NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

KARO BROWN,

Petitioner,

v.

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented here is the same as that presented in *Concepcion v. United States*, No. 20-1650, currently pending for decision by this Court:

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 developments.

PARTIES TO THE PROCEEDING

Karo Brown, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- United States v. Brown, No. 20-2787-cr (2d Cir. Nov. 8, 2021) *rehearing denied* (Dec. 20, 2021)

- United States v. Brown, No. 5:03-cr-00243-NAM (N.D.N.Y. Aug. 7, 2020)

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PETITION FOR WRIT OF CERTIORARI

Karo Brown respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unpublished as is the denial of rehearing. The district court's judgment (Pet. App. 5a) is unpublished.

JURISDICTION

The judgment of the Second Circuit was entered on November 8, 2021. Pet. App. 1a. A petition for rehearing was denied December 20, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, codified at 21 U.S.C. § 841 note, 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 the same question as *Concepcion v. United States*, No. 20-1650, in which this Court recently granted certiorari and heard oral argument. Both petitions ask whether, when deciding whether to "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 developments. *See* Petition for Writ of Certiorari at I, *Concepcion v. United States*, No. 20-1650 (U.S. May 24, 2021) (hereinafter "Concepcion Petition"). This Court's answer in *Concepcion* will likely resolve the question in this case. This Court should thus hold this petition in abeyance pending the disposition in *Concepcion*.

The First Step Act 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). The courts of appeals are divided on the scope of that authority. The Second Circuit has adopted a middle of the road approach in section 404(b) proceedings, neither requiring nor forbidding the consideration of post-sentencing developments in determining whether to reduce a sentence. *United States v. Moore*, 975 F.3d 84, 90-91, 92 n.36 (2d Cir. 2020) (holding that while "the First Step Act

does not obligate a district court to consider post-sentencing developments," neither does it forbid such consideration).

Within the Third, Fourth, Tenth, and D.C. Circuits, district courts are required to consider intervening legal or factual developments—and not just the changes to the crack-cocaine statutory penalties—when conducting First Step Act resentencings. Thus, in those circuits, Mr. Brown—who is serving a sentence of 40 years—would have had his Sentencing Guidelines range recalculated to reflect the intervening changes in the law reducing his total offense level and criminal history, to reflect the maximum statutory sentence of life no longer applied, or would have had his sentence reconsidered based on post-sentencing rehabilitation with assessment according to 18 U.S.C. §3553(a).

By contrast, within the Second Circuit, where Brown was sentenced, the district court is not required to consider intervening legal and factual developments or sentencing factors under 18 U.S.C. §3553(a) in deciding whether a sentence reduction is appropriate in light of the First Step Act changes. Like the First Circuit where Mr. Concepcion was sentenced, the district courts in the Second Circuit may, but need not, consider changes in the law or updated Guidelines and facts. In addition to the First and Second Circuits, the Sixth, Seventh, and Eighth Circuits have held that district courts are not required to consider any changes other than the revised statutory maximum and minimum sentences for crack cocaine imposed by the Fair Sentencing Act.

Finally, three other circuits go even further. In the Fifth, Ninth, and Eleventh Circuits, district courts are prohibited from considering any intervening case law or updated guidelines and are not required to consider updated facts. Defendants in those circuits must therefore suffer under the weight of legally inaccurate guidelines calculations and outdated section 3553(a) factors that do not account for post-sentencing conduct.

On February 10, 2005, Brown was sentenced to 480 months of imprisonment based on a statutory sentence that was later modified by Section 2 of the Fair Sentencing Act. The maximum statutory sentences for racketeering offenses with racketeering activities involving crack cocaine were modified because those statutory sentences depended upon the underlying racketeering activities to set the maximum sentence at 20 years or life. 18 U.S.C. §1963(a). The maximum statutory sentence in turn affected the advisory guideline calculation and sentence under U.S.S.G. §5G1.1.

In 2019, when Brown sought relief under the First Step Act, the district court relied on different racketeering acts and additional judge-found facts to leave Brown's 40- year sentence as is, denying the reduction and ignoring intervening legal changes and their effect on the sentencing guidelines calculations. *See* Pet. App. at 12a-14a.

The Second Circuit affirmed, relying on *Moore*. Pet. App. at 3a. "The First Step Act also does not require a district court to follow 'any particular procedures' during its review, 'except for those changes that flow from Sections 2 and 3 of the Fair Sentencing Act of 2010.'" *United States v. Moore*, 975 F.3d at 91–92. The Circuit decided the district court's alternate use of U.S.S.G. §2A1.1 as directed in

U.S.S.G. §2E1.1 with the related factual-findings did not flow from Section 2 of the Fair Sentencing Act. *See* Pet. App. at 3a-4a. The court ignored Brown's asserted errors in the factual determinations, application of guidelines, criminal history error, and lack of consideration of section 3553(a) factors to deny relief. Pet. App. at 4a.

Under the Second Circuit's decision the district court's use of the alternate racketeering activity to maintain the 40-year sentence would never be reviewed because the change did not flow from Section 2 of the Fair Sentencing Act. The Second Circuit only requires consideration of the changes that resulted from Sections 2 and 3 of the Fair Sentencing Act. Thus, any unrelated changes that affect the sentencing guidelines calculation, or statutory sentence would not provide a basis for a sentence reduction under section 404(b) precluding consideration of the effect of this Court's decision in *Apprendi*, the additional fact findings needed to calculate the alternate sentencing guidelines, Brown's maximum statutory sentence, and the effect on his sentencing guidelines range.

Similar to *Concepcion*, the Second Circuit's decision in Mr. Brown's appeal and *Moore* do not require the district court to consider changes in intervening legal standards, and other post-sentencing developments guiding the court's discretion in section 404 reductions impacting the prior sentencing determination. The decisions would allow district courts to deny a reduction in sentence changes in guidelines calculations where non-drug guidelines are involved because they do not "flow" from Section 2 of the Fair Sentencing Act. Second, the *Brown* decision forecloses review

of a district court's additional factual and legal findings not part of the original sentencing upon which the district court relied or other decisions resulting in the use of a non-drug guidelines because they do not "flow" from Section 2.

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

STATEMENT OF THE CASE

On August 3, 2004, after a jury trial, Petitioner Karo Brown was found guilty as an associate or employee of an enterprise, Boot Camp gang, with conspiring to engage in a pattern of racketeering activities involving murder, attempted murder or conspiring to commit a felony with a minor and conspiring to distribute and possess with intent to distribute 1.5 kilograms or more of crack cocaine. Pet. App. 29a-31a. On February 10, 2005, he was sentenced to 480 months in prison. Brown was then 25 years old. He has served 220 months in prison as of this writing and is now 42 years old. He filed a *pro se* and counseled motion in the district court seeking a reduction in his sentence under the First Step Act. The district court denied these motions without a hearing. Pet. App. 5a. Brown appealed the denial of his motion to the Second Circuit Court of Appeals. The Second Circuit affirmed, reasoning the district court properly exercised its discretion because the changes in Brown's sentence did not result from section 2 of the Fair Sentencing Act of 2010. Pet. App. 4a.

A. The Indictment, Trial, and Verdict

On July 1, 2004, a federal grand jury returned a Third Superseding Indictment charging Brown with a racketeering conspiracy, in violation of 18 U.S.C. § 1962(d). Pet App. 15a-26a. The indictment as amended for trial alleged Brown was a member of the Boot Camp street gang in Syracuse, New York. Pet. App. 15a-16a. Members of Boot Camp carried out drug activities and used various forms of violence to protect their territory. Pet. App. 16a-17a. As a member of Boot Camp, Brown knowingly and intentionally conspired with other gang members to commit racketeering activities including: "(1) murder, in violation of New York Penal Law sections 125.25, 110.00 and 105.17; and (2) conspiracy to possess with intent to distribute, possession with intent to distribute, and distribution of, marijuana and more than 50 grams of cocaine base (crack), in violation of Title 21, United States Code, Sections 841(b)(1)(A) and 846. Pet. App. 20a-21a. Of the sixteen overt acts alleged in furtherance of the conspiracy, Brown was named in four involving two shootings, driving a car from which firearms were tossed, and the possession of crack cocaine. Pet. App. 23a-24a.

Brown was found guilty of violating 18 U.S.C. §1962(d). Pet. App. 28a. As part of the verdict, the jury found the pattern of racketeering activity agreed to or reasonably foreseeable to Brown included: (1) more than one act involving murder, attempted murder, or conspiracy to murder in violation of New York Penal Law sections 125.25, 110.00 and 105.17; and (2) more than one act involving of a drug trafficking conspiracy in excess of 1.5 kilograms of crack cocaine. Pet. App. 29a-30a.

The jury further agreed that Brown used or attempted to use a person less than eighteen years of age to commit criminal activity described in Count 1 or to assist in avoiding detection of, or apprehension for, one or more of those offenses. Pet. App. 31a.

B. The Original Sentencing

Brown was sentenced on February 10, 2005. According to the statutory provisions in effect at the time, he was subject to:

> a. a maximum sentence of Life because the pattern of racketeering involved a quantity of cocaine base of 50 grams or more under 21 U.S.C. § 841(b)(1)(A); and
> b. a maximum sentence of Life because the other pattern of racketeering activity involved murder, attempted murder or conspiracy to commit murder. 18 U.S.C. §1963(a).

i. *The guideline calculation*

Brown's guidelines were calculated pursuant to U.S.S.G. §2E1.1(a)(2) using the drug offense guidelines, U.S.S.G. §2D1.1, because the calculation for the drug racketeering acts yielded the higher total offense level between the two racketeering activities. The guidelines calculation was as follows: base offense level of 38 for at least 1.5 kilograms under U.S.S.G. §2D1.1(c)(1), plus 2 levels each for the use of a firearm under §2D1.1(b)(1), and use of a minor under U.S.S.G. §3B1.4 for a total offense level of 42. As for Brown's criminal history, he had:

(1) a conviction in 1995 for a felony assault as a 15-year-old adjudicated as a juvenile delinquent with a two-year placement in state custody (1 point).
(2) a second conviction for felony assault in 1997 for which he served a four-year sentence (after revocation of probation) (3 points).
(3) two misdemeanor convictions in 2000 for criminal possession of a weapon and assault charged and resolved together with one-year

sentences consecutive to each other and concurrent to any probation violation (2 points).

(4) a conviction for attempted criminal possession of a weapon in 2002 resolved with a conditional discharge at the end of a year (1 point).

Brown received two points for committing the present federal offense while on probation and the conditional discharge with an additional point added for having committed the present offense within one year of release. Brown had 10 criminal history points which yielded a Criminal History Category of V. At the time of sentencing in 2005 this resulted in a guideline range of 360 months to life and a term of supervised release of not more than five years. Pet. App. 76a.

ii. ***The imposition of sentence***

Brown contested his role in the offense, the attribution of drug weight, the use of firearms, and the use of minors in the drug trafficking activities. Pet. App. 34a-41a. The Court adopted the guidelines recommendations and the factual content of the Presentence Report. Pet. App. 75a-76a. The Court sentenced Brown to 480 months imprisonment and four years of supervised release. The Court imposed the sentence because of the violent nature of much of Brown's criminal record, and the need to protect the public from him committing further crimes. The Court detailed portions of Brown's history which included assaults, shootings, and threatening a police officer as supporting the 40-year sentence. Pet. App. 76a-77a. The Court imposed an additional ten years above the low end of the guideline range because of Brown's lack of remorse. Pet. App. 78a.

C. Subsequent Legal Developments

i. *The Fair Sentencing Act*

On August 3, 2010, Congress enacted the Fair Sentencing Act, which reduced the 100:1 powder/crack cocaine penalty ratio to 18:1. Pertinent here, Section 2 of the Act had the effect of reducing the penalties for more than 50 grams of "crack" cocaine in §841 (b)(1)(A) by raising the drug quantity to 280 grams as the amount needed to trigger a mandatory minimum of ten years and a maximum life sentence. Pub. L. No. 111-220, 124 Stat. 2372, §2. *Terry v. United States*, 141 S. Ct. 1858, 1861 (2021); *see also id*. at 1866 (Sotomayor, J., concurring in part and concurring in the judgment). The Act was prompted by widespread and long-standing recognition that the sentences for crack cocaine had been highly and needlessly excessive and reflected "unjustified race-based differences." *Dorsey v. United States*, 567 U.S. 260, 266 (2012). The Act was not retroactive. Section 8 of the Act directed the Sentencing Commission to promulgate guideline amendments implementing the lower penalties for crack cocaine.

ii. *Guideline Amendments 748 and 782*

On October 15, 2010, the Sentencing Commission promulgated Amendment 748, which reduced the base offense levels for crack cocaine offenses. For example, an offense involving 1.5 kilograms of crack cocaine -- which previously triggered a base offense level of 38 was assigned a new base offense level of 34. On July 18, 2014, the Commission further amended the Drug Quantity Table such that an

offense involving 1.5 kilograms of crack cocaine was assigned a new base level of 32. Amendment 782.

iii. *The First Step Act*

On December 20, 2018, Congress passed the First Step Act. Pub. L. No. 115-391, 231 Stat.5194 (2018). Among other criminal-justice reforms, the Act made Section 2 and 3 of the Fair Sentencing Act retroactive. *See Terry v. United States*, 141 S. Ct. 1858, 1861-62 (2021). Defendants whose "statutory penalties * * * were modified by section 2 or 3 of the Fair Sentencing Act" were considered to have a "covered offense" under the First Step Act. First Step Act § 404(a). Section 404(b) then gave such defendants a mechanism to receive a new sentence: "A court that imposed a sentence for a covered offense may, on motion of the defendant, * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." *Id.* § 404(b). The Act contained two limitations: Defendants can only seek relief under section 404 once shot at relief and cannot get relief if their sentence "was previously imposed or previously reduced in accordance with * * * the Fair Sentencing Act." *Id.* § 404(c).

D. Brown's First Step Act Motion, Decision and Appeal

Brown filed a *pro se* motion under section 404 in December of 2019. He argued the reduction in his sentencing guidelines and statutory sentence along with his post-sentencing accomplishments supported a sentence reduction. His motion was later supplemented by a counseled motion. He argued he was eligible for a sentence reduction because his sentence for conspiracy to commit a RICO violation

was a "covered offense" and that his statutory sentencing range would be lower had the Fair Sentencing Act been "in effect at the time" he committed his offense. Brown also advised his criminal history would be lower if calculated correctly and according to current guidelines.

Mr. Brown further advised post-sentencing rehabilitation and efforts which were directly responsive to the sentencing factors set forth in 18 U.S.C. §3553 warranted relief. He again informed the court of the numerous educational, vocational, and counseling programs he successfully completed. He wrote the court and community expressing his acceptance of responsibility, apology, and remorse for his actions. Brown also provided personal testimonials from other prisoners he mentored and tutored in Bureau of Prisons ("BOP").

This was Brown's first §404 motion, and his sentence had not previously been imposed or reduced under the Fair Sentencing Act. *See* First Step Act § 404(c).

The district court denied Brown's motion without a hearing. Pet. App. 14a. The district court accepted Brown's conclusion that the application of the drug guideline would result in a lower guidelines sentence range without providing an updated calculation of those guidelines. Pet. App. 12a. The court then resurrected the second set of racketeering acts to drive its section 404(b) determination, noting the jury also found Brown's pattern of racketeering activities involved multiple acts of murder. Pet. App. 12a-13a. The district court found the guidelines range remained the same under U.S.S.G. §2A1.1 because Brown had a murder conspiracy

conviction. *Id.* The court considered Brown a continued threat to the community based on his offense conduct and criminal history. Pet. App. 14a.

E. The Second Circuit Decision

Brown appealed to the Second Circuit arguing the additional findings made by the district court related to murder were inaccurate, required additional factual and legal findings, and did not address the section 3553(a) sentencing factors in their entirety with a lack of full review of Brown's section 404(b) motion. The district court, in its effort to maintain the maximum statutory sentence of life erroneously found Brown had been convicted of a conspiracy to commit murder when no specific jury determination had been related to his actions. The court also failed to account for intervening legal changes affecting Brown's criminal history, or the impact of Section 2 of the Fair Sentencing Act on the statutory sentence and guidelines range.

In issuing their decision, the Court affirmed the denial of Brown's motion. The panel, relying on *United States v. Moore* held the district court procedure in deciding 404(b) motion required only those changes "that flowed from Section 2 and 3 of the Fair Sentencing Act of 2010." Pet. App. 3a. The district court was not "categorically required to hold a hearing at which the defendant is present before denying a motion for a sentence reduction under" the First Step Act." *Id.* The panel affirmed the district court's use of the Guidelines calculations under U.S.S.G. §2A1.1 based on the alternate racketeering acts related to murder as the predicate offense for § 2E1.1, and the district court's calculation of the offense level for that

conduct.[1] *Id.* The panel reasoned that because Brown's conviction was for a racketeering conspiracy, § 2E1.1 applied "to substitute the murder-related conduct for the drug-related conduct" establishing the base offense level "as a matter of course." Pet. App. 3a-4a. Relying further on *Moore*, the panel found that even though Brown contended there was error in the calculation of the guidelines range (for conspiring to commit racketeering acts involving murder) the offense level calculated in the original Presentence Report was unchanged by Section 2 and 3 of the Fair Sentencing Act. *Id.* The panel did not address Brown's argument about the change in criminal history calculations and category due to legal error and intervening changes in the law resulting in a lower guidelines range.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION PRESENTS THE SAME QUESTION AS *CONCEPCION V. UNITED STATES* AND SHOULD BE HELD PENDING RESOLUTION OF THAT CASE.

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

[1] Brown had also raised the district court's failing to recalculate the drug guidelines range, the lack of specificity of the jury verdict, the district court's belief that Brown himself was convicted of a murder conspiracy, and the lack of recalculation of Brown's criminal history.

being conducted in order that (if appropriate) they may be 'GVR'd when the case is decided." (emphasis omitted).

The Court should hold this petition pending its decision in *Concepcion* and then should dispose of the petition as appropriate in light of that decision. This is particularly appropriate here as the Circuit Court denied Brown's Motion for Reduced Sentence Pursuant to the First Step Act without addressing, considering, and applying certain intervening legal and factual circumstances after finding the procedures under section 404 are limited to "those changes that flow from Sections 2 and 3 of the Fair Sentencing Act of 2010." Pet. App. 3a. citing *United States v. Moore*, 975 F.3d 84, 91–92 (2d Cir. 2020). The same cases that form the basis for the split discussed in *Concepcion* form the basis for the split discussed in this petition. See *Concepcion* Petition at 15-18*; infra* Part II.

The outcome of this case is governed by the outcome of *Concepcion*. If this Court rules that courts must or may take into account intervening legal and post-sentencing developments when imposing a reduced sentence under Section 404, then the district court in this case erred in failing to consider *Apprendi* in Brown's First Step Act proceeding, the change in his criminal history, the change in maximum statutory sentence, and the change in the sentencing guidelines based upon current legal standards and accurate factual determinations affecting application of the guidelines.

Given the identity of issues in this case and *Concepcion*, this petition should be held pending resolution of *Concepcion* and then disposed of accordingly. *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)); *Vickers v. United States*, No. 20-7280, 2021 WL 2519058 (June 21, 2021) (mem.) (same); *Diaz-Morales v. United States*, 136 S. Ct. 2540 (2016) (mem.) (GVR'ing for further consideration in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016)); *Smith v. United States*, 134 S. Ct. 258 (2013)(mem.) (GVR'ing for further consideration in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013)); *Deane v. United States*, 568 U.S. 1022 (2012) (GVR'ing for further consideration in light of *Dorsey*, 567 U.S. 260); *Robinson v. United States*, 567 U.S. 948 (2012) (same).

II. THE DECISION BELOW IMPLICATES THE SAME DEEP CIRCUIT SPLIT PRESENTED IN *CONCEPCION V. UNITED STATES*.

This is the same split this Court granted review in *Concepcion* to resolve. This Court should accordingly hold this petition in abeyance pending its resolution of *Concepcion*. All twelve geographic circuits have addressed and disagreed on the scope of a district court's authority during a First Step resentencing.

Four circuits require a district court to consider intervening case law, updated sentencing Guidelines, or intervening factual developments when resentencing.[2]

[2] The Third, Fourth, Tenth, and D.C. Circuits agree that the First Step Act requires a district court to calculate the current Guidelines range at the time of resentencing – incorporating any legal changes to the Guidelines since the original resentencing – and resentence based on renewed consideration of the sentencing factors, which includes updated facts. *See, e.g.*, *United States v. Chambers*, 956 F.3d 667, 668 (2020); *United States v. Easter,* 975 F.3d 318, 325-26 (3d Cir. 2020); *United States v. Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020); *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020).

Five circuits allow district courts to ignore those issues.[3] And three circuits bar consideration of intervening law or updated Guidelines entirely.[4] The Second Circuit has held that in deciding whether to reduce a sentence under section 404 the district court is not required to "recalculate" the Guidelines range under the current law, unless the Fair Sentencing Act of 2010 changed the Guidelines range and only to the extent of those changes. *Moore*, 975 F.3d 84, 90, 91 n. 36. Nor is the district court required to consider the sentencing factors of 18 U.S.C. §3553(a) in its section 404(b) decision. *United States v. Moyhernandez*, 5 F.4th 195, 202 (2d Cir. 2021). The panel in Brown's appeal affirmed the district court decision because the sentencing guideline under U.S.S.G. §2E1.1 did not flow from changes resulting from Section 2 of the First Step Act. This decision following the limitations allowed by *Moore* was in error.

III. THE DECISION BELOW IS WRONG

This Court should also grant certiorari or at least hold this petition pending disposition in *Concepcion* because the Second Circuit's decision is wrong.

1. Section 404(b) instructs courts to "impose a reduced sentence." The legislative choice and use of "impose" in other federal sentencing statutes makes clear first

[3] The First, Second, Sixth, Seventh and Eighth Circuits held that district courts need not consider intervening legal developments or updated Guidelines and facts when resentencing under the First Step Act. *See. e.g., United States v. Maxwell*, 991 F.3d 685 (6th Cir. 2021); *United States v. Moore*, 975 F.3d 84, 90, 91 n. 36 (2d Cir. 2020); *United States v. Shaw* 957 F.3d 734, 741-42 (7th Cir. 2020); *United States v. Harris*, 960 F.3d 1103, 1006 (8th Cir. 2020), *cert denied*, No. 20-6870, 2021 WL 666739 (U.S. Feb. 22, 2021).

[4] The Fifth, Ninth, and Eleventh completely forbid district courts from considering any intervening case law or updated Guidelines and do not require district courts to consider updated facts. See, e.g., *United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 285 (2019); *United States v. Kelley*, 962 F.3d 470, 475-76 (9th Cir. 2020), pet. for cert. filed Mar. 15, 2021; *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020).

that courts are broadly authorized to consider any information relevant to sentencing. *See, e.g.,* 18 U.S.C. § 3553(a) ("[I]n determining the particular sentence to be imposed," district courts "shall consider" a host of factors); *id.* § 3582(a) (requiring courts to consider § 3553(a) factors when a district court "determin[es] whether to impose a term of imprisonment, and, if a term of imprisonment is imposed, in determining the length of the term"); *id.* § 3661 (prohibiting any "limitation" on what a court may "consider for the purpose of imposing an appropriate sentence"). And second, the word is used when directing courts to sentence a defendant in the first instance. *See id.* § 3553(a). This usage aligns with the dictionary definition of "impose." *See, e.g.*, *Impose*, Merriam-Webster Dictionary (online ed. 2021) ("to establish or apply by authority," for example, to "impose penalties").

When a court imposes a reduced sentence under Section 404, it should therefore follow the bedrock sentencing principle of 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"). That means determining a defendant's Fair Sentencing Act sentence in light of intervening constitutional law—like *Apprendi's* rule that only jury-found facts can increase the maximum penalty applicable to a crime. Imposing a sentence also necessitates "*correctly* calculating the applicable Guidelines range." *See Gall v. United States*, 552 U.S. 38, 49 (2007)(emphasizing district courts "should begin all sentencing proceedings

correctly calculating the applicable Guideline range.")(emphasis added). A First Step Act resentencing thus must "include[] an accurate calculation of the amended guidelines range at the time of resentencing." *Easter,* 975 F.3d at 325-326; see also *Brown,* 974 F.3d at 1145 ("A correct Guideline range calculation is paramount, and the district court can use all the resources available to it to make that calculation."); *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"). An accurate guidelines range must account for all intervening legal developments at the time of resentencing—such as *Apprendi,* and a criminal history category change which in this case would have lowered Brown's statutory maximum sentence and his guidelines range.

Applying intervening legal developments bearing on a defendant's sentence also respects the separation of powers. It "represents a rare instance in which Congress has recognized the need to temper the harshness of a federal sentencing framework that is increasingly understood to be much in need of tempering." *United States v. Concepcion*, 991 F.3d 279, 313 (1st Cir. 2021) (Barron, J., dissenting). But Congress did not afford carte blanche relief; it instead granted certain federal prisoners a vehicle to go to court and request relief. *See, e.g., United States v. Wirsing,* 943 F.3d 175, 186 (4th Cir. 2019) (explaining that "[t]he First Step Act provides a vehicle for defendants sentenced under a starkly disparate regime to seek relief"). And in so doing, it explicitly recognized that district courts have discretion to grant relief. *See* First Step Act § 404(c). This recognition accords with

"the remedial discretion that" courts "are accustomed to exercising when revisiting a sentence that may have been too harsh when first imposed." *Concepcion*, 991 F.3d at 313 (1st Cir. 2021) (Barron, J., dissenting). 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 remedial discretion. *Id*. But limiting judge's to only considering changes attributable to Section 2 of the Fair Sentencing Act does just that.

2. The Second Circuit's approach and the specific approach of the panel in Brown's appeal cannot be reconciled with the text and purpose of the First Step Act. That court based its rule on Section 404(b)'s requirement that courts should impose a reduced sentence "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." *Moore,* 975 F.3d at 91; Pet. App. 3a-4a. The Second Circuit has further affirmed the limitation of a district court's discretion affirming a district court's failing to incorporate section 3553(a) factors in determining a section 404(b) motion. *See Moyhernandez*, 5 F.4th at 202 ("Section 404 contains no explicit mandate to consider § 3553(a), and we do not infer that Congress intended to imply one.").

The lack of specificity of the verdict, as to which offenses the jury had determined Brown was guilty or involved in, meant the district court made additional factual and legal determination as part of its denial of Brown's resentencing to find the statutory maximum sentence of life still applied, and then applied the highest base offense level for murder in the first degree implicating this

Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. App. 12a. Those findings were necessary to support the continued statutory maximum of life under 18 U.S.C. §1963(a) allowing for the guidelines range of 360 months to life and maintenance of the 40-year sentence.

None of these determinations had been made as a part of the original sentencing. Pet App. 75a-80a. The district court made additional findings that Brown had committed murder or conspired to commit murder, required to maintain the 360-month to life guideline range and the maximum statutory sentence of life. Only two acts of the three alleged acts carried a life sentence under New York law as required to apply U.S.S.G. §2A1.1(a). NYPL §§ 125.25, 110.00 and 105.17; NYPL §§ 110.05; 70.00(2)(b). This specific determination had not been made by the jury leaving the possibility Brown was convicted beyond a reasonable doubt of racketeering acts solely involving two acts of NY attempted murder carrying a maximum sentence as a Class B felony of 25 years. NYPL §§ 125.25, 110.05; 70.00(2)(b). The affirmance of the district court's decision limiting the lower courts discretion because the changes in the guidelines did not result from Section 2 of the Fair Sentencing Act is an erroneous interpretation of section 404, a short-sighted view of changes that flow from Section 2 and 3 of the Fair Sentencing Act, and affirms a decision in contravention of *Apprendi*.

First, the Second Circuit's interpretation simultaneously erases the word "impose" from the text—requiring courts to follow normal sentencing procedures—and adds the word "only"—forcing courts to consider only sections 2 and 3 of the

Fair Sentencing Act. But the Act does not say that "only" those changes can be considered. Instead, the "as if" clause merely clarifies what drug-quantity thresholds and sentencing rules the district court should apply in conducting the new sentencing. "In effect, it makes" sections 2 and 3 of the Fair Sentencing Act "retroactive." *Chambers,* 956 F.3d at 672. Reading section 404(b) to only require changes from Sections 2 or 3 be considered in a section 404(b) proceeding would have the effect of limiting the number of eligible defendants suffering under severe sentences to only those whose drug guidelines or statutory sentences had changed contrary to the intent of Congress, which was to remedy the harsh sentences and inequities as intended under the Fair Sentencing Act of 2010.

Second, the "as if" language tells courts to act as if the Fair Sentencing Act had been in effect "at the time the covered offense was committed." First Step Act § 404(b). It says nothing about what courts should do with facts that existed "at the time of sentencing." See *Concepcion*, 991 F.3d at 302 n.9 (Barron, J., dissenting)("[T]he only time frame referenced in the 'as if' clause is the time of the commission of the offense."). Congress's silence on that makes sense. As multiple courts have explained, it is impossible "to speculate as to how a charge, plea, and sentencing would have looked had the Fair Sentencing Act been in effect" given the vagaries of plea negotiations, the discretion of prosecutors and courts, and the limits of evidence. *White*, 984 F.3d at 87 (quoting *United States v. Jackson*, 964 F.3d 197, 205 (3d Cir. 2020)); *see also United States v. Davis*, 961 F.3d 181, 192 (2d Cir. 2020); *United States v. Broadway*, 1 F.4th 1206, 1211-12 (10th Cir.

2021). As the Tenth Circuit put it, "[c]ourts are not time machines which can alter the past and see how a case would have played out had the Fair Sentencing Act been in effect" at the time of sentencing. *Broadway*, 1 F.4th at 1212. So while a Section 404 proceeding "is inherently backward looking," it is doubtful that Congress imposed on courts the "futile role" of speculating that facts that existed at a pre-Fair Sentencing Act sentencing would necessarily have existed at a post-Fair Sentencing Act sentencing. *Id*. And if Congress had wanted courts to endeavor so, it would have stated it plainly.

IV. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is obviously important, as this Court has already confirmed by granting certiorari on a case presenting the same question. Like in *Concepcion*, the question presented here affects federal prisoners across the country who are eligible for resentencing under the First Step Act. And requiring courts to consider intervening legal developments will have an immense impact on the reductions granted under the First Step Act. Brown's case is a prime example: He remains sentenced to 480 months' imprisonment despite the fact that, had intervening law been taken into account, the statutory maximum sentence he would face based on the racketeering acts the court relied upon is 20 years. The importance cannot be understated. Decades of imprisonment are at stake depending on whether intervening law applies at First Step Act proceedings.

To make the determination that Brown's murder conspiracy conviction maintained the same guidelines range, the district court had to make additional

factual and legal determinations. First, the district court determined Brown had been convicted of a murder conspiracy. Pet. App. 12a-13a, n.3. He had not. Second, the court found the racketeering acts in which Brown had conspired carried a life sentence, but not all of the acts related to murder for which he was convicted did so. *Id.* Third, the court disregarded intervening changes in the law, and perpetuated prior sentencing errors.

The finding that Brown had been convicted of a murder conspiracy was not supported by the record. That conclusion required the district court to make additional determinations to continue to support the 360-month to life guidelines range and statutory maximum sentence of life. The circuit decision's affirming those findings operates in the same manner as the Eleventh, Fifth, and Ninth Circuits which hold that this language forbids district courts from considering intervening legal developments when resentencing defendants under the First Step Act. *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) ("[T]he district court * * * is permitted to reduce a defendant's sentence only * * * 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense * * * ."); *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) (holding that a district court must "decide[ ] on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act"); *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020) (holding that district courts must "consider the state of the law at the time the defendant committed the offense, and change only

one variable: the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape"); see also *Concepcion* Petition at 17-18.

It is essential that the Court grant certiorari to restore uniformity to this important criminal justice reform.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Carlos Concepcion v. United States*, No. 20-1650, and then should be disposed of as appropriate in light of that decision.

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Respectfully submitted,

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