

No. _____

In the
Supreme Court of the United States

Lee Dale White,

Petitioner,

v.

United States of America,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Adam Nicholson
Assistant Federal Public Defender

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin Street, Suite 629
Dallas, TX 75202
214.767.2746
Adam_Nicholson@fd.org

QUESTIONS PRESENTED

- I. Whether a district court's denial of a motion for relief from under Section 404 of the First Step Act is subject to substantive reasonableness review?

PARTIES TO THE PROCEEDING

Petitioner is Lee Dale White, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
INDEX TO APPENDICES	iv
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY AND RULES PROVISIONS.....	1
LIST OF PROCEEDINGS BELOW	3
STATEMENT OF THE CASE.....	3
REASON FOR GRANTING THIS PETITION.....	9
I. This Court should grant review to determine whether the denials of motions for relief under Section 404 of the First Step Act are subject to substantive reasonableness review.	9
CONCLUSION.....	13

INDEX TO APPENDICES

Appendix A Judgment and Opinion of Fifth Circuit, Affirming the District Court's Order Denying First Step Act Relief

Appendix B December 4, 2020, Order of the United States District Court for the Northern District of Texas Denying First Step Act Relief

Appendix C Order of Limited Remand by Fifth Circuit

Appendix D May 15, 2020, Order of the United States District Court for the Northern District of Texas Denying First Step Act Relief

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>United States v. Batiste</i> , 980 F.3d 466 (5th Cir. 2020)	10, 11
<i>United States v. Boulding</i> , 960 F.3d 774 (6th Cir. 2020)	11, 12
<i>United States v. Collington</i> , 995 F.3d 347 (4th Cir. 2021)	9, 11, 12
<i>United States v. Concepcion</i> , 991 F.3d 279 (1st Cir. 2021)	10, 11
<i>United States v. Kelley</i> , 962 F.3d 470 (9th Cir. 2020)	10
<i>United States v. Lee Dale White</i> , 851 F. App'x 482 (5th Cir. 2020)(unpublished).	1, 3
<i>United States v. Mannie</i> , 971 F.3d 1145 (10th Cir. 2020)	10
<i>United States v. Moore</i> , 975 F.3d 84 (2d Cir. 2020)	10
<i>United States v. Venable</i> , 943 F.3d 187 (4th Cir. 2019)	6, 7
<i>United States v. White</i> , 984 F.3d 76 (D.C. Cir. 2020)	11, 12
<i>United States v. Wirsing</i> , 943 F.3d 175 (4th Cir. 2019)	9
<i>United States v. Woods</i> , 949 F.3d 934 (6th Cir. 2020)	6, 7
Federal Statutes	
18 U.S.C. § 3528(c)(2)	10

18 U.S.C. § 3553(a)	12
18 U.S.C. § 3582(c)(1)(b)	11
18 U.S.C. § 3582(c)(2)	10, 11
21 U.S.C. § 841(a)(1)	3
21 U.S.C. § 841(b)(1)(A)(iii)	4
21 U.S.C. § 841(b)(1)(B)(iii)	4
21 U.S.C. § 846.....	3
28 U.S.C. § 1254(1)	1
Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010)	<i>passim</i>
First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5194 (2018)	5
First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194 (2018)	5, 9
First Step Act of 2019, Pub. L. No. 115-391, § 404, 132 Stat. 5194–249 (2018)	<i>passim</i>
U.S.S.G. § 2D.1.1	4

PETITION FOR A WRIT OF CERTIORARI

Petitioner Lee Dale White seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is located within the Federal Appendix at *United States v. Lee Dale White*, 851 F. App'x 482 (5th Cir. June 25, 2021) (unpublished). It is reprinted in Appendix A to this Petition. That opinion concerns the district court's December 4, 2020, order denying relief, which is attached as Appendix B. A prior order of the Court of Appeals remanding the case to the district court is attached as Appendix C. Appendix D contains the district court's first order denying Mr. White's requested relief.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on June 25, 2021. On March 19, 2020, the Court extended the 90-day deadline to file a petition for certiorari to 150 days. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS

This Petition involves Section 404 of the First Step Act of 2019, Pub. L. No. 115-391, § 404, 132 Stat. 5194–249 (2018), which provides:

Sec. 404. APPLICATION OF THE FAIR SENTENCING ACT.

(a) **DEFINITION OF A 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.

LIST OF PROCEEDINGS BELOW

1. *United States v. Lee Dale White*, 851 F. App'x 482 (5th Cir. June 25, 2021), CA No. 20-10557, Court of Appeals for the Fifth Circuit. Judgment affirmed on June 25, 2021. (Appendix A).
2. *United States v. Lee Dale White*, 3:18-CR-00033-N, United States District Court for the Northern District of Texas. Order denying relief under the First Step Act, entered December 4, 2020. (Appendix B).
3. *United States v. Lee Dale White*, CA No. 20-10557, Court of Appeals for the Fifth Circuit. Order of limited remand entered October 9, 2020. (Appendix C).
4. *United States v. Lee Dale White*, 3:18-CR-00033-N, United States District Court for the Northern District of Texas. Order denying relief under the First Step Act, entered May 5, 2020. (Appendix D).

STATEMENT OF THE CASE

Mr. White's Original Conviction and Sentence

On October 7, 2009, Mr. White was indicted in the Eastern District of Texas on a four-count indictment. (ROA.16–21). Count One charged him with conspiracy to distribute and to possess with intent to distribute 50 grams or more of crack cocaine, a violation of 21 U.S.C. §§ 846 and 841(a)(1), beginning on or about October 2007 and continuing through at least September of 2008. (ROA.16).

Mr. White entered into a plea agreement with the Government. *See* (ROA.126). As a part of that plea, Mr. White acknowledged having distributed and/or joined with others in distributing crack cocaine, and the parties stipulated that Mr. White's base offense level would be 34—which corresponded to cocaine base in an amount of at

least 500 grams but less than 1.5 kilograms. (ROA.127) (citing the § 2D.1.1 of the 2009 edition of the United States Sentencing Guidelines Manual).

Using the 2009 version of the Guidelines Manual, Mr. White's Presentence Report ("PSR") calculated his total offense level to be 31—a stipulated base offense level of 34, less three points for acceptance of responsibility. (ROA.131–32). Mr. White was in Criminal History Category ("CHC") III. (ROA.135).

Mr. White's plea agreement bound the district court to a statutory-minimum sentence of 120 months, which was fifteen months below the lower end of the otherwise-applicable guideline imprisonment range of 135 to 168 months. (ROA.137). As a result, on February 24, 2010, the district court sentenced Mr. White to 120 months' imprisonment and a five-year term of supervised release. (ROA.24–26).

The Fair Sentencing Act of 2010

On August 3, 2010, Congress enacted the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010). Section 2 of the Fair Sentencing Act amended 21 U.S.C. § 841(b)(1)(A)(iii) by modifying what was a 50-gram threshold to 280 grams; it also amended § 841(b)(1)(B)(iii) by increasing a formerly 5-gram threshold to 28 grams.

Mr. White's Term of Supervised Release

Mr. White began his period of supervised release on February 1, 2017. (ROA.112). On January 16, 2018, jurisdiction over his supervised release was transferred to the Northern District of Texas. (ROA.6). Two days later, Probation filed a Petition for Offender Under Supervision, asking the district court for a violator's

warrant while alleging that Mr. White had violated the conditions of his supervised release, as evinced by his arrest on drug charges by Dallas Police. (ROA.112–15). A warrant for Mr. White’s arrest was issued, (ROA.116), and a revocation hearing was held on September 9, 2018. *See* (ROA.43). The district court then revoked Mr. White’s supervised release and sentenced him to a term of 24 months’ imprisonment and no additional supervised release, to be served consecutively to the sentence imposed in criminal case 3:17-CR-368-N in the Northern District of Texas. (ROA.43–44).

The First Step Act of 2018

In December of 2018, Congress enacted the First Step Act of 2018. Section 404 of the First Step Act gave sentencing courts the 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.” *See* First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). The First Step Act defined a “covered offense” as “a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . that was committed before August 3, 2010.” First Step Act of 2018, § 404(a).

Mr. White’s Motion for Relief Under the First Step Act

On January 10, 2020, Mr. White filed with the district court a pro se motion for sentence reduction under Section 404 of the First Step Act. (ROA.45–53). On May 15, 2020, the district court denied Mr. White’s motion, holding that he was ineligible for resentencing because he was imprisoned for violating the terms of his supervised release. App. D.

Mr. White’s Appeal of the District Court’s First Order

Acting pro se, Mr. White appealed the district court’s decision, arguing that the district court erred in holding that he was ineligible for relief under Section 404 of the First Step Act because he was serving a revocation sentence. *See generally* Appellant’s Brief, *United States v. White*, No. 20-10557 (5th Cir. Aug. 11, 2020). In response, the Government asked for the case to be remanded to the district court for the limited purpose of consideration whether, despite being under a revocation sentence, Mr. White was eligible for resentencing under Section 404, in light of *United States v. Venable*, 943 F.3d 187 (4th Cir. 2019), and *United States v. Woods*, 949 F.3d 934 (6th Cir. 2020), and, if so, whether the district court would grant or deny Mr. White’s First Step Act motion. Appellee’s Brief, *United States v. White*, No. 20-10557 (5th Cir. Sept. 3, 2020). The Court of Appeals granted the Government’s motion and remanded the case to the district court for the purposes put forth by the Government. App. C.

On Remand to the District Court

In its briefing on remand to the district court, the Government agreed with the persuasive authority of *Venable* and *Woods*, taking “the position that White is eligible for a [First Step Act] reduction.” (ROA.169–70). However, the Government argued that White’s revocation term should not be reduced because the district court “likely” would have imposed the same sentence even if Sections 2 and 3 of the Fair Sentencing Act was in effect at the time of Mr. White’s 2009 offense. (ROA.170–72).

After the district court appointed the Federal Public Defender to serve as Mr. White's counsel, the defense asked the district court to grant Mr. White sentencing relief by reducing his revocation sentence to less than 24 months and/or making the revocation sentence run concurrently to his sentence in case 3:17-CR-638-N. (ROA.174–91). In support of this argument, Mr. White concurred with the Government in arguing that, in light of *Venable* and *Woods*, he appeared to be eligible for relief under Section 404 of the First Step Act despite being under a revocation sentence. (ROA.182–83).

Mr. White argued that sentencing relief was merited because he had “already served more time than would have been justified had he been sentenced under the Fair Sentencing Act.” (ROA.184). Mr. White pointed to three parts of his plea agreement that would not have likely been the same if done after the application of the Fair Sentencing Act. First, he argued that he would not have stipulated to ten-year sentence because, although it was the statutory minimum at the time of his plea, his mandatory minimum would have been only five years after the Fair Sentencing Act. (ROA.184). Second, Mr. White argued that he would not have stipulated to the base offense level of 34 because later developments would have significantly reduced the base offense level for the amount of cocaine base involved in his offense. (ROA.185–86). Third, Mr. White argued that he would not have stipulated to a plea agreement that bound the court to a sentence that fell squarely within the applicable guideline range. (ROA.186).

On December 4, 2020, the district court entered an order stating that, although Mr. White was eligible for a sentence reduction under Section 404 of the First Step Act, it was exercising its discretion to deny such a reduction. App. B. The district court explained that it was denying a sentence reduction because it concluded that it would have imposed the same 24-month revocation sentence even after the application of the First Step Act. App. B at 4.

Mr. White's Appeal of the District Court's Second Order

This time on appeal, Mr. White argued that the district court's denial of his motion for a sentencing reduction resulted in substantively unreasonable sentence. *See* [App. A at 2]. He acknowledged his argument was foreclosed by a prior published decision of the Fifth Circuit. *See* [App. A at 2]. The Fifth Circuit granted the Government's motion for summary affirmance and affirmed the district court's decision. [App. A, at 2].

REASON FOR GRANTING THIS PETITION

I. This Court should grant review to determine whether the denials of motions for relief under Section 404 of the First Step Act are subject to substantive reasonableness review.

This Court should grant review to determine whether denials of motions for sentence reductions pursuant to Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), are subject to review for substantive reasonableness.

In 2010, Petitioner Joe White was sentenced under a sentencing scheme for crack cocaine offenses that, after being “widely criticized for producing racially disproportionate sentencing outcomes,” was changed later that same year by the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. *United States v. Collington*, 995 F.3d 347, 351 (4th Cir. 2021) (citing *United States v. Wirsing*, 943 F.3d 175, 177–78 (4th Cir. 2019)). Labeled an effort “[t]o restore fairness to Federal cocaine sentencing,” Pub. L. No. 111-220, 123 Stat. at 2372, the Fair Sentencing Act made significant changes to the crack cocaine sentencing guidelines that, unfortunately for Petitioner and others like him who were sentenced before the Fair Sentencing Act’s reforms, were not made retroactive.

Instead, Petitioner and other similar defendants had to wait until the First Step Act of 2018 was enacted before they could seek relief from their long-standing and long-outdated crack cocaine sentences. Section 404 of the First Step Act, entitled “Application of the Fair Sentencing Act,” finally made it possible for defendants who committed a “covered” crack cocaine offense before August 3, 2010, to receive a reduced sentence by the retroactive application of the changes brought by sections 2

and 3 of the Fair Sentencing Act. Good intent notwithstanding, Section 404 has left the circuit courts with little direction with which to settle some key questions that have arisen in connection to defendants' motions for relief from their pre-Fair Sentencing Act crack cocaine sentences.

One such question concerns whether district courts' denials of Section 404 motions are subject to review by the courts of appeal for substantive reasonableness.

The majority view among the circuits is that these cases are not open to reasonableness challenges. At least five circuits have chosen not to apply a reasonableness requirement to First Step Act review, although these sister circuits come to their conclusions for different reasons.. *See United States v. Concepcion*, 991 F.3d 279, 288–90, 291–92 (1st Cir. 2021); *United States v. Moore*, 975 F.3d 84, 88–92, 90 n.5 (2d Cir. 2020); *United States v. Batiste*, 980 F.3d 466, 479–80 (5th Cir. 2020); *United States v. Kelley*, 962 F.3d 470, at 477–79 (9th Cir. 2020); *United States v. Mannie*, 971 F.3d 1145, 1154–55, 1158 n.18 (10th Cir. 2020).

This petition arises from the Fifth Circuit, which has concluded that substantive reasonableness is inapplicable because it had previously adopted the abuse of discretion standard of review from its approach to cases involving 18 U.S.C. § 3528(c)(2)—a statute the Fifth Circuit has sometimes distinguished from and other times analogized to the First Step Act. *See Batiste*, 980 F.3d at 479–80. Although, in making this determination, the Fifth Circuit analogized the standard of review to that applied to § 3582(c)(2), the Court of Appeals provided little explanation for its decision to do so:

Although we have noted some distinctions between First Step Act sentence reduction motions and § 3582 motions, we also have found them similar in other respects. Pertinent here, in adopting an abuse of discretion standard of review for the discretionary component of a district court's First Step Act, section 404 determination, we analogized to the “abuse of discretion” standard of review applicable to “decisions whether to reduce sentences” pursuant to § 3582(c)(2). See [*United States v. Jackson*, 945 F.3d 315, 322 and n.2 (5th Cir. 2019)]. A de novo standard of review likewise applies “to the extent the court's determination turns on the ‘meaning of a federal statute’ such as the [First Step Act].” *Jackson*, 945 F.3d at 319 (5th Cir. 2019) (quoting [*United States v. Hegwood*, 934 F.3d 414, 417 (5th Cir. 2019)]). Given the foregoing, we similarly conclude the substantive reasonableness standard does not apply here.

Batiste, 980 F.3d. at 480. In contrast, the First Circuit applied the “abuse of discretion” standard based *not* on its approach to § 3582(c)(2) but, rather, its approach to motions under 18 U.S.C. § 3582(c)(1)(b). *Concepcion*, 991 F.3d at 288–90, 291–92. None of the courts holding the majority view have devoted extensive discussion to the applicability of the reasonableness standard.

The minority approach, however, is the better approach because the three circuit courts that have applied reasonableness review have each based their decision on language and purpose of the First Step Act itself. *United States v. Collington*, 995 F.3d 347, 358–60 (4th Cir. 2021); *United States v. White*, 984 F.3d 76, 90–91 (D.C. Cir. 2020); *United States v. Boulding*, 960 F.3d 774, 783–84 (6th Cir. 2020).

The Sixth Circuit first applied reasonableness review after considering the strong language employed by the First Step Act in describing the type of review that it anticipated for a district court would apply to merits of a Section 404 motion. *Boulding*, 960 F.3d at 784. Its reasoning exemplifies how the minority’s approach is rooted in the language of the First Step Act itself:

The First Step Act itself indicates that Congress contemplated close review of resentencing motions. Section 404(c) states that a prisoner cannot seek relief under the Act twice if the first motion was “denied *after a complete review of the motion on the merits.*” § 404(c) (emphasis added). Though coming from the provision that governs repeat resentencing motions, this language shows the dimensions of the resentencing inquiry Congress intended district courts to conduct: complete review of the resentencing motion on the merits. *See also United States v. Williams*, 943 F.3d 841, 844 (8th Cir. 2019). While “complete review” does not authorize plenary resentencing, a resentencing predicated on an erroneous or expired guideline calculation would seemingly run afoul of Congressional expectations. The Sentencing Commission has acknowledged those expectations; it has “informally advised that regardless of whether resentencing under the First Step Act constitutes a plenary resentencing proceeding or a more limited sentence modification proceeding, ‘the Act made no changes to 18 U.S.C. § 3553(a), so the courts should consider the guidelines and policy statements, along with the other 3553(a) factors, during the resentencing.’” [*United States v. Allen*, 956 F.3d 355, 258 n.1 (6th Cir. 2020)] (quoting *First Step Act*, ESP Insider Express (U.S. Sentencing Comm’n, Washington, D.C.), Feb. 2019, at 1, 8, https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf).

While a district court has discretion to consider all relevant factors and has wide latitude to provide the process it deems appropriate, the language of § 404 and our cases that interpret it, stand for the proposition that the necessary review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors. In light of this authority, we hold that an opportunity to present objections, subject to reasonableness review on appeal, is part and parcel of the process due to an eligible defendant.

Boulding, 960 F.3d at 784. The D.C. Circuit and the Fourth Circuit have followed suit, with similar, although nuanced, examination of the text of the First Step Act. *See White*, 984 F.3d at 90–91; *Collington*, 995 F.3d at 358–60,

This issue is ripe for review, with a developed circuit split. This is an excellent vehicle for this Court to grant review. This issue was preserved in the in the Court of

Appeals below. Mr. White is indisputably eligible for relief under the First Step Act from a sentence that remains several years longer than the sentencing range that would have applied after the application of the Fair Sentencing Act.

This Court should grant review to determine whether the Fifth Circuit has wrongly concluded that substantive reasonableness review is inapplicable to motions under Section 404 of the First Step Act.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 22nd day of November, 2021.

JASON D. HAWKINS
Federal Public Defender
Northern District of Texas

/s/ Adam Nicholson
Adam Nicholson
Assistant Federal Public Defender
Federal Public Defender's Office
525 S. Griffin Street, Suite 629
Dallas, Texas 75202
Telephone: (214) 767-2746
E-mail: Adam_Nicholson@fd.org

Attorney for Petitioner