

No.

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY HARRIS,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court must or may consider intervening legal and factual developments before imposing a reduced sentence on an individual found eligible for that relief pursuant to Section 404(b) of the First Step Act of 2018, based on an earlier conviction for a "covered offense".

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were the defendant-appellant Anthony Harris and the United States of America.

RELATED PROCEEDINGS

The following proceeding is directly related to this case:

United States v. Harris, No. 20-1357, 860 Fed. Appx. 20, 2021 U.S. App. Lexis 29237 (2d Cir. Sept. 28, 2021), *affirming* United States v. Harris, No. 04-CR-360 (RNC), 2020 U.S. Dist. LEXIS 63203 (D. Conn. Apr. 10, 2020).

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**PETITION FOR WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

Anthony Harris respectfully petitions for the issuance of a writ of *certiorari* to review a judgment of the United States Court of Appeals for the Second Circuit affirming the defendant's reduced sentence for a 2004 covered offense that the district court imposed pursuant to the First Step Act of 2018 without first considering intervening changes in the law other than those in the Fair Sentencing Act of 2010.

OPINIONS BELOW

The summary order of the court of appeals is attached (Appendix ("App.") 1a-3a), and is also reported at 860 Fed. Appx. 20, 2021 U.S. App. Lexis 29237 (2d Cir. Sept. 28, 2021). The district court's underlying decision is also attached (App. 4a-8a), and is reported at 2020 U.S. Dist. LEXIS 63203 (D. Conn. Apr. 10, 2020).

JURISDICTION

The Court of Appeals entered its judgment on September 28, 2021. This Court's jurisdiction is invoked 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, 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.

© 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.

STATEMENT OF THE CASE

1. In 2004, police arrested petitioner Anthony Harris after they observed him driving in excess of the speed limit. After his arrest, police found \$3,400 in cash in petitioner's pocket and, in the locked glove compartment of his sister's car, also found small bags of crack cocaine with a net weight of 25.2 grams, as well as a loaded and operable hand gun.

Based on this evidence, a federal indictment initially charged petitioner with possessing with an intent to distribute five grams or more of cocaine base or crack, in violation of 21 U.S.C. § 841, and his possession of a firearm after prior felony convictions, in violation of 18 U.S.C. §§ 922(g) and 924(e). Later, a superseding indictment added a third charge alleging petitioner's knowing possession of the same firearm in

relation to the same crack cocaine possession offense, in violation of 18 U.S.C. § 924©.

After the district court denied petitioner's motion to suppress the evidence seized from his sister's car and before petitioner stood trial in 2006, the government filed a second felony offender information pursuant to 21 U.S.C. § 851, increasing the statutory penalty exposure for the crack cocaine possession offense from 5-40 years to 10 years to life. After a three day trial, a jury convicted petitioner of all charges.

At his sentencing in 2007, petitioner faced severe statutory ranges for his offenses of conviction: 10 years to life for possessing 5 or more grams of crack cocaine, a consecutive 5 years to life for possessing a firearm during and in relation to this drug offense; and 15 years to life for possessing a firearm after prior felony convictions that, at that time, appeared to qualify him for penalties under 18 U.S.C. § 924(e) ("ACCA") as an armed career criminal. Those same prior convictions also increased petitioner's Guideline sentencing exposure for possessing 25.2 grams of crack cocaine, raising his base offense level from 28 to 37 pursuant to the career offender Guideline, U.S.S.G. § 4B1.1(a). All told, the Guidelines called for a sentence in the range of 360 months to life for the § 841 crack possession offense and the § 922(g) conviction for the possession of a firearm after prior felony convictions, to which an additional consecutive sentence of 5

years had to be added for the § 924(c) conviction, for a total effective sentencing range of 420 months to life.

Understandably, the district court concluded that this extraordinarily severe range was far greater than necessary for petitioner's circumscribed offense conduct. It therefore imposed a still severe non-guideline sentence of 240 months for the drug charge (120 months less than the career offender Guideline minimum of 360 months), a concurrent sentence of 180 months for possessing a firearm as a convicted felon (the ACCA statutory minimum under § 924(e)), and a mandatory consecutive term of 60 months for the violation of § 924©, for a total term of 300 months imprisonment.

After his convictions were upheld on direct appeal, petitioner filed a number of applications to reduce his sentence based on intervening developments in the law between 2008 and 2018. For example, he asked to have his sentence reduced pursuant to 18 U.S.C. § 3582(c) (2) based on then recent and retroactive amendments to § 2D1.1's Drug Quantity Table, but the district court denied that application because petitioner's Guideline range had been based on his career offender status and not on the drug quantity table. He also challenged the sentencing enhancements that resulted from his prior convictions based on this Court's decisions in Johnson v. United States, 576 U.S. 591 (2015) (invalidating the ACCA residual clause as void for vagueness), Mathis v. United

States, 136 S. Ct. 2243 (2016) (holding that a state conviction may not serve as ACCA predicate when the state offense is defined in terms broader than the elements of a generic offense), Molina-Martinez v. United States, 136 S. Ct. 1338 (2016) (recognizing, for plain error analysis, that an error in the computation of a Guidelines range is sufficient to show reasonable probability that a different sentence would have been imposed under correct range); and Welch v. United States, 136 S. Ct. 1257 (2016) (holding that Johnson's invalidation of ACCA residual clause as void for vagueness announced a substantive rule with retroactive application to cases on collateral review). Each of these post-conviction motions was also denied, often due to procedural obstacles to relief flowing from petitioner's earlier applications.

2. With the passage of the First Step Act in 2018, a new avenue for potential sentencing relief became available to all defendants convicted of a "covered offense" - that is, "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". Those defendants became eligible for a sentencing reduction to a term that would apply "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). Petitioner therefore moved once more for a reduction in his 300-month sentence, this time urging the court

to permit his immediate release, not only because he had already served more than 14 years of his combined sentences,¹ but because he was no longer subject to a mandatory minimum sentence for the drug count of conviction, his sentence had been enhanced for prior convictions that no longer warranted his classification as an armed career criminal or a career offender,² and the time he had already served exceeded the sentence he would receive if the district court again imposed a sentence that departed from the reduced Guideline range in the same proportion as his original sentence.

Had the court applied the presently evolved understanding of what prior convictions should not count as career offender or ACCA predicates and resentenced petitioner without those unwarranted classifications and resulting penalty enhancements, his revised Guideline range would have been 120-150 months for the § 841 and § 922 charges, plus 60 months for the § 924© charge, for a combined Guideline range of 180-210 months. Instead, the district court concluded that the “covered

¹ As of now, petitioner has served close to 210 months of his sentence, including accrued good time credits.

² Specifically, the state statute underlying a prior drug conviction that had been the sole basis for the § 851 statutory enhancement and one of the predicates for both the ACCA and career offender designations was held to be categorically overbroad in United States v. Savage, 542 F.3d 959, 964 (2d Cir. 2008). Also, most of petitioner’s other prior predicate convictions were either for offenses that did not require the use of force or involved inchoate attempts that no longer qualify as crimes of violence since Johnson v. United States, 576 U.S. 591 (2015).

offense” provisions of the First Step Act did not authorize plenary resentencing, so it would not reconsider whether petitioner’s sentence should still reflect the severe sentencing enhancements for his prior convictions under present law (App. 6a-7a).

Based on that cabined interpretation of the broad and remedial purposes of the First Step and Fair Sentencing Acts – legislation designed to correct the historically disproportionate and discriminatory penalties applied to crack cocaine offenses – and despite the court’s agreement that “[w]hether to reduce the sentence and, if so, the extent of the reduction, are matters entrusted to my discretion” (App. 7a), the court accepted a revised Guideline calculation that continued to apply enhanced penalties based on petitioner’s prior convictions, resulting in an overall Guideline range of 360 months to life, only 60 months less than the originally computed range (App. 7a). Then, finding that range still greater than necessary, the court reduced petitioner’s sentence to combined terms of 260 months, with 200 months imposed for the drug offense, concurrently with a 180-month mandatory minimum term for the ACCA charge, to be followed by 60 months for the § 924© conviction (App. 8a).

3. On appeal, petitioner acknowledged the appellate court’s subsequent decision in United States v. Moore, 975 F.3d 84 (2d Cir. 2020), holding that plenary resentencing

proceedings are not required under the First Step Act, but also recognizing that "a district court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence" under the First Step Act provisions for "covered offenses". *Id.* at 92 & n.36. As the district court may not have appreciated the extent of its authority to determine what other factors are relevant when resentencing a defendant for a covered offense, petitioner asked that the appellate court remand for reconsideration of the appropriate sentence and allow for consideration of intervening legal developments as they affect the sentence that should be imposed for the defendant's covered offense, including decisions that limit the types of prior convictions that do and do not qualify to enhance that sentence.

The appellate court agreed that the district court did not have the benefit of its decision in Moore when it resentenced petitioner, but nevertheless affirmed petitioner's sentence as "consistent with that decision" in its conclusions that plenary resentencing was not required by the First Step Act, and that a district court is not "obligated . . . to recalculate an eligible defendant's Guidelines range, except to account for those changes that flow from Sections 2 and 3 of the Fair Sentencing Act" (App. 3a & n.9). Further, in the appellate court's view, it would "effectively" amount to requiring plenary resentencing if it were to remand with instructions to

consider intervening developments in the law to redetermine whether petitioner's prior convictions may still serve as predicates for the severe sentencing enhancements previously applied to elevate the drug Guideline score in his case (App. 2a). Given these conclusions, the appellate court found no error in the district court's ultimate 40-month reduction to petitioner's sentence (App. 3a) – a term, again, that fell 50 to 80 months above the applicable Guideline range without sentencing enhancements based on petitioner's criminal history that would not have elevated his punishment if he were sentenced today.

4. Shortly after this decision, this Court granted *certiorari* in Concepcion v. United States, No. 20-1650, 210 L. Ed. 2d 1024, 2021 U.S. LEXIS 3710 (Sept. 30, 2021), in order to resolve a question that has divided the circuit courts: whether a district court must or may consider intervening legal and factual developments before imposing a reduced sentence on an individual for a covered offense pursuant to § 404(b) of the First Step Act. Oral argument is scheduled in Concepcion for January 19, 2022. Other petitions for *certiorari* raising the same or similar issues are also pending before this Court, e.g., Houston v. United States, No. 20-1479; Maxwell v. United States, No. 20-1653; Bryant v. United States, No. 21-5480; Moyhernandez v. United States, No. 21-6009, and the government has asked in the latter two cases to hold those petitions pending the Court's decision in Concepcion.

We respectfully request that, in addition to our brief arguments below, this Court consider on this petitioner's behalf all the comprehensive arguments that are already before the Court in Concepcion, as well as in other pending matters raising the same or similar issues, including those listed above. Then, to assure uniformity and the imposition of sentences that are not greater than necessary whenever a defendant is entitled to be resentenced pursuant to the remedial provisions of the First Step Act, the Court should require district courts to apply all developments in the law since the defendant's original sentencing when considering what lesser sentence to impose for a covered offense.

REASON FOR GRANTING THE WRIT

**THE COURT SHOULD RESOLVE THE CONFLICT
AMONG THE CIRCUIT COURTS OVER WHETHER
DISTRICT COURTS MUST OR MAY CONSIDER
INTERVENING LEGAL DEVELOPMENTS BEFORE
IMPOSING A REDUCED SENTENCE UNDER THE
FIRST STEP ACT UPON AN ELIGIBLE DEFENDANT**

In Concepcion v. United States, No. 20-1650, this Court will soon consider the scope of relief available to an eligible defendant under the First Step Act. From a review of the briefs submitted thus far in Concepcion, it would appear that both parties agree that district courts are at least permitted to consider intervening changes in the law, besides those flowing from the Fair Sentencing Act, when deciding whether to impose a reduced sentence for a defendant's covered offense and, if so, how much of a reduction is warranted. The main point of dispute is whether district courts should be required to do so.

When this issue is decided, we urge the Court to agree that, in order to give the full and intended remedial effect to the First Step Act, district courts should at the least be required to recalculate the defendant's applicable Guideline range under presently controlling law, not as a matter of discretion, but as the long recognized starting point for the imposition of every procedurally and substantively reasonable sentence. See Gall v. United States, 552 U.S. 38, 49-50 (2008). As this Court made clear in Gall, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Id.* at 49, citing Rita v. United States, 551 U.S. 338, 347-48 (2007). Gall also recognized that, "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark", followed closely by a district court's "individualized assessment" of all sentencing factors in 18 U.S.C. § 3553(a), and the court's adequate explanation for a chosen sentence, whether within or outside of a properly computed Guideline range. *Id.* at 49-50. Only when these steps are consistently followed will a sentence be amenable to meaningful appellate review and "promote the perception of fair sentencing". *Id.* at 50.

Of course, "fair sentencing" is exactly what the Fair Sentencing Act is expressly meant to achieve. That is so whether a sentencing proceeding is plenary or limited or somewhere in between. We join in the petitioners' arguments

presented in Concepcion and the other pending petitions for *certiorari* listed above that have advanced historical and textual analyses as well as statutory and policy considerations showing why, when imposing a reduced sentence for a covered offense under the First Step Act, courts should at least be required to consider current law and facts about a defendant that were not before the court at the original sentencing, just as this Court has already recognized, with respect to new factual information, in Pepper v. United States, 562 U.S. 476, 481 (2011) (“a district court at resentencing may consider evidence of the defendant's post-sentencing rehabilitation and . . . such evidence may, in appropriate cases, support a downward variance”). Rather than repeat all of those well crafted arguments here, we add only a few common sense remarks in the hopes that this petitioner, and all other similarly situated defendants who are eligible for a sentencing reduction under the First Step Act, may be afforded that fair sentence that was not available to them under earlier law.

At the outset, it is puzzling that this commonplace starting point for the imposition of any sentence should have become controversial. After all, courts are extremely adept by now at determining whether a Guideline calculation, furnished by a probation officer and subject to objections by the government and defense, is acceptable, and whether to sentence a defendant within that advisory range or to vary from it. From a practical standpoint, therefore, no benefit will be realized

by withholding a proper and contemporaneous computation of the applicable Guideline range to defendants who were previously sentenced under a law that is now recognized as excessively punitive and discriminatory. Those defendants too are entitled to have their sentence reconsidered starting from an accurate Guidelines benchmark, taking into account developments in the law that could well affect the ultimate punishment, not only with respect to drug quantity, but the drug offense level elevating provisions tied to criminal history as well.

Once a district court has applied current law and the current edition of the Guidelines (as the Sentencing Commission requires in any case, see U.S.S.G. § 1B1.11(a) (Policy Statement)), consideration of other more subjective sentencing factors in § 3553(a) leaves plenty of room for that judicial exercise of discretion that the First Step Act has expressly incorporated. Using that discretion, § 404(c) thus confirms that a district court has no obligation to reduce a defendant's sentence if other factors persuade the court that the original sentence was not greater than necessary. Permitting such discretion does not, however, excuse a court's initial obligation to determine what sentence the eligible defendant would receive under current law, thereby allowing that Guideline range to serve as the transparently uniform anchor to the exercise of discretion that follows when a court decides if and how much the defendant's sentence should ultimately be reduced.

Whenever a defendant is eligible to have a lesser sentence imposed under the covered offense provisions of the First Step Act, therefore, this Court should agree that the sentencing court must calculate an applicable Guideline range as the initial step in its determination. The sentencing court also must consider any changes in the § 3553(a) factors that guide a fair determination of what sentence will be sufficient but not greater than necessary, as this Court has also agreed. See Pepper, 562 U.S. at 489 (“courts must consider” § 3553(a) factors meant to constrain sentencing discretion); Gall, 552 U.S. at 51 (when court does not consider § 3553(a) factors, a “significant procedural error” results warranting reversal). The court may then exercise its customary discretion when deciding whether to reduce the defendant’s sentence and, if so, what sentence will be fair, sufficient and not greater than necessary.

Here, there was no dispute that this petitioner’s § 841(a) conviction for possessing a modest quantity of crack cocaine qualified as a covered offense for which a lesser sentence could now be imposed as if the Fair Sentencing Act had been the law at the time of his original sentencing in 2007. Because of criminal history enhancements that previously applied, however, the revised drug offense level did not depend solely on quantity: it also depended on career offender enhancements that elevated the statutory range and offense level if his prior convictions were for qualifying drug offenses or crimes of violence.

Thanks to developments in the law since 2007, the government can no longer carry its burden of demonstrating that prior convictions that previously elevated petitioner's drug offense level still qualify as enhancement predicates, whether for § 851, § 924(e), or § 4B1.1(a). Thus, a prior state drug conviction that was the sole basis for § 851's elevation of petitioner's statutory range is now recognized as categorically too broad to qualify, and most of his other predicate convictions were for offenses that did not require the use of force or involved inchoate attempts that no longer qualify as crimes of violence. These are matters that should always be considered in determining a "fair sentence", even if the sentencing proceeding is less than plenary in other respects.

Moreover, if the district court had considered these issues before imposing a reduced sentence of 260 months on this petitioner in 2020, he would likely be released by now. Without the criminal history enhancements that the law no longer recognizes as qualifying predicates, his combined Guideline range would be 180-210 months, and he has already served the uppermost sentence in this range. Given the downward variances the district court applied before, it is likely petitioner would be sentenced within this range if the court's anchoring Guideline calculation is now corrected.

At the least, requiring petitioner to serve the additional 50 months his present sentence requires is less than fair and greater than necessary, particularly for a defendant who is

more vulnerable to a COVID infection due to a medical condition. For such medically vulnerable prisoners exposed to the ongoing, life-threatening and unpredictable effects of the COVID pandemic for almost two years, courts are routinely considering applications for compassionate release pursuant to another provision in the First Step Act, 18 U.S.C. § 3582(c)(1)(A), and deciding such applications based in part on a presently applicable Guideline range and any changes to the § 3553(a) factors that guided the original sentencing. Courts should equally be required to fulfill these basic first steps before deciding whether and by how much to reduce a sentence for a covered offense under § 404(b).

For these reasons, and those advanced in Concepcion and all other pending petitions for *certiorari* raising the same issue, this Court should now require district courts to consider intervening legal and factual changes, compute a revised Guideline range, and apply § 3553(a) factors before deciding whether to impose a reduced sentence for a covered offense, and what lesser sentence is fair and sufficient. Upon this Court's agreement, petitioner Anthony Harris' present sentence should be vacated and he should be resentenced within the unenhanced guideline range that otherwise applies to his covered offense of conviction.

CONCLUSION

A writ of *certiorari* should be granted. Alternatively, as the government has requested in other pending matters, this petition should be held pending this Court's decision in Concepcion and decided in light of that decision.

Respectfully submitted,

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December 21, 2021

SUPREME COURT OF THE UNITED STATES

- - - - -X

ANTHONY HARRIS, :

Petitioner, : No. _____

-against- :

UNITED STATES OF AMERICA, :

Respondent. :

- - - - -X

CERTIFICATE OF COMPLIANCE

Georgia J. Hinde, attorney for petitioner Anthony Harris, hereby certifies that the foregoing petition conforms to the requirements of Supreme Court Rule 33.1(h) in that, according to the word-processing system used to prepare this petition, it contains 3957 words.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
December 21, 2021

/s Georgia J. Hinde
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