No. 21-8111

IN THE SUPREME COURT OF THE UNITED STATES

LEO CONTRERA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly determined that it lacked authority under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, to reduce petitioner's life sentence for murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) (1988).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D.N.Y):

United States v. Mora, No. 94-cr-729 (Aug. 28, 1996)

Contrera v. United States, No. 99-cv-5912 (Sept. 27, 2001)

Contrera v. United States, No. 06-cv-0330 (July 6, 2006)

Contrera v. United States, No. 14-cv-3343 (filed May 27, 2014)

United States Court of Appeals (2d Cir.):

United States v. Mora, No. 96-1566 (June 9, 1998)

Contrera v. United States, No. 01-2702 (June 28, 2002)

Contrera v. United States, No. 07-5054 (Apr. 16, 2008)

Contrera v. United States, No. 14-2118 (Aug. 25, 2014)

Contrera v. United States, No. 14-2669 (Aug. 25, 2014)

Contrera v. United States, No. 19-3723 (Mar. 23, 2021)

United States v. Contrera, No. 21-617 (Feb. 2, 2022)

United States v. Contrera, No. 20-4083 (Feb. 2, 2022)

United States Supreme Court:

Contrera v. United States, No. 98-5945 (Oct. 13, 1998)

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is available at 2022 WL 301784. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2022. The petition for a writ of certiorari was filed on May 3, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of arson, in violation of 18 U.S.C. 844(i) (1988); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) (1988); carrying and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1993); and conspiring to distribute heroin and cocaine base (crack cocaine), in violation of 21 U.S.C. 841(b)(1)(A)(i) and (iii) (1988) and 21 U.S.C. 846. See 11/30/20 D. Ct. Mem. & Order (Order) 4-5. The district court sentenced petitioner to two concurrent terms of life imprisonment on the murder and conspiracy counts; a term of 20 years of imprisonment on the arson count, to be served concurrently to the life sentences; and a term of five years of imprisonment for the Section 924(c) count, to be served consecutively to the other terms of imprisonment, all to be followed by five years of supervised release. Order 6-7. The court of appeals affirmed, 152 F.3d 921 (Tbl.), and this Court denied a petition for a writ of certiorari, 525 U.S. 940. Petitioner thereafter unsuccessfully sought relief under 28 U.S.C. 2255 and 18 U.S.C. 3582(c)(2). Order 7-8. A further Section 2255 motion remains pending in district court. See 14-cv-3343 D. Ct. Doc. 13 (June 2, 2021)

After the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a sentence

reduction under Section 404 of that Act. The district court granted in part and denied in part the motion, reducing petitioner's term of imprisonment on the drug-conspiracy count from life to time served. Order 22-23. The court of appeals affirmed. Pet. App. 1-5.

1. Petitioner was a crack-cocaine dealer on a street corner in Brooklyn in the late 1980s and early 1990s. Order 2. When his revenues began to decline, he entered into an arrangement with William and David Mora -- two brothers who operated their own drug-distribution ring -- to sell heroin on the corner. Ibid. The brothers and petitioner came to believe that their sales were being undercut by a gang of rival sellers. Ibid. "In order to drive out these rival sellers, William Mora and [petitioner] agreed to burn down a bodega" that they believed to be the headquarters of the rival drug-trafficking gang. Order 2-3. The fire killed Jose Salcedo, a 63-year-old store patron. Presentence Investigation Report (PSR) ¶ 14; see Order 3.

Petitioner recruited three accomplices for the arson, and the four men approached the bodega on January 24, 1993, with a container of gasoline. PSR ¶ 14; see Order 3. Petitioner and one of his accomplices entered the bodega, and petitioner held a gun to the head of an employee while his accomplice splashed gasoline up and down the aisles and on the store's shelves -- and on Salcedo. Order 3; cf. PSR ¶ 14 ("It is not known whether Salcedo was doused with gasoline deliberately."). The accomplice lit a book of

matches and ignited the gasoline. Order 4. Petitioner and his accomplices then fled. Ibid.

Salcedo was killed in the ensuing blaze. Order 4. "In addition, the entire building was gutted by the fire, the owner of the store received burns, and seventeen members of a local softball team playing dominoes in the back room of the bodega managed to escape only by breaking down a rear door of the building." Ibid. A week later, petitioner admitted to one of his closest friends that he had burned down the bodega. Ibid.

A federal grand jury in the Eastern District of New York charged petitioner, the Mora brothers, and others with various offenses related to the fire. 1998 WL 398802, at *1. Petitioner was ultimately charged with arson, in violation of 18 U.S.C. 844(i) (1988); murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) (1988); carrying and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1993); and conspiring to distribute heroin and crack cocaine, in violation of 21 U.S.C. 841(b)(1)(A)(i) and (iii) (1988) and 21 U.S.C. 846. PSR ¶¶ 2-5. The case proceeded to trial, and the jury found petitioner guilty on each of those counts. PSR ¶ 1.

Before sentencing, the Probation Office calculated petitioner's Sentencing Guidelines range to be life imprisonment, plus a mandatory consecutive sentence of five years on the Section 924(c) count. Order 5; see PSR ¶ 69. In arriving at that

calculation, the Probation Office grouped the arson and murder counts together and applied a guideline specifying offense levels for first-degree murder. PSR ¶ 25; see Sentencing Guidelines § 2A1.1 (1995). The Probation Office explained that the first-degree murder guideline was applicable because the arson guideline "instruct[ed] that if death resulted from the arson, the most analogous guideline from Chapter 2, Part A (Offenses against a Person) should be employed if it results in an offense level greater than" the level otherwise produced by the arson guideline, and the first-degree murder guideline was the most analogous guideline here. PSR ¶ 25; see Sentencing Guidelines § 2K1.4(c)(1) (1995); cf. 18 U.S.C. 1111(a) (defining federal first-degree murder to include murder committed in the perpetration of arson). The Probation Office grouped petitioner's drug-conspiracy offense separately in its calculations. PSR ¶¶ 17, 19-24.

Petitioner objected to using the first-degree murder guideline to determine the base offense level for his arson and murder convictions. See Sent. Tr. 15. At sentencing, the district court overruled that objection, explaining that the first-degree murder guideline was the most analogous one because petitioner's offense involved "the most serious type of murder, in which the murder, if not intended, was such an overwhelmingly probable consequence of the conduct that it's appropriately treated as the equivalent or equal of intentional murder." Ibid. The court did, however, decline to adopt the Probation Office's recommendation of

a two-level enhancement for obstruction of justice. Id. at 13. Declining to apply that enhancement made no difference to petitioner's guidelines range, which remained life plus the mandatory consecutive five-year sentence. See PSR ¶¶ 37, 40, 69; Sentencing Guidelines Ch. 5, Pt. A, tbl. & comment. (n.2) (1995).

The district court sentenced petitioner to two concurrent terms of life imprisonment on the murder and drug-conspiracy counts; a term of 20 years of imprisonment -- the statutory-maximum term, see PSR ¶ 66 -- on the arson count, to be served concurrently to the two life sentences; and a term of five years of imprisonment for the Section 924(c) count, to be served consecutively to the other terms of imprisonment, all to be followed by five years of supervised release. Sent. Tr. 47. The court of appeals affirmed, 152 F.3d 921, and this Court denied further review, 525 U.S. 940.

2. Petitioner subsequently moved to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. The district court denied the motion, and both that court and the court of appeals denied a certificate of appealability. 2009 WL 2383034, at *3. The court of appeals twice declined to grant petitioner leave to file a second or successive Section 2255 motion. 14-2118 C.A. Order (Aug. 25, 2014); 07-5054 C.A. Order (Apr. 16, 2008).

Petitioner also moved for a sentence reduction under 18 U.S.C. 3582(c)(2), which permits a district court to modify a previously imposed term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing

range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2). Petitioner requested that his life sentence for conspiring to distribute crack cocaine and heroin be reduced in light of Amendment 706 to the Sentencing Guidelines, which "generally reduce[d] by two levels the base offense levels applicable to crack * * * offenses." 2009 WL 2383034, at *3; see Sentencing Guidelines App. C, Amends. 706, 711 (Nov. 1, 2007).

The district court determined that petitioner was ineligible for a sentence reduction under Section 3582(c)(2) because the relevant guidelines amendments did not have the effect of lowering his guidelines range. 2009 WL 2383034, at *5. The court explained that petitioner's guidelines range had been calculated by grouping the arson and murder convictions together and calculating a base offense level for those counts, separately calculating a base offense level for the drug-conspiracy conspiracy, and then applying the guideline for determining a combined offense level from multiple groups of counts. Ibid.; see PSR ¶¶ 32-40; Sentencing Guidelines § 3D1.4 (1995). The court further explained that the end result of those calculations remained the same even after the retroactive changes to the drug-quantity table that petitioner invoked in his Section 3582(c)(2) motion. 2009 WL 2383034, at *5. Petitioner did not appeal.

In 2019, petitioner sought authorization from the court of appeals to file a successive Section 2255 motion to challenge his Section 924(c) conviction in light of this Court's decision in

United States v. Davis, 139 S. Ct. 2319 (2019). See 19-3723 Pet. C.A. Mot. for Leave 5 (Nov. 8, 2019); see also 28 U.S.C. 2255(h). The court of appeals granted him authorization, see 19-3723 C.A. Order 1 (Mar. 23, 2021), and petitioner's Davis-based Section 2255 motion remains pending in the district court.

3. In 2020, petitioner filed a counseled motion to reduce his sentence under Section 404 of the First Step Act. Pet. App. 2. Section 404 permits a defendant to seek a reduced sentence for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222.

Petitioner contended that his drug-conspiracy conviction was a covered offense because the statutory penalties for his violation had been specified by Section 841(b)(1)(A)(iii), which was later modified by Section 2 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. See D. Ct. Doc. 855, at 5-7 (Sept. 21, 2020); cf. Terry v. United States, 141 S. Ct. 1858, 1862-1864 (2021). Petitioner further contended that Section 404 authorized the district court to reduce his sentence for the noncovered offense of murder in aid of racketeering, on the theory that his life sentence for that separate count of conviction was imposed alongside his life sentence for the drug-conspiracy count as part

of a "single sentencing package." D. Ct. Doc. 855, at 15; see id. at 15-18.

The government agreed that petitioner's drug-conspiracy conviction was a covered offense, even though petitioner had been convicted of conspiring to distribute both crack cocaine and heroin, but urged the district court to decline to reduce petitioner's sentence for that offense as a matter of discretion. D. Ct. Doc. 861, at 5 (Oct. 28, 2020). The government also contended that petitioner's murder conviction was not a "covered offense" and that the court had no sound basis to reduce his sentence for that offense. Id. at 5-6.

The district court granted in part and denied in part petitioner's Section 404 motion. Order 1-23. The court determined that petitioner's drug-conspiracy conviction was a covered offense, but that his murder conviction was not. Order 11-18. The court further determined that, under "[t]he Guidelines now," petitioner's guidelines range for the covered drug-conspiracy offense would be "360 months to life imprisonment." Order 20-21. After considering "the relevant sentencing factors set forth in [18 U.S.C.] 3553(a)," including petitioner's educational achievements in prison and his lack of "recent disciplinary infractions," the court determined that a reduction of his sentence on the covered offense from life imprisonment to time served (approximately 26 years) was appropriate. Order 21-22. The court declined to reduce petitioner's life sentence for murder in aid of

racketeering, describing that noncovered offense as "ineligible for First Step Act relief." Order 22.

Petitioner appealed. While his appeal was pending, he filed a pro se motion in the district court invoking Rule 36 of the Federal Rules of Criminal Procedure and seeking to "correct alleged errors" in the presentence report. Pet. App. 2. Specifically, petitioner "allege[d] that the [presentence report] (and the District Court at the time of his sentencing) applied an incorrect base offense level" in calculating the guidelines range for his grouped arson and murder convictions and that the presentence report "improperly included a Guidelines enhancement for obstruction of justice" (the one that the district court later declined to adopt). Id. at 4; see pp. 5-6, supra. The court denied the motion, finding that it sought relief beyond the scope of Rule 36, and petitioner appealed. Pet. App. 2-3; see 02/05/22 D. Ct. Order (electronic docket entry).

The court of appeals affirmed in an unpublished summary order that covered both appeals. Pet. App. 1-5. Like the district court, the court of appeals determined that petitioner's conviction for murder in aid of racketeering was not "a 'covered offense' under Section 404 of the First Step Act" because the Fair Sentencing Act did not modify the statutory penalties for that offense. Id. at 3. And the court concluded that petitioner's fallback argument -- that his life sentence for that count could nonetheless be reduced under Section 404 because it allegedly

formed "part of a single aggregate sentencing package" with the covered drug-conspiracy offense, ibid. (citation omitted) -- was foreclosed by the court's then-recent decision in United States v. Young, 998 F.3d 43 (2d Cir. 2021). Pet. App. 3. The court of appeals also rejected petitioner's various challenges to "the Guidelines calculation" in his presentence report, finding that the district court had not erred in declining to permit petitioner to relitigate those matters either in the Section 404 proceeding or under Rule 36. Id. at 4.

ARGUMENT

Petitioner contends (Pet. 16-17, 21-24, 51-52) that the court of appeals erred in concluding that the district court lacked authority under Section 404 of the First Step Act to modify his life sentence for murder in aid of racketeering, in violation of 18 U.S.C. 1959(a)(1) (1988). Although the government agrees that Section 404 can allow a district court to reduce the sentences for noncovered offenses that were imposed in a package with a covered offense, petitioner would not benefit from that approach because his life sentence for his (noncovered) murder offense was not imposed as part of a single integrated sentencing package with his (covered) drug-conspiracy offense. Thus, while tension exists in the courts of appeals on the extent of a district court's authority under Section 404 to reduce a sentence for a noncovered offense under the sentencing-package doctrine, this case would be an unsuitable vehicle in which to review that issue, which in any

event would not warrant this Court's review at this time. The petition for a writ of certiorari should be denied.

1. The outcome of this case was correct, because in the circumstances here Section 404 of the First Step Act did not authorize the district court to reduce petitioner's sentence on his murder offense.

a. Section 404 permits a district court to impose a reduced sentence for an offender "only if he previously received 'a sentence for a covered offense.'" Terry v. United States, 141 S. Ct. 1858, 1862 (2021) (quoting First Step Act § 404(b), 132 Stat. 5222). Section 404(a) defines a "'covered offense'" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 * * * that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222. Sections 2 and 3 of the Fair Sentencing Act, in turn, prospectively amended certain provisions of the drug laws, with the effect of increasing the amounts of crack cocaine necessary to trigger certain penalties. See Fair Sentencing Act §§ 2-3, 124 Stat. 2372; Dorsey v. United States, 567 U.S. 260, 273 (2012).

Here, petitioner was convicted before August 3, 2010, of conspiring to distribute crack cocaine and heroin, in violation of 21 U.S.C. 841(b)(1)(A)(i) and (iii) (1988) and 21 U.S.C. 846. See PSR ¶¶ 1, 5. The statutory penalties for that offense were specified in part by Section 841(b)(1)(A)(iii), which is one of

the provisions that was later modified by Section 2 of the Fair Sentencing Act. See Terry, 141 S. Ct. at 1862. The district court therefore "correctly concluded that [the drug-conspiracy count] is a 'covered offense' under Section 404 of the First Step Act," Pet. App. 3, and the court was authorized to -- and did -- impose a reduced sentence for that offense. See Order 11, 20-23.

Petitioner's conviction for murdering Jose Salcedo in aid of racketeering activity, however, is not a "covered offense." The statutory penalties for that offense were prescribed by Section 1959(a)(1), which at the time provided that a person who commits murder in aid of racketeering shall be punished "by imprisonment for any term of years or for life." 18 U.S.C. 1959(a)(1) (1988); see PSR ¶ 66. The Fair Sentencing Act did not modify those statutory penalties. While "dealing in controlled substances is one of the multiple crimes that may be defined as 'racketeering activity,'" Order 16, the statutory penalties prescribed for petitioner's violation of Section 1959(a)(1) did not depend in any way either on the quantity of crack cocaine involved in the racketeering activity or the provisions that the Fair Sentencing Act modified. See 18 U.S.C. 1959(a)(1) (1988).

b. Petitioner does not dispute that his murder conviction is not a covered offense. See Pet. 26 (describing that conviction as "a non-covered offense"). Petitioner also does not challenge the extent of the sentence reduction that he received on his drug conviction, which was the maximum reduction -- to time served --

that could have been granted as a practical matter. Petitioner contends (Pet. 16), however, that if an offender has a covered offense under Section 404 of the First Step Act, then the district court may reduce the offender's sentence for both that offense and for "all sentences, whether 'covered' offenses or not, that formed an aggregate sentencing package."

The government agrees that, in appropriate circumstances, Section 404 authorizes a district court to reduce a sentence for a noncovered offense to the extent that the noncovered offense formed part of a single, integrated sentencing package with a covered offense. See U.S. Br. at 32, Concepcion v. United States, 142 S. Ct. 2389 (2022) (No. 20-1650). As a general matter, when the record indicates that the sentencing court imposed what was effectively a single intertwined sentence that took into account the defendant's convictions for both a covered offense and a noncovered offense, then reducing the defendant's sentence for the noncovered offense is consistent with the text and purpose of Section 404 of the First Step Act. Section 404 authorizes a sentencing court to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act" had been in effect at the time of the covered offense. First Step Act § 404(b), 132 Stat. 5222. In sentencing-package cases, the court in essence imposes a single "sentence," and revisiting the entire "sentence" may be appropriate to put the defendant in the position he would have

occupied had the Fair Sentencing Act been in effect at the time of the covered offense.

But petitioner's reliance on those principles in this case is misplaced, because the district court did not package his murder and drug-conspiracy offenses for purposes of sentencing. At sentencing, the court indicated that, in imposing a life sentence for petitioner's Section 1959(a)(1) conviction, it had foremost "in [its] mind" the seriousness of the Salcedo murder. Sent. Tr. 15. The court explained that the murder -- in which Salcedo was doused with gasoline and killed by the fire that petitioner and his accomplices set to burn down a bodega -- was "appropriately treated as the equivalent or equal of intentional murder." Ibid. And, as the court explained, the murder count "focuse[d] on [petitioner's] act" of killing Salcedo, "separate from dealing in controlled substances" -- a position that petitioner himself has embraced in a recent pro se filing in support of his pending Section 2255 motion in the district court. See 14-cv-3343 D. Ct. Doc. 24, at 9 n.1 (Oct. 7, 2022) (stating that the drug-conspiracy count "set forth a separate, independent drug conspiracy against [petitioner], a conspiracy that had nothing whatsoever to do with the Mora organization or any [racketeering] offense").

In this Court, however, petitioner suggests (Pet. 7, 26) that the district court imposed a single, aggregate sentencing package because his guidelines range was calculated in part on the basis of both his covered offense and the noncovered offenses. But the

Guidelines generally require "determining a single offense level that encompasses all the counts of which the defendant is convicted." Sentencing Guidelines Ch. 3, Pt. D, intro. comment. (1995) (emphasis omitted); see id. § 1B1.1(a)(4). The more salient point is that petitioner's conviction for murder in aid of racketeering was not grouped together for guidelines purposes with his conviction for conspiring to distribute crack cocaine and heroin. PSR ¶ 32. Although not in itself dispositive, the separate grouping of the two offenses in the district court's guidelines calculations is strong evidence that the court did not view the two concurrent life sentences that it imposed for the two offenses as embodying a single aggregate sentence.

c. In its unpublished summary order, the court of appeals stated that it was bound by circuit precedent to conclude that Section 404 does not authorize a sentence reduction for a noncovered offense, even where the noncovered offense was "grouped with a covered offense for sentencing purposes and formed a legally interdependent sentencing package with the covered offense." Pet. App. 3 (quoting United States v. Young, 998 F.3d 43, 49 (2d Cir. 2021)) (brackets omitted). That view did not affect the proper disposition of this case because, as just explained, the case does not in fact involve a "legally interdependent sentencing package." Ibid. Accordingly, the district court was not authorized to reduce petitioner's life sentence on the murder count even if Section 404

might authorize sentence reductions on noncovered offenses in true sentencing-package cases that involve different circumstances.

The court of appeals' prior decision in Young also need not be read so broadly. In Young, the defendant had been convicted before the enactment of the Fair Sentencing Act of two crack-cocaine offenses, one covered under Section 404 and the other not. Young, 998 F.3d at 45, 52-55. The court rejected the defendant's theory that his sentence for the noncovered offense could be reduced under Section 404 because it had been "grouped" with the covered offense. Id. at 55. The court's opinion contains language that could be read as adopting a categorical rule that Section 404 never permits reducing a sentence for a noncovered offense. See, e.g., id. at 49. But the court also stated in Young that it was rejecting the defendant's argument "for the reasons [it had] identified" in an earlier decision, United States v. Martin, 974 F.3d 124, 130, 137 (2d Cir. 2020), which the court then quoted at length. Id. at 55 (quoting Martin, 974 F.3d at 130, 137). Martin, in turn, contains important qualifications that the court in Young did not address or suggest that it meant to override.

In Martin, the defendant was convicted of a covered offense -- conspiring to distribute crack cocaine -- and, while serving his sentence for that offense, was convicted in two additional prosecutions of two noncovered offenses. 974 F.3d at 130-131. The defendant argued that Section 404 authorized the district court to reduce his sentences for both the covered crack-cocaine offense

and the two later noncovered offenses, on the theory that the Federal Bureau of Prisons (BOP) administered the three separate sentences as a single aggregate unit for some purposes. See id. at 133. The court of appeals correctly rejected that argument, explaining that BOP's "custodial calculations" do not merge together sentences imposed in separate judicial proceedings. Id. at 136. The court acknowledged, however, that sentences may be "aggregated -- or combined -- in specific circumstances" not present in that case, ibid., and it gave the example of Section 404 sentence-reduction proceedings involving an intertwined sentencing package:

> [W]here a judgment of conviction contains multiple convictions and sentences for multiple offenses, and where the defendant's sentences are contingent upon the calculated offense level of other offenses * * * , a reduction of one sentence may impact sentences that were imposed for other convictions within the same judgment of conviction. That is not this case. Cf., e.g., United States v. Hudson, 967 F.3d 605, 609-12 (7th Cir. 2020) (finding the First Step Act permitted modification of grouped offenses other than covered offense for purposes of imposing a reduced sentence).

Id. at 135 n.11.

Taken together, Martin and Young suggest that the court of appeals has not conclusively foreclosed the possibility that Section 404 may authorize a sentence reduction for noncovered offenses in certain cases involving sentencing packages. The broader reading of Young reflected in the unpublished summary order in this case is non-precedential. And to the extent that Martin and Young arguably point in different directions on this point,

reconciling any "internal difficulties" within circuit precedent is primarily a task for the court of appeals, rather than this Court. Wisniewski v. United States, 353 U.S. 901, 902 (1953) (per curiam).*

4. Petitioner contends (Pet. 21-25) that the courts of appeals are divided on the question whether Section 404 authorizes a sentence reduction for a noncovered offense, at least to the extent that the noncovered offense formed part of an integrated sentencing package with a covered offense. Although some tension exists in the case law, petitioner overstates the degree of disagreement and its practical significance.

Petitioner relies (Pet. 21-22) primarily on the Seventh Circuit's decision in United States v. Hudson, 967 F.3d 605 (2020). In Hudson, the Seventh Circuit concluded that a district court was authorized under Section 404 to reduce a sentence for both covered crack-cocaine offenses and noncovered firearms offenses because the latter were "grouped with [the offender's] covered offenses for sentencing" and resulted in an "aggregate sentence" comprising all the offenses. Id. at 610. The court explained that construing Section 404 in that manner "aligns with the text" of the statute and "comports with the manner in which sentences are imposed" in

* In the court of appeals, the government contended that petitioner was ineligible for a Section 404 sentence reduction for his noncovered offense under Young, without also informing the court of the government's continued position that Young does not foreclose a reduction on a noncovered offense in a true sentencing-package case (unlike this one). See 20-4083 Gov't C.A. Br. 13-16. That omission was inadvertent.

certain cases. Id. at 610-611. As explained above, it is not clear that the Second Circuit has necessarily adopted a contrary approach.

The other decisions that petitioner identifies (Pet. 23-24) also do not establish any square conflict of authority warranting further review at this time. Petitioner characterizes United States v. Gravatt, 953 F.3d 258 (4th Cir. 2020), as holding that the existence of a covered offense allows the district court to modify "any non-covered offense." Pet. 23 (emphasis added). Gravatt is not so expansive. There, the Fourth Circuit determined that a district court could modify a defendant's sentence for a drug-conspiracy conspiracy, where the conspiracy had the dual objects of distributing powder cocaine and crack cocaine. Gravatt, 953 F.3d at 264. In determining that a dual-object conspiracy involving crack cocaine can be a covered offense, the Fourth Circuit did not address whether similar reasoning would extend to reducing a sentence for a noncovered offense. And petitioner himself received a reduced sentence for the multi-object drug conspiracy in this case. See p. 9, supra.

Petitioner errs in suggesting (Pet. 21) that either the First or the Eleventh Circuit has adopted a categorical rule foreclosing any Section 404 sentence reductions for noncovered offenses even in circumstances involving an integrated sentencing package. The First Circuit did not address the sentencing-package issue in United States v. Concepcion, 991 F.3d 279 (2021), rev'd and

remanded, 142 S. Ct. 2389 (2022). Similarly, the Eleventh Circuit did not address the sentencing-package issue in either of the decisions that petitioner identifies. See United States v. Denson, 963 F.3d 1080, 1082 (2020) (concluding that a district court is not required to hold a hearing at which the defendant is present before ruling on a Section 404 motion), abrogated in part on other grounds by Concepcion, 142 S. Ct. at 2401; United States v. Gee, 843 Fed. Appx. 215, 217 (2021) (per curiam) (concluding that Section 404 does not entitle the defendant to a plenary resentencing on all counts of conviction).

The Tenth Circuit likewise did not address or resolve the sentencing-package issue in United States v. Brown, 974 F.3d 1137 (2020) (cited at Pet. 23). In Brown, the Section 404 movant had been convicted of a single count of possessing more than five grams of crack cocaine with intent to distribute. Id. at 1140. The Tenth Circuit therefore had no occasion to address whether Section 404 may in some circumstances authorize a district court to impose a reduced sentence for a noncovered offense. The issue in Brown instead concerned the extent to which a court may consider intervening legal developments at Section 404 proceedings that are unrelated to the Fair Sentencing Act. See id. at 1144-1146. This Court's later decision in Concepcion v. United States, supra, resolved that issue.

In a recent decision not cited by petitioner, however, the Tenth Circuit stated that "the First Step Act prohibits a district

court from reducing the sentence on a non-covered offense, even if * * * the covered and non-covered offenses were grouped together under the Sentencing Guidelines and the covered offense effectively controlled the sentence for the non-covered offense." United States v. Gladney, 44 F.4th 1253, 1262 (2022), petition for reh'g pending, No. 21-1159 (filed Oct. 13, 2022). Gladney does not support further review in this case. The Tenth Circuit is present considering whether to rehear Gladney en banc, and that process should be allowed to play out before any evaluation of the Tenth Circuit's position on the sentencing-package issue.

3. The question whether Section 404 authorizes a district court to reduce a sentence for a noncovered offense that was imposed as part of an intertwined sentencing package with a covered offense does not warrant further review, particularly in this case. As demonstrated above, any disagreement within the courts of appeals is shallow and uncertain. The issue is also of declining prospective importance and not squarely presented here.

The issue can only possibly arise for the diminishing set of defendants who remain incarcerated for crack-cocaine offenses for which a sentence was imposed before August 3, 2010 -- the effective date of the Fair Sentencing Act -- and for whom Section 404 proceedings have not yet concluded. See First Step Act § 404(b) and (c), 132 Stat. 5222. And within that set of defendants, the issue can only arise if the defendant was sentenced in the same proceeding on both a covered offense and a noncovered offense, and

only if the sentence imposed for the noncovered offense has not yet been fully discharged when the Section 404 proceedings occur. Moreover, even if the court has authority under Section 404 to reduce the sentence for a noncovered offense in some circumstances, the court is never obligated to exercise it in any particular case; the sentence reductions authorized by Section 404 are expressly discretionary. See id. § 404(c), 132 Stat. 5222. Petitioner has therefore not shown that the sentencing-package question is likely to arise or affect the outcome in any significant number of cases. And at all events, this case would be an unsuitable vehicle for further review of the sentencing-package issue because this case does not squarely present the issue. See pp. 15-16, supra.

4. Petitioner's other arguments do not suggest that further review of his case is warranted.

To the extent that petitioner contends (Pet. 41-50, 52-55) that the Court should grant further review to address a district court's authority under Section 404 to correct alleged guidelines errors unrelated to the Fair Sentencing Act, this Court already resolved that matter in Concepcion. The Court made clear in Concepcion that, in Section 404 proceedings, the sentencing court "cannot * * * recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act," but that the court may then consider a wider range of developments to inform its exercise of discretion,

"with the properly calculated Guidelines range as the benchmark." 142 S. Ct. at 2402 n.6.

To the extent that petitioner contends (Pet. 27-40) that the Court should grant further review to examine alleged guidelines errors at his original sentencing, that contention is unsound. The alleged errors are not properly before the Court in this Section 404 proceeding or under Rule 36, see Pet. App. 4; the alleged errors are highly fact-bound and case-specific; and, at all events, the alleged errors are illusory, including for the reasons the district court identified, see 02/05/22 D. Ct. Order. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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