant, and it does not detract from the danger drug trafficking brings to the community or wash away Johnson's extensive criminal past, which are important considerations for this Court.
>
> That being said, the Court does find that Johnson's conduct while imprisoned justifies reducing his term of supervised release from eight years to six. This reduction would be in line [with] the new revised guideline, as well. Thus the Court grants the motion in that respect only.

The Appeal and Affirmance of the District Court

Petitioner appealed to the Eleventh Circuit, arguing that consideration of all of the § 3553(a) factors was mandatory under Section 404(b). And indeed, he argued, not only did every clue in the text and well-settled canons of construction support that position, but meaningful appellate review would simply not be possible if consideration of the factors were merely permissible and the court could disregard whichever factors it wished. Here, he explained, the district court reversibly erred in

failing to consider his post-sentencing conduct as relevant to the requested reduction in his term of imprisonment. He explained, citing *Pepper*, that whether favorable or unfavorable, a defendant's post-sentencing record impacts the need for further deterrence and protection of the public from further crimes by the defendant, as well as the need to avoid unwarranted disparities since (as he had shown) defendants convicted of similar conduct with similar records had received substantial reductions even after a commutation of these sentences, based upon their post-offense rehabilitation. To deny him the exact relief granted other similarly-situated defendants, he argued, created rather than avoided unwarranted disparities. He urged the court to find that in failing to consider the relevance of post-sentencing conduct to his term of imprisonment under Section 404(b), the district court abused its discretion. Treating post-sentencing rehabilitation as relevant *only* to the length of supervised release and not at all to the proper length of imprisonment, he argued, was a mistaken interpretation of Section 404(b), and reversible error *per se*.

The government responded that the district court was not required to consider the § 3553(a) factors, but that in any event, it had in fact weighed the relevant § 3553(a) factors here. Specifically, the government argued, the fact that the court denied Petitioner any reduction to his commuted term of imprisonment under the FSA based on the amount of crack in the case and his extensive criminal record evidenced that it considered his 'history and characteristics" and the "nature and the circumstances of the offense" under 18 U.S.C. § 3553(a)(1). Moreover, the government argued, the court had also considered the "kinds of sentences" available under §

3553(a)(3), and the Guideline range under § 3553(a)(4), by stating that Petitioner's commendable post-sentencing conduct and rehabilitative efforts were insufficient to warrant any further reduction of an already-below-Guideline sentence.

In his reply brief, Petitioner pointed out that the government had not even attempted to argue that the district court considered his rehabilitation evidence as relevant to *other* factors under § 3553(a), such as to the need for the term of imprisonment imposed to "afford adequate deterrence to criminal conduct," § 3553(a)(2)(B); "to protect the public from further crimes of the defendant," § 3553(a)(2)(C); and "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6). And, to the extent that the government claimed no circuit had required a court to consider post-sentencing conduct under Section 404(b), that was wrong because multiple circuits had reversed for the district court's failure to consider post-sentencing conduct – at least, where as here, such conduct was specifically emphasized by the defendant as grounds for a reduction.[1] In all of these circuits, Petitioner noted, it is impermissible for a district court to deny Section 404 relief – as the court did here – based entirely on a defendant's criminal history and the nature of his offense, without any demonstrated consideration of his arguments as to how his post-sentencing conduct impacted the mandated considerations in § 3553(a)(2)

[1] In this regard, Petitioner cited *United States v. Easter*, 975 F.3d 318, 326 (3rd Cir. 2020); U*nited States v. Chambers*, 56 F.3d 667, 675 (4th Cir. 2020)); *United States v. Allen*, 956 F.3d 355, 356-58 (6th Cir. 2020); *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020); *United States v. Shaw*, 957 F.3d 734, 742 (7th Cir. 2020); and *United States v. White*, 984 F.3d 76, 90-91 (D.C. Cir. 2020).

and (a)(6). The government ignored these § 3553(a) factors entirely, treating Petitioner's perfect disciplinary record and other evidence of rehabilitation over his lengthy period of incarceration as irrelevant to the decision to reduce a term of imprisonment under Section 404(b).

Without hearing oral argument, on June 14, 2021, the Eleventh Circuit issued an unpublished decision affirming the district court's refusal to reduce Petitioner's term of imprisonment. *United States v. Johnson*, 859 F. App'x 500 (11th Cir. June 14, 2021). As support for finding that to be a proper exercise of the court's discretion under Section 404(b), the Eleventh Circuit cited its precedential decision in *United States v. Potts*, 997 F.3d 1142 (11th Cir. 2021), *pet. for cert filed* Oct. 15, 2021 (No. 21-6007) where it had held that a district court "may," but is not required to, consider the § 3553(a) factors in deciding whether to exercise its discretion to reduce a sentence under Section 404(b), and found no abuse of discretion in a court's refusal to reduce an eligible defendant's sentence based solely on the nature and circumstances of the offense, and his criminal history – without regard for post-offense conduct evidencing rehabilitation. *Id.* at 1146-47.

Here, "[a]s in *Potts*," the Court found, the district court considered the § 3553(a) factors, but "reasonably determined that the facts of [Petitioner's] case did not merit a revised sentence'" of imprisonment. *Johnson*, 859 F. App'x at 501 (noting, as the relevant "facts" the district court "reasonably" considered in denying any reduction in the term of imprisonment, the "'amount of crack cocaine [he] was convicted of possessing,' 'the danger drug trafficking brings to the community,' and his status as

a career offender for accumulating 17 convictions in 12 years that included numerous controlled substance offenses").

The Eleventh Circuit noted that the district court had determined "'that Johnson's conduct while imprisoned justified[d] reducing his term of supervised release from eight years to six,'" but found no abuse of discretion under Section 404(b) in the court's failure to consider that same rehabilitation and positive prison record as relevant to a reduction in the term of imprisonment under Section 404(b). *Id.* According to Eleventh Circuit, the "weight to given any specific § 3553(a) factor" under Section 404(b) – or all factors clearly impacted by post-sentencing conduct and the reduced statutory minimum – is "left to the district court's discretion." *Id.* (citation omitted). In short, the court found no abuse of discretion in the district court's decision to only reduce Petitioner's term of supervised release based on post-sentencing rehabilitation, but "leaving undisturbed his sentence of imprisonment" irrespective of his rehabilitation. *Id.*

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 in below as well.

As noted above, in Petitioner's case the court of appeals followed *United States v. Potts*, 997 F.3d 1142 (11th Cir. 2021), *pet. for cert filed* Oct. 15, 2021 (No. 21-6007), where it had upheld a district court's denial of sentencing relief to an eligible defendant under Section 404(b) based solely upon the "facts and circumstances of the case," without any consideration of intervening legal developments (namely, Congress' reduction of the minimum mandatory terms under § 841 through Section 2 of the FSA), or intervening factual developments (the defendant's post-sentencing rehabilitation as evidenced by a positive prison record). According to *Potts*, a district court's statement in its order of denial disregarding such intervening legal and factual developments is "sufficient" as a matter of law, and completely within the court's discretion. And here, the Eleventh Circuit similarly found no abuse of discretion under Section 404(b) in the district court's failure to consider changes to the minimum mandatory term of imprisonment and in Petitioner's own "history and circumstances" through post-sentencing rehabilitation as having any relevance to the question of whether his term of imprisonment should be reduced. As in *Potts*, the calculus under Section 404(b) in Petitioner's case was fixated in time as of the date of sentencing, as if nothing significant had changed.

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 current facts (such as demonstrated post-sentencing rehabilitation) 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).

Notably, with specific regard to post-sentencing rehabilitation, the Petitioner in *Concepcion* argued, as the Petitioner here did before the Eleventh Circuit as well, that for the reasons articulated by the courts in *Chambers* and *Easter*, the district court must consider all § 3553(a) factors, including factual ones impacted by post-sentencing conduct. *See* 2021 WL 2181524, at *25 (explaining that as this Court held in *Pepper v. United States*, 562 U.S 476, 488-89 (2011) "a district court cannot artificially limit itself to a defendant's past history and circumstances while ignoring more recent developments").

And indeed, although the Petitioner in *Conception* correctly pointed out that not only the Eleventh Circuit but the Fifth and Ninth as well 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 *Potts* and the instant case, in upholding a refusal to reduce a term of imprisonment under Section 404(b) when the district court – in exercising its

"discretion" under that provision – did not consider as being relevant in any way Congress' changes to the minimum mandatory statutory penalties 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 to a proper exercise of discretion under Section 404(b) to reduce a term of imprisonment, because the court did in fact reduce the defendant's term of imprisonment based on the "congressional change." *Id.* at 416.

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 statutory 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 term of imprisonment for the offense of conviction, as well as undeniably "commendable" changes in the defendant himself throughout his lengthy incarceration – is thus even at odds with the approaches of the Fifth and Ninth Circuits.

As aptly demonstrated by the decision in this case, the rule applied in the Eleventh Circuit after *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)," and that 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 demonstrated post-offense rehabilitation in determining whether to reduce his current term of imprisonment, the decision below should be vacated. Petitioner's case should be remanded for reconsideration of his motion by the district court with a correct understanding of the bounds of discretion under Section 404(b).

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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October 25, 2021