No. _____

IN THE
Supreme Court of the United States

_____

ANTWAN BOYD,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED FOR REVIEW

The question presented here is the same as that presented in *Concepcion v. United States*, No. 20-1650, on which this Court recently granted certiorari:

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.

LIST OF PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

United States District Court (M.D. Fla.):

- *United States v. Boyd*, No. 8:08-cr-251-JSM-AAS, Doc. 131 (M.D. Fla. April 6, 2021)

United States Court of Appeals (11th Cir.):

- *United States v. Boyd*, No. 21-11299, 2022 WL 151572 (11th Cir. Jan. 18, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Antwan Boyd respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion, 2022 WL 151572 (11th Cir. Jan. 18, 2022), is provided in the petition appendix (Pet. App.) at 1a–6a.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Eleventh Circuit issued its decision affirming the denial in part of Mr. Boyd's motion for relief under § 404 of the First Step Act. Mr. Boyd has timely filed this petition pursuant to this Court's Rule 29.2.

RELEVANT CONSTITUTIONAL/STATUTORY PROVISIONS

A. The First Step Act of 2018

Entitled "Application of the Fair Sentencing Act," Section 404 of the First Step Act of 2018 provides in full:

> (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.

Pub L. No. 115-391, 132 Stat. 5194, § 404.

B. The Fair Sentencing Act of 2010

Entitled "Cocaine Sentencing Disparity Reduction," Section 2 of the Fair Sentencing Act of 2010 provides, in relevant part:

> (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
>
> > (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and
> >
> > (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

Pub. L. No. 111-220, 124 Stat. 2372, § 2(a).

C. 21 U.S.C. § 841

As amended by the Fair Sentencing Act of 2010, 21 U.S.C. § 841 provides, in pertinent part:

> **(a) Unlawful acts** Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;
>
> * * *
>
> **(b) Penalties** Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> **(1)**
>
> **(A)** In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 280 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years . . . . Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. . . .

* * *

(B) In the case of a violation of subsection (a) of this section involving—

* * *

> **(iii)** 28 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;
>
> * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment . . . .

(C) In the case of a controlled substance in schedule I or II . . . , except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . . Notwithstanding section 3583 of title 18, any sentence

> imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. . . .

21 U.S.C. §§ 841(a)(1), (b)(1)(A)–(C).

INTRODUCTION

This petition presents the same question as *Concepcion v. United States*, No. 20-1650, in which this Court recently granted certiorari. *See* 2021 WL 4464217 (U.S. Sept. 30, 2021) (mem.). 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* Pet."). This Court's answer in *Concepcion* will likely resolve the question in this case, as current Eleventh Circuit precedent does not allow either approach; 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. Like the Eleventh Circuit, the Fifth and Ninth Circuits read the "as if" language to mean that courts

may consider only the effect of the Fair Sentencing Act on the defendant's sentence, but no other intervening legal developments. The Third, Fourth, and Tenth Circuits, on the other hand, have held that courts *must* consider intervening legal developments. The First, Second, Sixth, Seventh, and Eighth Circuits allow—but do not require—district courts to consider any intervening legal developments. This question is important.

Here, the Eleventh Circuit applied its narrower, strained reading of the "as if" requirement to hold that the district court could not consider the effect on Mr. Boyd's sentence of intervening statutory changes to the recidivist enhancement statute. On June 26, 2009, Mr. Boyd was sentenced to a mandatory term of Life imprisonment because of prior delivery of cocaine convictions. His sentence was later reduced to 240 months through a grant of executive clemency. If charged today, would no longer qualify as a career offender under the Sentencing Guidelines, as his prior Florida aggravated fleeing to elude conviction would not qualify as a crime of violence under the current Guidelines Manual.

When Mr. Boyd sought relief under the First Step Act, the district

court found that he was eligible for a reduction because he was sentenced for a covered offense. However, the district court relied on the Probation Office's assessment that Mr. Boyd remained a career offender and his guideline range was 360 months to Life. The district court found that his 240-month sentence fell below the reduced applicable guideline range.

On appeal, Mr. Boyd maintained that the district court abused its discretion in declining to further reduce his sentence and that nothing prohibited the district court from imposing a reduced sentence in accordance with current law. However, the Eleventh Circuit affirmed the district court's denial of relief, citing other prior circuit precedent holding that district courts are not required to take intervening changes in the law into account when considering First Step Act motions. *See United States v. Stevens*, 997 F.3d 1307, 1316 (11th Cir. 2021); *United States v. Taylor*, 982 F.3d 1295, 1302 (11th Cir. 2020). Given the similarity 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

At his original sentencing, the statutory penalties to which Mr. Boyd was subject were Life imprisonment as to count two.[1] This was based on a 21 U.S.C. § 851 enhancement filed by the government before Mr. Boyd proceeded to trial. Due to the statutory mandatory minimum, Mr. Boyd's guideline range was Life imprisonment; absent the § 851 enhancement, his guideline range would have been 360 months to Life on account of his career offender status, based on a total offense level of 37 and criminal history category of VI. As it had no choice, the district court sentenced Mr. Boyd to Life imprisonment and 10 years' supervised release as to count two.

Signed into law on December 21, 2018, § 404(b) of the First Step Act makes retroactive the Fair Sentencing Act of 2010's reduction in the disparity between crack and powder cocaine sentences to defendants whose offense occurred before the Act's passage. First Step Act of 2018, Pub. L. No. 115-391 (S. 756), 132 Stat. 5194 (enacted Dec. 21, 2018). Mr.

[1] Mr. Boyd was also charged and convicted of one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). He was sentenced to a concurrent term of 120 months' imprisonment and 3 years' supervised release. That conviction is not at issue here.

Boyd is one such defendant who has borne the consequence of the disparate drug sentencing policy that Congress sought to correct.

On March 16, 2021, Mr. Boyd filed a motion to reduce sentence pursuant to the First Step Act, maintaining that he was eligible for a reduced sentence and, therefore, the district court had broad discretion to modify his previously imposed term of imprisonment pursuant to 18 U.S.C. § 3582(c)(1)(B) and Section 404 of the First Step Act, retroactively applying the amended statutory provisions of sections 2 or 3 the Fair Sentencing Act. He further maintained that he would no longer qualify as a career offender under the current Guidelines Manual, resulting in a significantly lower guideline range. The government responded in opposition to Mr. Boyd's motion, agreeing that he was eligible for relief but opposing a reduction in his term of imprisonment because his 240-month sentence was below the amended guideline range suggested by the Probation Office.

On April 6, 2021, the district court entered an order granting in part Mr. Boyd's motion for relief under the First Step Act. Pet. App. at 1b–3b. The court found Mr. Boyd eligible for relief and reduced his term of supervised release to 8 years. However, the district court denied a

reduction of his sentence as his 240-month sentence was below the applicable guideline range. Mr. Boyd appealed.

On appeal, Mr. Boyd argued that the district court abused its discretion when it declined to further reduce his sentence under Section 404 of the First Step Act of 2018 as the sentence remained greater than necessary to achieve the purposes of sentencing and that the district court's order failed to provide sufficient explanation for its decision. Further, he maintained that nothing prohibited the district court from applying current law in consideration of his request. He requested that the appeals court vacate the district court's order and remand his case for reconsideration. The government maintained that the district court did not abuse its discretion.

On January 18, 2022, the Eleventh Circuit affirmed, finding that "[t]he district court acted within its discretion in denying Boyd's motion for a reduction in his sentence and adequately explained its reasons for doing so." Pet. App. at 6a. The Eleventh Circuit also cited prior precedent that the district court was not authorized to consider changes in the law beyond those of the Fair Sentencing Act. *Id.* at 5a.

REASONS FOR GRANTING THE WRIT

I. This petition presents the same question as *Concepcion v. United States* and should be held pending resolution of that case.

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

This petition presents the same question as *Concepcion v. United States*, No. 20-1650, on which this Court recently granted certiorari. 2021 WL 4464217. The same cases that form the basis for the split discussed in *Concepcion* form the basis for the split at issue in this petition. *See Concepcion* Pet. at 15–18. 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 developments when imposing a reduced sentence under Section 404, then the district court in this case erred in failing to consider changes to the Sentencing Guidelines' career-offender provision in denying Mr. Boyd's First Step Act request for a reduced term of imprisonment.

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)); *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)).

II. The decision below implicates the same deep circuit split presented in *Concepcion v. United States*.

The decision below implicates the circuit split over the extent to which courts can consider intervening legal developments when imposing a reduced sentence under the First Step Act. *Concepcion* notes the deep division over whether courts must or may take intervening legal developments into account when resentencing under the First

Step Act. *See Concepcion* Pet. at 13–19. The root of the confusion is Section 404(b)'s language that "[a] court . . . 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."

On one side of the split, the Eleventh, Fifth, and Ninth Circuits 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* Pet. at 17–18.

The Third, Fourth, and Tenth Circuits take the opposite position, requiring district courts to consider intervening law when imposing a reduced sentence under the First Step Act. *See United States v. Easter*, 975 F.3d 318, 325–326 (3d Cir. 2020) ("[T]he necessary [§ 404] review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing . . . ."); *United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020) (holding that courts must recalculate the Guidelines sentencing range in light of "intervening case law"); *United States v. Brown*, 974 F.3d 1137, 1144–46 (10th Cir. 2020) (similar); s*ee also Concepcion* Pet. at 13–15.

The First, Second, Sixth, Seventh, and Eighth Circuits have charted a middle course, holding that district courts may—but need not—consider intervening legal developments. *See United States v. Concepcion*, 991 F.3d 279, 289–90 (1st Cir. 2021) ("[A] district court may take into consideration any relevant factors (other than those specifically proscribed), including current guidelines, when deciding to what extent a defendant should be granted relief under the First Step

Act."); *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 (emphasis added)); *United States v. Maxwell*, 991 F.3d 685, 691 (6th Cir. 2021) (holding that courts can "consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much"), petition for cert. filed, No. 20-1653 (U.S. May 24, 2021); *United States v. Fowowe*, 1 F.4th 522, 524 (7th Cir. 2021) (extending *United States v. Shaw*, 957 F.3d 734 (7th Cir. 2020), to hold that "[Section] 404(b) authorizes but does not require district courts to apply an intervening judicial decision in evaluating First Step Act motions"); *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020) ("First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines." (emphasis added)); *see also Concepcion* Pet. at 15–7. This Court recently granted certiorari to resolve this confusion.

III. The decision below is wrong.

This Court should also grant certiorari or at least hold this petition pending disposition in *Concepcion* because the Eleventh

Circuit's decision is wrong. "Section 404(b) also expressly permits the court to 'impose a reduced sentence.' Not 'modify' or 'reduce,' which might suggest a mechanical application of the Fair Sentencing Act, but 'impose.'" *Chambers*, 956 F.3d at 672. And the way Congress uses the word "impose" in other federal sentencing statutes makes two things clear. First, the word is used to broadly authorize courts to consider anything 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"); 18 U.S.C. § 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* 18 U.S.C. § 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 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, 243–44 (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 current law, including intervening changes to the recidivist enhancement statute for drug offenses. Imposing a sentence also necessitates "correctly calculating the applicable Guidelines range," which this Court in *Gall v. United States* highlighted as the way district courts "should begin all sentencing proceedings." 552 U.S. 38, 49 (2007) (emphases 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 325–26; *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 673–74 (rejecting argument that "a court must perpetuate a Guidelines error that was an error even at the time of initial sentencing"). Finally, an accurate guidelines range

must account for all intervening legal developments at the time of resentencing—such as the changes to the offenses that qualify for enhancement under the career offender guideline at USSG § 4B1.2, which in this case would have lowered Mr. Boyd's guidelines range as he no longer qualifies as a career offender.

Applying intervening legal developments bearing on a defendant's sentence also respects the separation of powers. As the *Jones* Court recognized, the First Step Act was part of an effort to undo "the disparity between the penalties for crack- and powder-cocaine offenses." 962 F.3d at 1296–97. Indeed, 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." *Concepcion*, 991 F.3d at 313 (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, Congress explicitly recognized that district courts have

discretion to grant relief. *See* First Step Act § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

Such a reading 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 (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 tying judges' hands to old statutory law effectively does just that. The Eleventh Circuit's approach cannot be reconciled with the text and purpose of the First Step Act.

CONCLUSION

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

Respectfully submitted,

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