NO.: 22-5562 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

UNITED STATES OF AMERICA,
Respondent,

v.

CHRISTOPHER ALEXANDER,
Petitioner.

On Petition for Writ of Certiorari
To the Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Christopher Alexander # 25906-177
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Pro se

QUESTION PRESENTED

Whether Petitioner was denied his due process rights when the district court granted his Section 404 of the First Step Act motion, but imposed upward variant sentences without allowing the Petitioner an opportunity to reply to misinformation by the Government in its response?

LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals for the Fifth Circuit appears at Appendix A to the petition and is

[X] is unpublished; or

The opinion of the United States district court appears at Appendix B to the petition and is

[X] is unpublished.

The opinion of the United States district court on motions for reconsideration appears at Appendix C.

JURISDICTION

The date on which the United States Court of Appeals decided the case was on June 8, 2022. See Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitutional Amendment V – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On June 19, 2001, Petitioner was indicted in a three-count Indictment with two others, LaShonda Williams and Craig Alexander. Count One charged all defendants with violations of 21 U.S.C. Sections 846, 841 (a) (1), and 841 (b) (1) (A) (iii), conspiracy to distribute and possess with intent to distribute more than 50 Grams of a mixture and substance containing cocaine base (crack cocaine). Counts 2 and 3 charged all defendants with violations of 21 U.S.C. sections 841 (a) (1) and 841 (b) (1) (A) (iii) and 18 U.S.C. section 2, possession with intent to distribute more than 50 Grams of a mixture and substance containing cocaine base (crack cocaine) and aiding and abetting. **ECF # 7.**

On September 19, 2001, all three defendants which included Petitioner, were found guilty by a jury on all counts of the Indictment. **ECF #'s 99, 100, 105.** At sentencing on January 11, 2002, and after being overruled on several objections, Petitioner was held accountable for 4.111 kilograms of crack cocaine, which in 2002,

equated to a base offense level of 38. Base offense level of 38 was enhanced four levels for Petitioner's role in the offense to a total offense level of 42. With a criminal history category of III (6 points), and a total offense level of 42, Petitioner had a sentencing range of 360 months to life. Petitioner was sentenced to terms of imprisonment of life on all three counts to be served concurrently. **ECF # 109-1.**

Petitioner's direct appeal to the Fifth Circuit was affirmed on July 15, 2003. United States v Christopher Alexander, No. 04-10912 (5th Cir. 7/15/2005). Petitioner's motion pursuant to 28 U.S.C. Section 2255 were denied by the district court on July 26, 2005, **ECF #'s 189**. The certificate of appealability (COA) was denied by the Fifth Circuit on August 17, 2006. **ECF # 210**. See also United States v Christopher Alexander, No. 05-11167 (5th Cir. 8/17/2006).

Petitioner filed for relief pursuant to 18 U.S.C. Section 3582 (c) (2) on three separate occasions based on retroactive amendments to the Guidelines. First, Petitioner sought relief from retroactive amendment 706[1], which modified the drug quantity thresholds in the Drug Quantity Table so as to assign, for crack cocaine offenses, base offense levels corresponding to guideline ranges that included the statutory mandatory minimum penalties. Accordingly, pursuant to the amendment, 5 grams of cocaine base were assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and 50 grams of cocaine base were assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Crack cocaine offenses for quantities above and below the mandatory minimum threshold quantities similarly were adjusted downward by two levels.

[1] Filed on March 9, 2009 at ECF # 254.

The Government filed a response opposing the relief that Petitioner sought; because, Petitioner's total offense level decreased from level 42 to level 40, but at a criminal history category of III, he had an advisory sentencing range of 360 months to life pursuant to Amendment 706 which was the same sentencing range as level 42. **ECF # 256**. After Petitioner was given an opportunity to reply to the Government's Response, **ECF # ,257**, the District Court denied the motion pursuant to 18 U.S.C. Section 3582 on October 27, 2010. **ECF # 260**.

Next, Petitioner filed his second motion pursuant to section 3582 and sought relief from retroactive amendment 750[2], which re-promulgated without changes to the emergency, temporary revisions to the Drug Quantity Table in section 2D1.1 and related revisions to Application Note 10 to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. See 21 U.S.C. sections 841 (b) (1) (A), (B), (C), 960 (b) (1), (2), (3).

The Government filed a response on January 31, 2012 and again opposed the relief sought; because, the Government believed that the amendment did not reduce Petitioner's guideline range. **ECF # 310**. Petitioner was afforded an opportunity to file a reply to the response filed by the Government, but he did not so; because, he received the

[2] Filed on January 3, 2012 at ECF # 304.

Response after the District Court denied his motion. Even though, Petitioner was eligible for relief, the District Court denied the motion on February 29, 2012 based in part on the Government's Response[3]. **ECF # 319.**

Lastly, Petitioner filed a motion pursuant to section 3582 based on retroactive amendment 782 which reduces the United States Sentencing Guidelines base offense level by two levels for ALL controlled substances, across the board[4]. In its Response to the motion, the Government agreed that Petitioner was eligible for relief, but opposed relief because of Petitioner's offense conduct/relevant conduct and his post-sentencing conduct which included eleven disciplinary violations since being incarcerated. **ECF # 361.** Petitioner did not file a reply to the response; because, he was eligible for relief. The District Court denied relief on August 18, 2016 based in part, on the Government's Response, Petitioner's relevant conduct for the instant offenses, and his conduct while incarcerated[5]. **ECF # 363.** The appeal to the Fifth Circuit was denied on February 9, 2018. **ECF # 391.** United States v Christopher Alexander, No. 17-10725 (5th Cir. 2/09/2018).

The instant motion, pursuant to Section 404 of the First Step Act of 2018, was filed on June 26, 2020. **ECF # 414.** Petitioner sought relief from the retroactive

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[3] The Government reasoned that the quantity of 14,716.98 kilograms of marijuana had a base offense level of 36, but, 14,716.98 kilograms of marijuana has a base offense level of 34, at least 10,000 kilograms but less than 30,000 kilograms of marijuana. **ECF # 310 at 5-6 of 7.** With a four-level enhancement for role in the offense, Petitioner had a total offense level of 38, a criminal history category of III, and a sentencing range of 292-365 months.

[4] Filed on January 14, 2016 at ECF # 357.

[5] The District Court stated: "The defendant received a sentence of life. This sentence was fair in light of the factors in Title 18, United States Code, Section 3553 (a), including his criminal history, offense conduct or relevant conduct, and the post-sentencing conduct. Therefore, the defendant shall not be granted a further reduction in his sentence."

application of the 18-to-1 ratio for cocaine and crack that applied to defendants with crack who were sentenced before 2010 under the 100-to-1 ratio.

After being instructed to file a response to the section 404 motion, **ECF # 419**, the Government filed its response on August 4, 2021. **ECF # 421**. The Probation Office filed a First Step Act worksheet on July 2, 2021 detailing Petitioner's eligibility and his advisory guideline sentencing range of 292 to 365 months. Without giving Petitioner an opportunity to reply to the Response, the District Court on August 11, 2021, reduced Petitioner's life sentences to concurrent 480-month terms of imprisonment on Counts One thru Three; even though, he had an advisory guideline sentencing range of 292 to 365 months. **ECF $# 422**.

Petitioner filed a motion for reconsideration on September 9, 2021, **ECF # 428**, which was denied by the District Court on September 15, 2021. **ECF # 430**. Because, Petitioner was not given an opportunity to object to the upward variant guideline sentences the District Court imposed, he filed an appeal with the Fifth Circuit.

In the appeal to the Fifth Circuit, Petitioner alleged that the District Court abused its discretion by imposing above advisory guideline sentences without stating reasons for doing so and without giving Petitioner an opportunity to respond to the upward variant sentences. The Fifth Circuit denied the appeal on May 17, 2022 by finding that "[t]he district court explicitly stated in its order that it had considered the 18 U.S.C. Section 3553 (a) factors and determined that a sentence reduction from life to 480 months of imprisonment was appropriate in light of public safety issues and Petitioner's post-sentencing conduct." **ECF # 452**.

REASONS FOR GRANTING THE WRIT

The writ should be granted to determine the procedure to be used when the district court decides to lower a sentence pursuant to section 404 of the First Step Act of 2018. Under section 404 (b) of the First Step Act, a court "that imposed a sentence for a covered offense ***may*** ... 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. The statute defined "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 ... that was committed before August 3, 2010.

At the initial sentencing on or about January 11, 2002, Petitioner was sentenced to three concurrent life sentences based on a mandatory guideline sentencing range of 360 months to life. In 2002, the three counts, in which Petitioner was charged, had statutory sentencing range of 10 years to life. In 2021 and section 404 of the FSA of 2018, the three drug counts had statutory sentencing range of 5 to 40 years.

In the instant matter, Petitioner was eligible for the reduction; because, he was serving sentences for "covered offenses" that had been modified by section 2 or 3 of the Fair Sentencing Act and the covered offenses were committed before August 3, 2010. The district court did not have to reduce Petitioner's sentences; even though, Petitioner was eligible for modification of his sentences. But the district court exercised its discretion and lowered Petitioner's sentences of life imprisonment on Counts One thru Three to concurrent sentences of 480-month; even though, Petitioner's advisory amended guideline sentencing range was 292-365 months for all three counts.

Petitioner also seeks this writ to determine if the safeguards announced in Concepcion v United States, No. 20-1650 (S. Ct. June 27, 2022)[6] should be applicable in the instant matter. In Concepcion, in relevant parts, the Supreme Court held that "the discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings. The Court in Pepper v. United States, 562 U. S. 476, found it "clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing. Id., at 490.

Accordingly, federal courts re-sentencing individuals whose sentences were vacated on appeal regularly consider evidence of rehabilitation, or evidence of rule breaking in prison, developed after the initial sentencing. Where district courts must calculate new Guidelines ranges as part of resentencing proceedings, courts have also exercised their discretion to consider non-retroactive Guidelines changes. In some cases, a district court is prohibited from recalculating a Guidelines range to account for non-retroactive Guidelines amendments, but the court may nevertheless find those amendments to be germane when deciding whether to modify a sentence at all, and if so, to what extent." Concepcion, at 8–9.

The Fifth Circuit's decision in the instant case conflicts with this Court's decision in Concepcion and with other circuit court's decisions. See United States v. Easter, No. 19-2587 (3d Cir. Sept. 15, 2020) (vacated and remanded the denial of the defendant's motion for a reduction of his sentence for firearm and drug offenses, holding that a sentencing court considering a motion for sentence reduction under the First Step Act

[6] Concepcion was decided after the district court's decisions.

must consider all statutory sentencing factors, to the extent applicable, including post-sentencing rehabilitation. In doing so, the court disagreed with several courts of appeals that have held that consideration of 18 U.S.C. section 3553 (a) factors at re-sentencing is permissive. Although the sentencing court must consider section 3553 (a) factors, the court held this does not entitle the defendant to a plenary re-sentencing under the First Step Act.); United States v. Stewart, 964 F.3d 433 (5th Cir. 2020). (Vacated the denial of the defendant's motion for a sentence reduction under the First Step Act and remanded for reconsideration. The court held that the district court erred by denying the defendant the benefit of Amendment 750's retroactive changes to the crack cocaine equivalency calculation when re-sentencing him under the First Step Act. Noting that section 404 (b) of the First Step Act does not permit plenary resentencing, the court held that the district court erred by constraining itself to the guidelines in effect at the time of his original sentence). See also United States v. Chambers, 2020 U.S. App. LEXIS 13106 (4th Cir. April 23, 2020) -- The district court granted Brooks' Section 404 motion, but refused to lift the career offender enhancement on the grounds that a Section 404 resentencing could not consider guidelines mistakes, only the difference in statutory punishment. The court adjusted his supervised release term, but not his prison sentence. The 4th Circuit reversed. It held nothing in the First Step Act keeps courts from recognizing past Guidelines errors. "Section 404(b)... expressly permits the court to 'impose a reduced sentence'," the 4th said. "Not 'modify' or 'reduce,' which might suggest a mechanical application of the Fair Sentencing Act, but 'impose'... And, when "imposing" a new sentence, a court does not simply adjust the statutory minimum; it must also recalculate the Guidelines range."), and, United States v. Holloway, 2020 U.S. App. LEXIS 13276

(2nd Cir. April 24, 2020) (In reversing the district court, the Second Circuit held that 18 USC 3582 (c) (1) (B) – not (c) (2) – governed Section 404 motions. Therefore, Section 1B1.10 does not apply, and therefore, the fact that Jason's guidelines did not change does not prevent a district court from considering a sentencing reduction. Plus, the fact that Jason had finished his sentence while his motion was pending did not prevent the district court from cutting the length of his term of supervised release to compensate for the lower sentencing range).

SUMMARY OF ARGUMENT

In 2018, Congress enacted the First Step Act, which made retroactive the statutory penalties for covered offenses enacted under the Fair Sentencing Act. Under section 404 (b) of the First Step Act, a court "that imposed a sentence for a covered offense ***may*** … 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. The statute defined "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 … that was committed before August 3, 2010.

In the instant matter, Petitioner alleged on appeal to the Fifth Circuit that the District Court abused its discretion for partially granting him relief from Section 404 of the First Step Act of 2018. Even though, Petitioner had an amended advisory guideline sentencing range of 292-365 months, the District Court imposed a sentence of 480-month on all three counts which was the statutory maximum for the offenses. As reasons for the 480-month, the District Court stated

> "[a]fter considering the factors set forth in 18 U.S.C. Section 3582 (a), as well as public safety issues, and the defendant's post-sentencing conduct, the Court grants the defendant's motion and imposes a sentence of 480 months...."

ECF # 422; see also **Appendix B.**

In the motion to re-consider its Order which imposed a variant amended sentence of 480-month, Petitioner asserted that the District Court 1) had used the wrong legal standard to evaluate his motion; since USSG Section 1B1.10 and the sentencing factors in section 3553 (a) are not applicable to reductions under section 404 of the First Step Act; 2) had failed to consider the new amended advisory guideline range of 292-365 months before imposing an upward variant sentence of 480 months; 3) had imposed a variant sentence of 480-month without allowing justification and without allowing Petitioner an opportunity to object to the Government's Response which recommended the 480-month amended sentence. **ECF # 428.** In a one-page Order filed on September 14, 2021, the District Court denied the motion for reconsideration by stating '[a]fter due consideration, the Court ORDERS that Defendant's Motion for Reconsideration, received September 13, 2021, be DENIED." **Appendix C; see also ECF # 430.**

The Fifth Circuit affirmed the District Court's decisions; because it found that the explanations given by the District Court, which was a recommendation by the Government, was sufficient for appellate review. United States v Whitehead, 986 F.3d 547, 551 (5th Cir. 2021); United States v Batiste, 980 F.3d 466, 479 (5th Cir. 2020). The Fifth Circuit also held that any error, from the District Court's denying Petitioner an opportunity to object prior to issuing its ruling, was harmless error considering that the District Court considered Petitioner's objections when it ruled on his motion for

reconsideration. United States v Mueller, 168 F.3d 186, 189 (5th Cir. 1999); (citing United States v Balderas, 105 F.3d 981, 984 (5th Cir. 1997). See **Appendix A.**

ARGUMENT/ISSUE

Whether Petitioner was denied his due process rights when the district court granted his Section 404 of the First Step Act motion, but imposed upward variant sentences without allowing the Petitioner an opportunity to reply to misinformation by the Government in its response?

Petitioner sought relief from Section 404 of the First Step Act of 2018 in the district court that initially imposed mandatory sentences of life imprisonment on three crack cocaine convictions in 2002. In its Response to the Section 404 motion by Petitioner, the Government agreed that Petitioner was eligible for relief but requested sentences of 480 months which was the statutory maximum for the amended offenses[7]. The Response by the Government requested sentences at the statutory maximum for the amended offenses, which had moved from violations of section 841 (b) (1) (A) which had 10 years to life statutory sentences, to violations of sections 841 (b) (1) (B) which had 5 to 40 years statutory sentences under section 404 of the First Step Act. To support its request for maximum statutory AMENDED sentences on the three drug offenses, the Response cited as reasons Petitioner's long, consistent, and severe criminal history, offense conduct or relevant conduct, and post-sentencing conduct. **ECF # 421.**

In denying relief, the District Court stated:

[7] Initially, Petitioner was sentenced pursuant to 21 U.S.C. Section 841 (b) (1) (A) and faced statutory minimum and maximum of 10 years to life. Under section 404 of the First Step Act, Petitioner was re-sentenced under section 841 (b) (1) (B) which had statutory minimum and maximum sentences of 5 to 40 years.

"[a]fter considering the factors set forth in 18 U.S.C. Section 3582 (a), as well as public safety issues, and the defendant's post-sentencing conduct, the Court grants the defendant's motion and imposes a sentence of 480 months...."

Appendix B.

Petitioner asserted on appeal that the district court abused its discretion by 1) failing to consider the racially unjust sentences he received as a result of the 100-to-1 crack-to-cocaine ratio; 2) using the wrong legal standard to evaluate the motion under section 404 of the First Step Act; 3) failing to afford Petitioner's procedural due process before imposing upward variant sentences; and, 4) failing to consider the mitigating section 3553 (a) factors.

In affirming the district court's decision, the Fifth Circuit held that the explanations given by the District Court was sufficient for appellate review and cited as support United States v Whitehead, 986 F.3d 547, 551 (5th Cir. 2021); and United States v Batiste, 980 F.3d 466, 479 (5th Cir. 2020). And, the Fifth Circuit also held that any error, from the District Court's denying Petitioner an opportunity to object prior to issuing its ruling, was harmless error considering that the District Court considered Petitioner's objections when it ruled on his motion for reconsideration. United States v Mueller, 168 F.3d 186, 189 (5th Cir. 1999); (citing United States v Balderas, 105 F.3d 981, 984 (5th Cir. 1997). See **Appendix A**.

In reaching its decision that the explanations given by the District Court was sufficient for appellate review, The Fifth Circuit failed to recognize that the district court used the wrong standard to evaluate the motion pursuant to section 404 of the First Step Act; the Fifth Circuit failed to consider the district court's over emphasis on Petitioner's instant offenses, prior offenses, and post-conviction prohibitive conduct without

considering the other factors; the Fifth Circuit failed to consider the district court's failure to consider the unjust and racially imposed sentences caused as a result of the 100-to-1 ratio for crack and cocaine. In deciding that any error for not allowing Petitioner an opportunity to object was harmless, the Fifth Circuit failed to articulate how it knew that district court considered Petitioner's objections in his motion for reconsideration. The one sentence two-line denial by the district court gave no indication that the district court consider the objections raised by Petitioner in his motion for reconsideration. **See Appendix C.**

A. The Fifth Circuit failed to recognize that the district court used the wrong standard to evaluate the motion pursuant to section 404 of the First Step Act.

In his appeal to the Fifth Circuit, Petitioner alleged that the district court used the wrong standard to evaluate his motion pursuant to section 404 of the First Step Act. The heading on the form used by the district court was titled "Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. Section 3582 (c) (2)". The Second Circuit held that the First Step Act is a statutory source of sentencing relief independent from the U.S. Sentencing Guidelines or any other policy statement that may otherwise preclude a reduction in sentence. United States v. Holloway, 956 F.3d 660 (2d Cir. 2020). The Second Circuit joined the Third, Fourth and Sixth Circuit Courts of Appeal in holding that the First Step Act does not disqualify applicants from sentencing relief even when they fail to show a reduced advisory guideline range. See, e.g., United States v. Wirsing, 943 F.3d 175, 183 (4th Cir. 2019) (held that section 3582 (c) (1) (B) is the appropriate vehicle for a First Step Act motion.); United States v. Beamus, 943 F.3d 789, 792 (6th Cir. 2019); United States v. Gibbs, 787 F. App'x 71, 72 n.1 (3d Cir. 2019).

A First Step Act motion is not properly evaluated under 18 U.S.C. section 3582 (c) (2). That provision applies only if the defendant seeks a reduction because he was sentenced "to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. section 994 (o)," i.e., a change to the Sentencing Guidelines[8]. 18 U.S.C. section 3582 (c) (2). But a First Step Act motion is based on the Act's own explicit statutory authorization, rather than on any action of the Sentencing Commission. For this reason, such a motion falls within the scope of section 3582 (c) (1) (B), which provides that a "court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute."[9]

This section contains no requirement that the reduction comport with U.S.S.G. section 1B1.10 or any other policy statement, and thus the defendant's eligibility turns only on the statutory criteria discussed above. Accordingly, Petitioner was eligible for a reduction in his term of imprisonment, and the district court erred in imposing an enhanced variant sentence on the basis that it believed itself to be bound by U.S.S.G. section 1B1.10.

A defendant's eligibility for a reduced term of imprisonment under Section 404 of the First Step Act is not governed by 18 U.S.C. section 3582 (c) (2), and thus a district court considering such a motion is not constrained by U.S.S.G. section 1B1.10 (a) (2) (b).

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[8] This authority, in relevant part, provides that "[t]he Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. section 994 (o).

[9] In so holding, we agree with the other Courts of Appeals to have thus far addressed this question. See United States v. Wirsing, 943 F.3d 175, 183 (4th Cir. 2019); United States v. Beamus, 943 F.3d 789, 792 (7th Cir. 2019); United States v. Gibbs, 787 F. App'x 71, 72 n.1 (3d Cir. 2019) (mem.); see also McDonald, 944 F.3d at 772 (noting that eligibility for relief turns only on offense of conviction).

Instead, such a motion is governed by 18 U.S.C. section 3582 (c) (1) (B). Petitioner's eligibility for First Step Act relief was therefore not dependent on whether his Guidelines range would be lower in light of the Fair Sentencing Act.

Section 3582 (c) (2) was the appropriate vehicle for defendants seeking relief under the Guidelines amendments related to the Fair Sentencing Act. See United States v Peters, 843 F.3d 572, 575 (4th Cir.). However, the distinct language of the First Step Act compels the interpretation that motions for relief under that statute are appropriately brought under section 3582 (c) (1) (B). And there is no reason to suppose that motions brought pursuant to section 3582 (c) (1) (B) are subject to the restrictions particular to section 3582 (c) (2), which are grounded in the text of the latter statute. See Dillon V United States, 560 U.S. 817, 824-27, 831 (2010); United States v Peters, 843 F.3d 572, 574, 577-80 (4th Cir. 2016). Rather, in determining eligibility under section 3582 (c) (1) (B), courts must look to the applicable statute to determine "the extent" to which modification is "expressly permitted by [that] statute." section 3582 (c) (1) (B).

Motions under section 3582 (c) (2) permit, but do not require, sentence modification after the applicable Guideline range "has subsequently been lowered by the Sentencing Commission." 18 U.S.C. Section 3582 (c) (2). When a defendant is eligible for a sentence reduction under section 3582 (c) (2), the court has discretion over whether to grant the reduction based on consideration of two sources: the factors in 18 USC section 3553 (a) and "applicable policy statements issued by the Sentencing Commission at USSG section 1B1.10." Id. See United States v Rodriguez, 855 F3d 526, 529 (3d Cir 2017); United States v Watkins, 625 F3d 277, 281 (6th Cir 2010).

A district court abuses its discretion when 1) it does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. See Jeff D. v. Otter, 643 F.3d 278 (9th Cir. 2011); 2) it rules in an irrational manner. See Chang v. United States, 327 F.3d 911, 925 (9th Cir. 2003); 3) it makes an error of law. See Koon v. United States, 518 U.S. 81, 100 (1996); See also Fox v. Vice, 131 S. Ct. 2205, 2211 (2011) (recognizing trial court has wide discretion "but only when, it calls the game by the right rules"); and, 4) Record contains no evidence to support district court's decision. See Oregon Natural Res. Council v. Marsh, 52 F.3d 1485, 1492 (9th Cir. 1995).

Decisions on "matters of discretion" are traditionally "reviewable for 'abuse of discretion.'" Pierce v. Underwood, 487 U. S. 552, 558 (1988). The abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error: "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U. S. 384, 405 (1990).

Petitioner likewise was eligible for a reduction in his term of supervised release, an issue not addressed by the district court in its partial grant of Petitioner's motion. The First Step Act provides authority to district courts to reduce imposed sentences, a term that encompasses equally terms of imprisonment and terms of supervised release, both of which constitute statutory penalties which were modified by sections 2 and 3 of the Fair Sentencing Act. Cf. Mont v. United States, 139 S. Ct. 1826, 1834 (2019) ("Supervised release is a form of punishment that Congress prescribes along with a term of imprisonment as part of the same sentence." (Citing 18 U.S.C. section 3583)). Under a review using section 3582 (c) (2), supervised release is not an issue.

B. The Fifth Circuit failed to consider the district court's over emphasis on Petitioner's instant offenses, prior offenses, and post-conviction prohibitive conduct without considering the other factors.

Section 3553 (a) states that the court shall, as in must, consider certain factors in determining the specific sentence to impose so that the sentence is enough, but not more than necessary, to meet the objectives of sentencing (according to the statute, these are deterrence, protection of the public, rehabilitation and punishment, and to promote respect for the law while reflecting the seriousness of the offense). Under section 3553, a court considers the following factors:

1. the nature and circumstances of the offense and the history and characteristics of the defendant
2. the need for the sentence imposed to: (A) reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; (D) and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
3. the kinds of sentences available;
4. the kinds of sentence and the sentencing range established for…the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines;
5. any pertinent policy statement issued by the Sentencing Commission
6. the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
7. the need to provide restitution to any victims of the offense.

Title 18 U.S.C. Section 3553 (a).

After stating that it had considered the section 3553 (a) factors, including public safety issues, and the defendant's post-sentencing conduct, the district court imposed variant sentences 115-month above the top of the advisory guideline sentencing range of

292-365 months. In reaching its decision, the district court improperly relied on factual findings that had either been "built into" the Guidelines computation already, or, on prohibitive conduct in which Petitioner had already been punished. From the district's decision, the district court considered only one of the seven factors - the nature and circumstances of the offense and the history and characteristics of the defendant, and this was not enough for a proper appellate review.

Petitioner had the following prior convictions: December 9, 1989, Evading Arrest (45 days custody); September 9, 1991, and January 12, 1994, Driving While License Suspended (3- & 30-days custody, respectively); May 25, 1992, Hindering Apprehension (30 days custody); February 15, 1994, Theft of Service $500-$1500 (30 days custody); February 4, 1995, Unlawfully Carrying a Weapon and False ID (20 days custody each count); August 8, 1997, Failure to ID (30 days custody); December 17, 1998, Forgery and December 17, 1998, Tampering with Government Records (probation on each count); and March 30, 1998, Assault & Battery with a Dangerous Weapon (probation).

Petitioner's criminal history did not warrant an upward variant sentence from his advisory guideline range of 292-365 months; because, only one of Petitioner's prior convictions can be considered as a crime of violence – assault and battery with a deadly weapon. The other priors were mostly misdemeanors and traffic violations, and all of the priors together only produced a total of six criminal points and criminal history category of III. Petitioner was not a habitual offender (career offender). Instead of a criminal history category of I, Petitioner had a criminal history category of III, which produced a more severe sentencing range, which means, Petitioner's prior criminal history had

caused his sentences to be more severe already as part of the mandatory Guidelines in 2002.

Next, the district court relied, in part, on Petitioner's prohibitive conduct while incarcerated that included the following disciplinary infractions: 2020 - Fighting with another person; 2016 - Possessing drugs/alcohol; 2015 - Refusing to obey an order; 2013 - Use of drugs/alcohol and refusing drug/alcohol tests; 2011 - Using mail without authority and Disruptive conduct; 2010 - Possessing a dangerous weapon and Possessing intoxicants; 2008 - Refusing to obey an order and assaulting without serious injury; and 2003 - Phone abuse and Failing to stand for count. See **ECF # 421 at 6 of 8.**

Petitioner's post-sentencing conduct, while not stellar by no means, involved mostly minor violations of BOP policies. Petitioner was punished for each violation by the BOP. Several courts have considered the effect of prohibitive post-sentencing conduct on the application of the retroactive crack cocaine amendment to the Guidelines. In United States v Marzouca, 2008 WL 2169517 (E.D. N.Y. May 21, 2008), the district court granted the crack cocaine reduction, even though the defendant had several serious incidents of assault[10] and other disruptive behaviors while he has been in prison. The sentencing court reasoned that Marzouca had been punished by the BOP for his disruptive conduct while incarcerated and saw no need to inflict additional punishment by denying the reduction. See also United States v Ayala, 2008 WL 55525 (W.D. Va. February 26, 2008) (The government filed an objection to the defendant's pro se motion for reduction of his sentence based on the crack cocaine amendment, because the defendant had two incidents while in prison--an "assault without injury" and "fighting

[10] The defendant Marzouza had three assaults while in prison. Two of the assaults involved serious injuries, and one of those caused the victim to receive 50 stitches.

with another person," and an extension criminal record prior to incarceration, but the district court granted the reduction. In granting the defendant's motion, the sentencing court reasoned that the Sentencing Commission amended the sentencing guidelines to correct what it perceived as gross inequities between sentences for crack cocaine offenses and sentences for powder cocaine offenses, and the objections raised by the government had been addressed by criminal history points pre-sentencing and sanctions in prison post-sentencing.).

Each time Petitioner was involved in an incident in prison, he was sanctioned. And sometimes the punishment was severe. For the failure to stand for count, Petitioner loss his commissary privileges for 30 days; for phone abuse, Petitioner lost his phone privileges for 30 days, for possession of a dangerous weapon, Petitioner was placed in SHU for 30 days, and he lost his commissary privileges for 180 days, for use of drugs/alcohol, he lost email and phone privileges for 3 months; and, for fighting with another person, Petitioner lost phone and commissary privileges for 3 months. Petitioner has aged and matures since he being incarcerated for more than 21 years. "Recidivism rates decline relatively consistently as age increases." U.S. Commission, Measuring Recidivism: The Criminal History Computation Of The Federal Sentencing Guidelines, at 12 (2004).

The Fifth Circuit gave no indication on how it determined that the district court had considered any of the other six factors under section 3553 (a); because, if the district court had considered them, they would have favored within guideline sentences for the three drug offenses.

Even though, the district court failed to consider six of the seven section 3553 (a) factors, the Fifth Circuit stated it had adequate record for appellate review. Petitioner was a 32 years old immature young adult when he was arrested for dealing in small quantities of crack cocaine in 2001. Petitioner and two others were held accountable for a total of 4.11 kilograms of crack in which they distributed over the period of a year, and Petitioner received an enhancement for his role in the offenses. In 2001, when Petitioner was sentenced, his mandatory guidelines range was 360 months to life based on the 100-to-1 ratio for crack and cocaine, a criminal history category of III, and total offense level of 42.

After more than twenty-one years of being incarcerated, Petitioner has turned the corner on criminal activities and he is on path of having his act together. Reducing the sentences to within advisory guideline sentences of 292-365 months would still reflect seriousness of the offense, promote respect for the law, and provide just punishment for the offense and adequate deterrence to criminal conduct. Congress has directed sentencing courts to consider the need for a defendant's sentence to afford adequate *deterrence* to criminal conduct. 18 U.S.C. Section 3553 (a) (2) (B). This is usually understood to include both specific deterrence as to the individual defendant and general deterrence as to the public at large. Speaking to the issues of specific and general deterrence, Judge Posner of the United States Court of Appeals for the Seventh Circuit, in United States v. Presley, 790 F.3d 699 (7th Cir 2015), wrote about the deterrent prong of Section 3553 (a). Writing for the unanimous panel, Judge Posner said,

> A sentence long enough to keep the Defendant in prison until he enters the age range at which the type of criminal activity in which he has engaged is rare and should achieve the aims of ...specific deterrence, while lengthening the sentence is unlikely to increase general deterrence significantly if the persons

> engaged in the criminal activity for which the Defendant is being sentenced have a high discount rate; for beyond a point reached by not a very long sentence, such persons tend not to react to increases in sentence length by abandoning their criminal careers.

790 F.3d at 702. As to the deterrent effect of lengthy sentences on others, Judge Posner simply stated, in effect, that criminals do not read about and consider other people's sentences, and, if they do, "the length of a sentence has less effect on such a person than the likelihood that he'll be caught, convicted, and imprisoned." Id. at 701.

As to *the need for the sentence imposed to reflect the seriousness of the offense; to promote respect for the law, and to provide punishment for the offense*, Petitioner requested a reduction in his top of guideline sentences of life imprisonment; because, section 404 of the First Step Act lowered his statutory and mandatory minimum and maximum sentences from 10 years to life to statutory and mandatory minimum and maximum sentences 5 to 40 years. The district court improperly ignored other mitigating factors such as Petitioner's voluntarily enrollment in several self-help classes/courses, and his MEDIUM pattern score on recidivism. Petitioner has completely several self-help classes/courses that include: Math Made Simple, Spanish, Personal Development, CDL, Legal Research, Personal Finance, Real Estate, Basic Computer Concepts, and Fitness that will aid him when he is released.

C. The Fifth Circuit failed to consider the district court's failure to consider the unjust and racially sentence caused as a result of the 100-to-1 ratio for crack and cocaine.

The district court failed to consider the unjust and racially imposed sentences that were mandatory in 2001 and which were based on a 100-to-1 ratio. The Anti-Drug

Abuse Act of 1986 created lengthy mandatory minimum sentences for crack cocaine offenses, resulting in a 100-to-1 disparity between crack cocaine and powdered cocaine weights and their application to sentencing laws. For example, 500 grams of powdered cocaine would trigger a 5-year mandatory minimum sentence, but only 5 grams of crack cocaine would trigger that same 5-year mandatory minimum. Not only did this mandatory minimum create a severe sentencing disparity between crack cocaine and powdered cocaine, it also led to racial disparities. Estimates vary, but according to the United States Sentencing Commission, over 80 percent of offenders convicted of crack cocaine offenses are African-American. The Fair Sentencing Act was passed in August 2010 to "restore fairness to Federal cocaine sentencing" laws that had unfairly impacted blacks for almost 25 years. The Fair Sentencing Act of 2010 repealed portions of the Anti-Drug Abuse Act of 1986 that instituted a 100-to-1 ratio between crack and powder cocaine, treating one gram of crack as equivalent to 100 grams of powder cocaine for sentencing purposes. The 100-to-1 ratio had long been acknowledged by many in the legal system to be unjustified and adopted without empirical support. The Fair Sentencing Act lowered the ratio to a more lenient 18-to-1 ratio.

In 2010, recognizing the statistical evidence of widespread racial discrimination based on empirical studies, Congress passed the Fair Sentencing Act. The preamble to the Fair Sentencing Act, recognizing racial injustice, states that it is designed "to restore fairness to Federal cocaine sentencing." Justice Breyer's majority opinion in Dorsey v United States, 132 S. Ct. 2321, 2328 (2012), states that the new law was adopted "because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences." The Chairman of the Judiciary Committee,

Senator Patrick Leahy, reflecting on the purpose of the Fair Sentencing Act of 2010, stated that the former 100-to-1 ratio law is "one of the most notorious symbols of racial discrimination in the modern criminal justice system." 156 Cong. Rec. S.1683 (daily ed. Mar. 17, 2010). Many members of Congress stated that the old law should be changed because it was racially discriminatory and not based on any coherent rationale.

Because the Fair Sentencing Act included a directive to the U.S. Sentencing Commission (USSC) in Section 7 to amend the sentencing guidelines, the members of the commission voted to make its subsequent guideline changes retroactive. The proposed reform allowed Section 2 and Section 3 of the Fair Sentencing Act to be applied retroactively for crack cocaine offenses committed before August 3, 2010, as the USSC guideline change retroactivity did not reach the full population serving sentences under the previous 100-to-1 disparity. Someone who receive a 5- or 10-year mandatory minimum before August 3, 2010 were not impacted by the USSC's guideline changes.

In 2018, Congress enacted the First Step Act, authorizing district courts to "impose a reduced sentence" on defendants serving sentences for certain crack-cocaine offenses "as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." Pub. L. 115–391, §404(b), 132 Stat. 5222. In the current bill, Section 404, "Application of the Fair Sentencing Act," states explicitly that a "court that imposed a sentence for a covered offense, may...impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed."

Section 404 authorizes district courts to make a discretionary decision about whether and how to reduce a defendant's sentence, but only if the defendant was

sentenced for a "covered offense." Section 404(b) thus conditions "eligibility — that is, when a court may entertain a motion for relief under [Section 404] — on whether a sentence was imposed 'for a covered offense'" within the meaning of Section 404(a). United States v. Holloway, 956 F.3d 660, 664 (2d Cir. 2020)

The Fair Sentencing Act and First Step Act aimed to eliminate unwarranted sentencing disparities, to be sure, but not all sentencing disparities. For example, although it reduced the crack-powder disparity from 100-to-1, the Fair Sentencing Act left in place a disparity of approximately 18-to-1. Section 404 relief is discretionary, after all, and a district judge may exercise that discretion to deny relief where appropriate. See First Step Act section 404 (c), 132 Stat. at 5222; Holloway, 956 F.3d at 666. It is hardly surprising that Congress would prefer to extend such "procedural relief" broadly to ensure that substantive relief would be available everywhere it is appropriate, safe in the knowledge that district courts would retain discretion to deny relief where it is not appropriate.

D) The Fifth Circuit failed to consider the violations of Petitioner's Fifth Amendment Due Process rights for the district court's failure to allow Petitioner an opportunity to reply to the response filed by the Government before imposing upward variant sentences.

Although due process tolerates variances in procedure "appropriate to the nature of the case," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435

U.S. 247, 259 (1978). Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests. Fuentes v. Shevin, 407 U.S. 67, 81 (1972)[11]. The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable follow-up measures" that may be available. Jones v. Flowers, 547 U.S. 220, 235 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so).

In addition, notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970). Ordinarily, service of the notice must be

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[11] At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978).

reasonably structured to assure that the person to whom it is directed receives it. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v. Hanrahan, 409 U.S. 38 (1974); Greene v. Lindsey, 456 U.S. 444 (1982).

"Before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." Day v. McDonough, 547 U.S. 198, 210 (2006). The Fifth Circuit has said that the complete denial of the opportunity to be heard on a material issue is a violation "of due process which is never harmless error," Republic Nat'l Bank of Dallas v. Crippen, 224 F.2d 565, 566 (5th Cir. 1955), and have reversed district court orders and judgments in a variety of settings when such an opportunity was not provided. See, e.g., McIntosh v. Royal Caribbean Cruises, Ltd., 5 F.4th 1309, 1312 (11th Cir. 2021); S.E.C. v. Torchia, 922 F.3d 1307, 1318–19 (11th Cir. 2019); United States v. Shaygan, 652 F.3d 1297, 1317–18 (11th Cir. 2011); Parker v. Williams, 862 F.2d 1471, 1474– 75, 1481–82 (11th Cir. 1989), Turquitt v. Jefferson County, 137 F.3d 1285, 1292 (11th Cir. 1998) (en banc); Council of Federated Organizations v. Mize, 339 F.2d 898, 900–01 (5th Cir. 1964)

Here, Petitioner did not have an opportunity to present arguments in support of his request for a sentence reduction under the First Step Act. The district court based its initial partial grant of the motion and upward variant sentences on the Response filed by the Government which embellished Petitioner's criminal history, post-sentencing conduct and the relevant conduct for the instant offenses without giving Petitioner an opportunity to reply. That was error.

In Concepcion v United States, No. 20-1650 (S. Ct. June 27, 2022), the Supreme Court held that federal courts historically have exercised broad discretion to consider all

relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. District courts' discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence. Pp. 6–11.

CONCLUSION

Petitioner respectfully requests that the instant action be granted, reversed, and remanded to the Fifth Circuit; so that, the Fifth Circuit will review the procedure used to impose variant sentences after granting a section 404 of the First Step Act motion.

Respectfully submitted on the 1st day of August 2022.

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