No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TRACY VAUGHN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellant.

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

PETITION FOR WRIT OF CERTIORARI

TRACY VAUGHN, Petitioner

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Question Presented

Whether, in deciding whether to impose a reduced sentence for a crack cocaine offense under Section 404(b) of the First Step Act, a district court must consider the sentencing factors of 18 U.S.C. § 3553(a).

Parties to the Proceeding and Rule 29.6 Statement

Petitioner is Tracy Vaughn. Respondent is the United States of America, appellee below. Petitioner is not a corporation.

Statement on Related Cases

There are no cases directly related to this case.

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Petition for a Writ of Certiorari

Tracy Vaughn respectfully petitions the Court for a writ of certiorari to review the opinion entered by the United States Court of Appeals for the Eight Circuit on September 1, 2021.

Opinions Below

The decision of the United States Court of Appeals affirming the denial of Vaughn's request for a reduction under the First Step Act can be found at *United States v. Vaughn* , 857 Fed. App'x 887 (8th Cir. 2021). A copy of the opinion is appended to this Petition. (App. A) The district court's Memorandum and Order is unpublished but is also attached to this Petition.(App. B)

Jurisdiction

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 1, 2021. Vaughn filed a Petition for Rehearing *En Banc*, and that Petition was denied on October 19, 2021. This Petition has been timely filed within ninety days of the Court of Appeals' denial of the Petition for Rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory and Guideline Provisions Involved

1. First Step Act, Pub. L. 115-391, § 404 (2018)

(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.

2. 18 U.S.C. § 3553(a)

(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–

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(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 First Step Act, Pub. L. No. 115-391 (2018), is Congress's latest attempt to undo the effects of racially harmful drug laws that punished crack cocaine offenders 100 times more severely than powder cocaine offenders. Its previous remedy, the Fair Sentencing Act, Pub. L. 111-220 (2010), dramatically lowered the ratio but was not made retroactive to the thousands of crack cocaine offenders, like Petitioner Tracy Vaughn, who were serving prison sentences under the original statutory penalties. The First Step Act addresses this problem in Section 404(b), which permits a district court to "impose a reduced sentence" on eligible defendants "as if" the revised penalties in the Fair Sentencing Act were "in effect at the time the covered offense was committed." First Step Act, Pub. L. 115-391, 132 Stat. 5194 § 404(b).

Unfortunately, the lower courts have not agreed on how to implement § 404(b). Courts are divided over whether, in reducing a sentence under this provision, they can or must consider intervening legal changes like Sentencing Guideline amendments. *Compare, e.g., United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020) (holding that legal changes affecting career-offender designations must be considered

when imposing a reduced sentence under Section 404) *with United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019) (holding that the "as if" clause of section 404 means that nothing but the changes in the Fair Sentencing Act can be considered). They also disagree on whether a district court must consider the sentencing factors of 18 U.S.C. § 3553(a) in a First Step Act proceeding just as it would in any other sentencing proceeding. *Compare United States v. Easter*, 975 F.3d 318 (3d Cir. 2020) (holding that, in light of how Congress has previously employed the term "impose," Section 404(b)'s statement that a district court may "impose a reduced sentence" mandates consideration of all of the 18 U.S.C. § 3553(a) factors) *with United States v. Moore*, 963 F.3d 725 (8th Cir. 2019) (holding that, while the district court *may* consider the §3553(a) factors in deciding whether to reduce a sentence, the First Step Act does not require it to do so).

This Court has granted certiorari in *Concepcion v. United States*, 142 S. Ct. 54 (Sept. 30, 2021) (granting certiorari), to resolve these conflicts. This case involves the same issues that are presented in *Concepcion*.

1. Procedural history

On March 20, 2003, Tracy Vaughn was indicted on one count of conspiracy to distribute 50 grams or more of cocaine base. At the time of his indictment, offenses involving 50 grams or more of crack cocaine were subject to a statutory sentencing range of 10 years to life in prison.

A few days before the trial began, the government filed an Information of prior conviction under 21 U.S.C. § 851. The Information alleged that Vaughn had previously been convicted of possession with intent to distribute cocaine in Douglas County, Nebraska. If proven, that prior conviction would raise Vaughn's statutory minimum sentence to 20 years.

Vaughn's case proceeded to a bench trial and the court found Vaughn guilty. In its Findings of Fact and Conclusions of Law, the court found that the government had proven beyond a reasonable doubt that Vaughn's conspiracy involved 50 grams or more of crack cocaine.

Following Vaughn's trial, a PSR was prepared for sentencing. The PSR concluded that Vaughn's offense involved 2.17 kilograms of crack cocaine. At the time, any quantity greater than 1.5 kilograms placed a defendant at a base offense level of 38. (Id.) Vaughn was also a career offender due to two prior qualifying convictions. However, because Vaughn's drug quantity offense level exceeded the career offender level under U.S.S.G. § 4B1.1, his offense level remained 38. Vaughn was in Criminal History Category VI. Together, these calculations yielded a guideline sentencing range of 360 to life imprisonment.

Vaughn objected to the PSR's drug quantity calculation. He also objected to aspects of his criminal history score, arguing that his prior offenses should be considered a single offense because he had been sentenced for them in a single proceeding.

At sentencing, the district court overruled Vaughn's objections and formally adopted the PSR's guideline calculations. It did not, however, address the notice under 21 U.S.C. § 851. Section 851 provides that, "[i]f the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information." 21 U.S.C. § 851(b). The court made no such inquiry. The court simply adopted the PSR's sentencing calculations and resulting Guideline range.

The guidelines were mandatory at the time of Vaughn's sentencing hearing. The court imposed the minimum sentence of 360 months imprisonment.

2. Request for relief under the First Step Act

Because of his career offender status, Tracy Vaughn did not benefit from the lower crack cocaine guideline amendments passed after his sentencing hearing. *See Terry v. United States*, 141 U.S. 1858, 1866-67 (2021) (Sotomayor, J., concurring) (explaining how career offenders, while not "free from the harsh effects of the 100-to-1 ratio," were categorically ineligible for the relief provided by the Sentencing Commission's amendments to the crack cocaine guidelines). After the First Step Act became law, however, Vaughn sought relief under section 404(b) of the Act.

Vaughn was unquestionably eligible for a reduction in sentence under the Act. Under the First Step Act, sentencing courts "that imposed a sentence for a covered

offense may . . . 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." First Step Act, Pub. L. 115-391, 132 Stat. 5194 § 404(b). A "covered offense" 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 . . ., that was committed before August 3, 2010." Vaughn had a "covered offense" because his crime was committed before August 3, 2010, and statutory penalties for his offense of conviction were modified by the Fair Sentencing Act. Under the Fair Sentencing Act an offense involving 50 grams of crack cocaine was subject to 5 to 40 years in prison—significantly lower than the 10 years to life that he faced in 2004.

After establishing his eligibility in his motion for a sentence reduction, Vaughn used the 18 U.S.C. § 3553(a) factors to argue for a reduction. Vaughn asked the court to consider how the guidelines had changed since his sentencing hearing. His guidelines range was 360 to life at sentencing, but under the current guidelines it would be 262 to 327 months. Vaughn further urged the court to consider his post-offense rehabilitation. Vaughn had obtained his GED and taken numerous educational and rehabilitative courses during his 17 years of incarceration. He had an exemplary prison disciplinary record, marred only by a single citation for phone abuse and improper use of mail in 2004. Vaughn asserted that the combination of these factors warranted a sentence reduction under the First Step Act.

3. The district court's denial of a sentence reduction

In a decision issued March 4, 2020, the district court agreed that Vaughn was eligible for a sentence reduction. It acknowledged that his current statutory sentencing range under the Fair Sentencing Act is 5 and 40 years in prison. The court had not conducted the inquiry required to apply the § 851 enhancement, so the court agreed that the enhancement could not be factored into Vaughn's penalty range.

Notwithstanding these findings, the district court declined to lower Vaughn's sentence. In announcing its decision, the court did not reference 18 U.S.C. § 3553(a) or analyze any of its factors. It did not address the guideline amendments or any of the rehabilitative efforts that Vaughn had offered in support of a reduction. The court mentioned only two reasons for denying Vaughn's motion: the amount of crack cocaine involved in his offense and Vaughn's criminal history. Those two factors were the sole drivers of drug sentences when Vaughn was sentenced in 2004, and they were the sole drivers of the district court's denial of relief under the First Step Act 17 years later.

4. The decision of the Eighth Circuit

Vaughn appealed to the United States Court of Appeals for the Eighth Circuit. Vaughn argued that the district court erred by failing to consider the 18 U.S.C. § 3553(a) sentencing factors in deciding whether to reduce his sentence under the First Step Act. In fact, there was no evidence that the court had considered Vaughn's arguments at all. Vaughn noted that Congress had passed the First Step Act to rectify the injustices that resulted from the 100:1 crack/powder cocaine ratio. Rather than

implement that policy, the district court replicated those injustices by once again allowing drug quantity to dictate its sentencing decision.

To support his argument that the § 3553(a) factors apply in a section 404(b) proceeding, Vaughn cited the statutory text. Section 404(b) states that, if a defendant has a "covered offense," a district court may "impose a reduced sentence" as if the Fair Sentencing Act had been in place at the original sentencing hearing. In other federal sentencing statutes, the term "impose" means to order a specific sentence after consideration of the § 3553(a) factors. Since Congress does not legislate on a clean slate, and since a given term is presumed to mean the same thing throughout a statute, Vaughn argued that the use of the term "impose" in the First Step Act also required consideration of the § 3553(a) sentencing factors.

In an opinion issued September 1, 2021, the Eighth Circuit rejected Vaughn's argument. The Court of Appeals noted that, while Vaughn's appeal was pending, the Eighth Circuit had decided *United States v. Moore* and two other cases which elaborated on the scope of resentencing under the First Step Act. In *Moore*, the Eighth Circuit rejected the defendant's arguments about the use of the word "impose" and held that a district court is not obligated to consider the § 3553(a) factors in a proceeding under Section 404(b). *Moore, supra*, 963 F.3d at 727. Because of this precedent, the Eighth Circuit held in Vaughn's case that the district court did not err in failing to conduct a § 3553(a) analysis. *Vaughn*, 857 Fed. App'x at 888.

As for Vaughn's claim that the district court had failed to consider his arguments for a reduction at all, the Eighth Circuit was unconvinced. According to the Eighth Circuit, the district court's "lengthy familiarity" with the case ensured it had considered Vaughn's arguments and had a reasoned basis for rejecting them. *Id.*

Vaughn filed a Petition for Rehearing *En Banc* in which he challenged the Eighth Circuit's conclusion that consideration of the § 3553(a) factors was permissive rather than mandatory in a First Step Act proceeding. The Eighth Circuit denied that petition without elaboration on October 19, 2021.

Reasons for Granting the Petition

I. This case presents the same question the Court will decide in *Concepcion v. United States.*

This case involves the nature and scope of a resentencing procedure under Section 404(b) of the First Step Act. That issue is squarely presented in *Concepcion v. United States*, No. 20-1650 (cert. granted Sept. 30, 2021), which is before the Court this term.

In *Concepcion*, a defendant serving a 228-month sentence for a crack cocaine offense sought a reduced sentence under Section 404(b) of the First Step Act. *United States v. Concepcion*, 891 F.3d 279, 282 (1st Cir. 2021). Conception unquestionably had a covered offense, as his statutory sentencing range was altered by the Fair Sentencing Act. *Id.* at 284. Knowing that a reduction was discretionary, however, Concepcion set

forth a number of reasons for a lower sentence. Concepcion noted that that intervening sentencing guideline amendments had significantly reduced the guideline range for his offense. *Id.* at 683. He also pointed out that the definition for "crime of violence" had changed to the point where he would no longer qualify as a career offender if sentenced today. *Id.* Finally, Concepcion highlighted his drug treatment and other post-sentence rehabilitation during incarceration. He asked the district court to take these circumstances into account and grant his motion for a reduced sentence.

The district court denied Concepcion's request. It believed it was prohibited from considering any intervening legal and factual developments, other than the Fair Sentencing Act, in deciding a motion under § 404(b). *United States v. Concepcion*, No. 07-10197, 2019 WL 4804780 at **2 - 6 (D. Mass. Oct. 1, 2019).

Concepcion appealed his case to the First Circuit. He argued that, in considering a request for a sentence reduction under the First Step Act, a district court is *required* to evaluate the 18 U.S.C. § 3553(a) factors and calculate the new guideline range based on the guidelines in effect at the time of resentencing. *Concepcion*, 991 F.3d at 283. As a fallback, Concepcion argued that even if a new guideline calculation was not obligatory, "the court should have at least considered the intervening developments as part of its calibration of the other section 3553(a) factors." *Id.*

The First Circuit rejected these arguments. After noting a split in the circuits over the scope of resentencing under the First Step Act, the First Circuit held that the district court *may*, but need not, consider § 3553(a) factors in deciding whether to reduce a sentence. *Id.* at 290 (emphasis supplied). A district court may also consider guideline changes, prepare a new presentence report, and recalculate the guidelines range under current law, but is not required to do so. *Id.*

Concepcion sought review by this Court 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, a district court must or may consider intervening legal and factual developments." Petition for a Writ of Certiorari in *Concepcion v. United States*, 2021 WL 2181524 (May 24, 2021) (Question Presented). This Court granted certiorari to resolve the conflict in the Courts of Appeals on this question.

Vaughn's case involves one component of the question presented in *Concepcion*: whether, in deciding whether to reduce a sentence under Section 404(b) of the First Step Act, the district must consider the sentencing factors in 18 U.S.C. § 3553(a). In his request for a sentence reduction, Vaughn argued that consideration of those factors was *required* by the text of § 404(b). Like the First Circuit in *Concepcion*, however, the Eighth Circuit held that consideration of those factors was not mandatory. *Vaughn*, 857 F3d. App'x at 888.

The Petitioner's merits brief in *Conception* explains why this reading of Section 404(b) is incorrect. First and foremost, it is not compatible with the statutory text.

Section 404(b) provides that a "court that *imposed* a sentence for a covered offense may," on motion, "*impose* a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act were in effect." First Step Act, Pub. L. 115-391, § 404(b) (emphasis added). This language must be read against the backdrop of existing sentencing statutes, which is presumed to inform Congress' choice of language. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

Federal sentencing statutes use the verb "impose" to mean "sentence" after consideration of the 18 U.S.C. § 3553(a) factors. See 18 U.S.C. § 3553(a)("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," and "in determining the particular sentence to be *imposed*, shall consider [the factors set forth in § 3553(a)(1)-(7)) (emphases added); 18 U.S.C. § 3582(a) ("The court, in determining whether to *impose* a term of imprisonment, and, if a term of imprisonment is to be *imposed*, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.") (emphasis added); 18 U.S.C. § 3661 ("[n]o limitation may be placed on the information concerning the background, character, and conduct of a person . . . which a court . . . may receive and consider for the purpose of *imposing an appropriate sentence.*")(emphasis added). Under principles of statutory construction, courts presume that "identical words . . . are intended to have the same meaning." *Sorenson v. Secy. of Treasury*, 475 U.S.851, 860 (1986). Thus,

when Congress employed the word "impose" in the First Step Act, it intended to import the considerations that accompany that term.

The fact that Congress used the verb "impose" twice in the same sentence reinforces this construction. Under § 404(b), a court "that *imposed* a sentence for a covered offense" may "*impose* a reduced sentence." Pub. L. No. 115-391, § 404(b) (emphasis added). In the first instance, "imposed" unquestionably refers to imposition of the original sentence, which would have occurred under the 18 U.S.C. § 3553(a) factors. "A word or phrase is presumed to bear the same meaning throughout a text," especially when those words appear in close proximity to one another. *See FCC v. AT & T Inc.*, 562 U.S. 397, 408, (2011) ("identical words and phrases within the same statute should normally be given the same meaning") Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 170 (West 2012); (quoting). The second "impose" in Section 404(b) should therefore mean the same as the first: to sentence in accordance with the § 3553(a) factors.

The pragmatic advantages of applying the § 3553(a) factors is another reason to make them mandatory in a First Step Act proceeding. As the Third Circuit explained in *Easter*, *supra*, applying the § 3553(a) factors "(1) 'makes sentencing proceedings under the First Step Act more predictable to the parties,' (2) 'more straightforward for district courts,' and (3) 'more consistently reviewable on appeal.'" *Easter*, 975 F.3d at 325 (quoting *United States v. Rose*, 379 F. Supp.3d 223, 225 (S.D.N.Y. 2019)). Without § 3553(a)'s familiar framework, a district court can vary

the factors it considers from defendant to defendant, leading to the very kinds of disparities the First Step Act intended to eliminate.

Disparities have long permeated crack cocaine sentences. To prevent further disparities in both process and results, Vaughn asks that this Court reserve a ruling on this Petition pending its decision in *Concepcion.* Once the Court is persuaded that a district court *must* consider the § 3553(a) factors in ruling on a § 404(b), the Court should grant Vaughn's Petition, vacate the Eighth Circuit's decision, and remand for further proceedings consistent with its decision in *Concepcion.*

Conclusion

Following a decision in *Concepcion*, the petition for a writ of certiorari should be granted.

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