No. _____

In The Supreme Court of the United States

GREGORY DONELL EATMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court recently granted certiorari in *Concepcion v. United States*, No. 20-1650, on the question of whether, when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal and factual developments. The question in *Concepcion* covers the question presented here:

> Whether, when deciding if it should "impose a reduced sentence" under Section 404(b), a district court must or may consider the 18 U.S.C. § 3553(a) sentencing factors, including the current sentencing range established by the U.S. Sentencing Guidelines.

Related Proceedings

United States v. Eatmon, No. 7:08-cr-00133, ECF 57 (N.D. Ala. May 4, 2020).

United States v. Eatmon, No. 20-11845, 2021 WL 4099238 (11th Cir. Sept. 9, 2021).

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Gregory Donell Eatmon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the Eleventh Circuit is not reported, but available at 2021 WL 4099238 and reprinted in the Appendix to the Petition. Pet. App. 1a. The decision of the district court is not reported, but reprinted at Pet. App. 8a.

JURISDICTION

The Eleventh Circuit affirmed the district court on September 9, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222, codified at 21 U.S.C. § 841, provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

INTRODUCTION

This petition presents a question encompassed by the broader question the Court will consider this Term in *Concepcion v. United States*, No. 20-1650. That case is scheduled for oral argument in January 2022 on the question of "[w]hether, 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." Petition for Writ of Certiorari

at I, *Concepcion,* No. 20-1650 (U.S. May 24, 2021), 2021 WL 2181524, at *I; 2021 WL 4464217 (U.S. Sept. 30, 2021) (mem.). The instant petition likewise asks this Court to address whether the district court "must or may" consider intervening legal and factual developments, including changes to Mr. Eatmon's Sentencing Guidelines range, which 18 U.S.C. § 3553(a)(4) instructs courts to consider when imposing a sentence. Because this Court's decision in *Concepcion* should resolve the question in this case, the Court should hold this petition in abeyance pending that decision.

The First Step Act of 2018 authorizes courts to "impose a reduced sentence" on certain defendants "as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act, § 404(b). Courts of appeals are sharply divided on whether district courts must or may consider intervening factual and legal developments, including the Section § 3553(a) factors, when imposing a reduced sentence under Section 404(b). Relevant here, the Eleventh Circuit has held that district courts are not required to calculate the current Sentencing Guidelines range or consider any of the Section 3553(a) factors. *See United States v. Gonzalez*, 9 F.4th 1327, 1332-33 (11th Cir. 2021).

The Eleventh Circuit applied *Gonzalez* in Mr. Eatmon's case to conclude that the district court had not abused its discretion by failing to calculate the current Sentencing Guidelines range or consider the Section 3553(a) factors. The court of appeals expressly held that "the [district] court was not required to consider the factors" or calculate his current Sentencing Guidelines range. Pet. App. 7a (quoting *Gonzalez*, 9 F.4th at 1333). The correctness of this holding is at the heart of the

question presented in *Concepcion*. Given the identity of issues between this case and *Concepcion*, this Court should hold this petition in abeyance pending disposition of that case.

STATEMENT OF THE CASE

1. Mr. Eatmon's sentence

Mr. Eatmon pleaded guilty to two federal charges: possession with the intent to distribute a mixture or substance containing a detectable amount of marijuana, 21 U.S.C. § 841(a)(1) and (b)(1)(D), and 50 grams or more of a mixture or substance containing a detectable amount of crack cocaine, 21 U.S.C. § 841(a)(1) and (b)(1)(A) (Count One); and possession of a gun in connection with Count One, 18 U.S.C. § 924(c) (Count Two). At the time of the offenses, the statutory penalties for Count One were driven by Congress's decision in the Anti-Drug Abuse Act to treat one gram of crack cocaine as the equivalent of 100 grams of powder cocaine. Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986). Even though Mr. Eatmon's sentencing Guidelines range for Count One was 87-to-108 months, 21 U.S.C. § 841(b)(1)(A) prescribed a sentence from 10 years-to-Life for possession with the intent to distribute 50 grams or more of crack cocaine. In 2008, the district court imposed the mandatory minimum prison term for each count, for a total term of 180 months' imprisonment: (1) 120 months on the marijuana and crack-cocaine offense, and (2) a consecutive term of 60 months on the gun offense. Mr. Eatmon is currently serving that sentence with the Bureau of Prisons.

2. The Fair Sentencing Act of 2010

Less than two years later his sentencing, Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, upon concluding that the mandatory minimum penalties for crack cocaine offenses were unduly harsh for the small quantities needed to trigger them. Section 2 of the Act increased the quantity of crack cocaine required to trigger § 841's enhanced penalties: it raised subsection (b)(1)(A)'s threshold from 50 grams to 280 grams and subsection (b)(1)(B)'s threshold from 5 grams to 28 grams. These changes reduced the 100:1 powder-to-crack cocaine ratio to an 18:1 ratio. But, important here, Congress did not apply these changes retroactively to individuals sentenced before the Act's passage.

The U.S. Sentencing Commission mirrored the changes of the Fair Sentencing Act by retroactively lowering the guidelines for crack-cocaine offenses. *See* U.S.S.G. Suppl. To App. C, amend. 750 (2011), made retroactive by amend. 759 (2011). The retroactive amendment to the Guidelines allowed some defendants to move for a sentence reduction under 18 U.S.C. § 3582(c)(2), which permits courts to "reduce the term of imprisonment" when a defendant was sentenced "based on" a sentencing range that the Commission subsequently lowered. But application of the retroactive Guidelines did not help individuals, like Mr. Eatmon, sentenced to a statutory minimum before 2010.

3. The First Step Act of 2018

Eight years after the Fair Sentencing Act, Congress gave the statutory changes retroactive effect in the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

Section 404(a) defines 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 of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." 132 Stat. at 5222. Section 404(b) of the Act authorizes district courts to give the amended penalties retroactive effect: "A court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if section 2 or 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." *Id.* Finally, Section 404(c) precludes relief from a sentence "previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010," and where a defendant's prior Section 404 motion was "denied after a complete review of the motion on the merits." *Id.*

4. Mr. Eatmon's post-sentencing motions

Following passage of the First Step Act, Mr. Eatmon sought relief under Section 404(b). He asserted that Count One is a "covered offense" and that the statutory minimum for this count is now 60 months rather than 120 months under 21 U.S.C. § 841(a)(1) and (b)(1)(B). The motion further asserted that the current Guidelines range would be 46-to-57 months, due to the amendments by the Sentencing Commission, before application of the 60-month mandatory minimum. *See* U.S.S.G. § 5G1.1(b). Thus, Mr. Eatmon asserted that his current Guidelines range and statutory minimum both decrease from 120 months to 60 months for Count One.

In support of the reduction, the motion specifically noted the amended statutory and Guidelines ranges, and the sentencing disparities created by those amendments. The government did not dispute that Mr. Eatmon is eligible for a reduction under Section 404(b), but opposed imposition of a reduced sentence due to his post-sentencing disciplinary record with the Bureau of Prisons.

In May 2020, the district court denied Mr. Eatmon's motion. The court acknowledged that Count One is a "covered offense" and "may be eligible for a sentence reduction under Section 404." Pet. App. at 9a. It wrote that "[h]owever, whether [Mr. Eatmon] should receive an actual reduction is within the discretion of the court." *Id*. The court noted that the government opposed a reduction based on Mr. Eatmon's post-sentencing disciplinary record and "[a]dditionally, he has failed to cite to any factual or legal basis that supports his motion." *Id.* at 10a.

5. Mr. Eatmon's appeal

Mr. Eatmon appealed the district court's denial, arguing that the court failed to consider the relevant 18 U.S.C. § 3553(a) factors, particularly failing to calculate and consider that the Sentencing Guidelines range for Count One had decreased from 120 months to 60 months. The Eleventh Circuit rejected Mr. Eatmon's arguments based on its decision in *Gonzalez*, which held that a district court is not required to calculate the current Guidelines range or consider the Section 3553(a) factors before exercising its discretion on a Section 404(b) motion. Pet. App. at 7a (citing *Gonzalez*, 9 F.4th at 1332-33). The Court acknowledged that "although, 'it may be that the better practice is for a district court to calculate the new sentencing range before

deciding whether to grant or deny a First Step Act motion,'" but that it was not required by the Court's precedent. *Id.* (quoting *Gonzalez*, 9 F.4th at 1332).

REASONS FOR GRANTING THE PETITION

I. This petition should be held pending a decision in *Concepcion* because that decision should resolve the question presented here.

To ensure similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before it and, once the related case is decided, resolves the held petitions in a consistent manner. *See, e.g., Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting that the Court has "[granted, vacated, and remanded ('GVR'd')] in light of a wide range of developments, including [its] own decisions"); *id.* at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." (emphasis omitted)).

The issue in this petition should be resolved by *Concepcion*. There, the Court granted review to decide whether the district court "must or may" consider intervening factual and legal developments when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act. As argued in *Concepcion*, consideration of the Section 3553(a) factors is required by the text of the First Step Act and this consideration necessarily includes the current Sentencing Guidelines. Brief for Petitioner at 4, *Concepcion*, No. 20-1650 (U.S. Nov. 15, 2021), 2021 WL 5359775, at *4. If this Court rules that courts *must* take into account intervening factual and legal developments when imposing a reduced

sentence under Section 404, then the district court in this case erred in failing to consider the relevant Section 3553(a) factors, particularly the current Sentencing Guidelines range. And the issue about the scope of Section 404(b) is recurring in numerous cases, with the government responding that it is appropriate to hold petitions that *Concepcion* may affect. *See e.g.*, *United States v. Jackson*, No. 19-11955, 995 F.3d 1308 (11th Cir. 2021), *pet. for cert. filed*, No. 21-5874 (U.S. Oct. 4, 2021) (government filed response, Dec. 3, 2021); *United States v. Potts*, 997 F.3d 1142 (11th Cir. 2021), *pet. for cert. filed*, No. 21-6007 (U.S. Oct. 19, 2021) (government response filed Nov. 18, 2021). Given the overlap of the issues in this case and *Concepcion*, this petition should be held pending resolution of *Concepcion*. *See, e.g., Bettcher v. United States*, No. 19-5652, 2021 WL 2519034 (June 21, 2021) (mem.) (GVR'ing for further consideration in light of *Borden v. United States*, 141 S. Ct. 1817 (2021)).

II. The decision below implicates a sharp circuit split that *Concepcion* should resolve.

This petition and *Concepcion* present a split among the courts of appeals on the scope of a district court's review and minimum considerations under Section 404(b) of the First Step Act. This circuit split covers application of the Section 3553(a) factors, as well as the current Sentencing Guidelines range, and prevents uniform application of the First Step Act throughout the country. This Court's grant of certiorari in *Concepcion* reflects the need to clarify the law for the lower courts.

The Third, Fourth, Sixth, and D.C. Circuits have each held that the First Step Act requires a district court to consider the applicable Section 3553(a) factors when deciding if it should "impose a reduced sentence" on an individual under Section

404(b). *See United States v. Lawrence*, 1 F.4th 40, 44 (D.C. Cir. 2021) ("district courts [in Section 404 proceedings] must consider all relevant factors, including new statutory minimum or maximum penalties; current Guidelines; post-sentencing conduct; and other relevant information about a defendant's history and conduct") (internal quotation marks omitted); *United States v. Easter*, 975 F.3d 318, 326 (3d Cir. 2020) ("when deciding whether to exercise its discretion under § 404(b) of the First Step Act to reduce a defendant's sentence, including the term of supervised release, the district court *must* consider all of the § 3553(a) factors to the extent they are applicable"); *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) ("the language of § 404 and our cases that interpret it, stand for the proposition that the necessary review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors"); *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020) ("agree[ing]" that that "the § 3553(a) sentencing factors apply in the § 404(b) resentencing context"). The Seventh Circuit has not required district courts to consider the Section 3553(a) factors and intervening judicial decisions, but has held that a district court *must* calculate and consider an individual's current Sentencing Guideline range before deciding if it should impose a reduced sentence under Section 404(b). *United States v. Fowowe*, 1 F.4th 522, 534 (7th Cir. 2021); *United States v. Corner*, 967 F.3d 662, 666 (7th Cir. 2020). And the First, Eighth, Tenth, and Eleventh Circuits have broadly held that consideration of the Section 3553(a) factors is not required. *United States v. Stevens*, 997 F.3d 1307, 1316 (11th Cir. 2021) ("The First

Step Act is clear—it is a permissive statute that does not mandate consideration of the § 3553(a) sentencing factors by a district court when exercising its discretion to reduce a sentence under section 404(b) of the First Step Act."); *United States v. Concepcion*, 991 F.3d 279, 289 (1st Cir. 2021) ("endors[ing]" the position "that 'a district court may, but need not, consider section 3553 factors' in a reduction in sentence"), *petition for cert. granted*, No. 20-1650; *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1438, 209 L. Ed. 2d 157 (2021) ("the § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines"); *United States v. Mannie*, 971 F.3d 1145, 1158 n.18 (10th Cir. 2020) (the Section 3553(a) factors "are permissible, although not required, considerations when ruling on a [First Step Act] motion"); *see also United States v. Whitehead*, 986 F.3d 547, 551 (5th Cir. 2021) ("While consideration of the pertinent § 3553(a) factors certainly seems appropriate in the FSA resentencing context, we have left open whether district courts must undertake the analysis. At present it suffices if the record does indeed reflect such consideration.") (internal citation omitted); *United States v. Houston*, 805 F. App'x 546, 547 (9th Cir. 2020) (there is no "requirement that courts consider section 3553(a) factors" when deciding whether to impose a reduced sentence under the First Step Act), *petition for cert. file*d, No. 20-1479 (Apr. 21, 2021).

The Eleventh Circuit's decision in Mr. Eatmon's case is directly traceable to *Concepcion*. In holding that district courts are not required to consider the Section 3553(a) factors, the Eleventh Circuit expressly joined the First Circuit's decision. *See*

Stevens, 997 F.3d at 1316 n.4. The Eleventh Circuit then applied *Stevens* in *Gonzalez* to reaffirm that "[i]n exercising its discretion, a district court may consider the sentencing factors set forth in 18 U.S.C. § 3553(a), but it is not required to do so." *Gonzalez*, 9 F.4th at 1332 (citing *Stevens*, 997 F.3d at 1316). And the Court further held in *Gonzalez* held that calculation of the current Sentencing Guidelines is not required. *Id*. at 1333. The Court then applied *Gonzalez* to affirm the denial of Mr. Eatmon's motion by reasoning that circuit law did not require consideration of the Section 3553(a) factors or calculation of the current Guidelines range. Pet. App. 7a.

III. The decision below is wrong.

This Court should also hold this petition pending disposition in *Concepcion* because the Eleventh Circuit's decision is wrong. Section 404(b) of the First Step Act permits courts to "*impose* a reduced sentence." (emphasis added). The text is "[n]ot 'modify' or 'reduce,' which might suggest a mechanical application of the Fair Sentencing Act, but 'impose.'" *Chambers*, 956 F.3d at 672. By using the term "impose," Congress channeled courts' discretion through 18 U.S.C. § 3553(a), which contains the "[f]actors to be considered in *imposing* a sentence." § 3553(a) (emphasis added). Courts are therefore required to consider the Section 3553(a) factors, including the current Sentencing Guidelines range, when imposing a sentence under Section 404(b).

Further, when a court imposes a reduced sentence under Section 404(b), it should give meaningful effect to Congress's remedial policy judgment by applying the law as it stands at the time of sentencing. *See Erlenbaugh v. United States*, 409 U.S.

239, 243-244 (1972) (explaining that the Court presumes that Congress "uses a particular word with a consistent meaning in a given context"). To effectively fulfill this judgment, a First Step Act proceeding must "include[] an accurate calculation of the amended guidelines range at the time of resentencing." *Easter*, 975 F.3d at 325-326; *see also Chambers*, 956 F.3d at 673-674 (rejecting argument that "a court must perpetuate a Guidelines error that was an error even at the time of initial sentencing"). And to be an accurate Guidelines range, it must account for all intervening developments and Guideline amendments in effect today, which in this case included a dramatically lower the Sentencing Guidelines range.

Congress's stated purpose in enacting Section 404 of the First Step Act was to remedy the injustice to defendants who were sentenced before the Fair Sentencing Act and faced significantly harsher penalties than defendants sentenced after. *See, e.g., United States v. Collington*, 995 F.3d 347, 354 (4th Cir. 2021) ("Congress intended section 404 of the First Step Act to give retroactive effect to the Fair Sentencing Act's reforms and correct the effects of an unjust sentencing regime."); *United States v. Jones*, 962 F.3d 1290, 1296–97 (11th Cir. 2020) (the First Step Act was part of an effort to undo "the disparity between the penalties for crack- and powder-cocaine offenses"). Allowing courts to ignore current facts and law when deciding whether to impose a reduced sentence would frustrate Congress's clear remedial purpose. Mr. Eatmon's case is an example as the difference between his Guidelines range from the time of sentence to today is five years. Given this context and statutory purpose, the First Step Act should not be construed in a way that would

attribute to Congress an intent to constrain district courts from exercising their traditional discretion.

CONCLUSION

This Court should hold this petition in abeyance pending the disposition of *Concepcion*.

Respectfully Submitted,

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