No. _____

IN THE

Supreme Court of the United States

DAVID TROY, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Concepcion v. United States*, 142 S. Ct. 2389, 2404 (2022), this Court held district courts may "consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to" § 404(b) of the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5222. This Court further stated district courts "cannot, however, recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act" of 2010, Pub. L. 111-220, 124 Stat. 2372, before "then consider[ing] postsentencing conduct or nonretroactive changes" in the law. *Concepcion*, 142 S. Ct. at 2402 n.6.

Concepcion did not address whether other retroactive changes in the law must be corrected in a First Step Act proceeding. Yet the Fourth Circuit below found that not only did *Concepcion* make that holding, *Concepcion* abrogated prior circuit precedent which concluded that all retroactive changes in the law must be corrected. App. 5A-7A. Those conclusions were wrong. The question presented is:

Whether retroactive changes in the law unrelated to the Fair Sentencing Act must be corrected in a First Step Act proceeding?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED CASES

(1) *United States v. Troy*, No. 4:04-CR-811-TLW, U.S. District Court for the District of South Carolina. Judgment entered Nov. 10, 2020.

(2) *United States v. Troy*, No. 20-7725, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Mar. 29, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Guidelines

PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Troy, III, respectfully prays that a writ of certiorari issues to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 20-7725, entered on March 29, 2023.

OPINION BELOW

The Fourth Circuit's opinion (App. 1A-13A) is reported at 64 F.4th 177. Mr. Troy did not file a petition for rehearing or rehearing en banc. The district court's order (App. 15A-21A) is unreported.

JURISDICTION

The Fourth Circuit issued its opinion and entered its judgment on March 29, 2023. App. 14A. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is filed within 90 days of March 29, 2023.

STATUTORY PROVISION INVOLVED

Section 404 of the First Step Act of 2018 provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

INTRODUCTION

The text of the First Step Act requires district courts to reconsider a sentence "as if" the Fair Sentencing Act applied at the time of the offender's offense. § 404(b). A district court cannot close its eyes to other retroactive changes in the law when it is directed by the First Step Act to apply the Fair Sentencing Act retroactively.

Despite that straightforward conclusion, the Fourth Circuit found that this Court's decision in *Concepcion* held district courts may—not must—consider retroactive changes in the law when considering a First Step Act motion. *See* App. 6A. The Fourth Circuit's reasoning founders on its misreading of *Concepcion*. *Concepcion* held only that *non*retroactive changes in the law may be considered—whether retroactive changes in the law must be considered was neither argued nor decided.

The Fourth Circuit's error was significant. The district court originally sentenced Mr. Troy as a career offender. Application of subsequent Fourth Circuit decisions, however, renders that enhancement retroactively unlawful. *See United States v. Simmons*, 649 F.3d 327 (4th Cir. 2011) (en banc); *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013). Mr. Troy's retroactively correct Guidelines range is 121-151 months' imprisonment, far below the 276-month sentence originally imposed, and then retained on First Step Act review, by the district court. Yet the Fourth Circuit found the 276-month sentence substantively reasonable because it was within Mr. Troy's original career-offender-enhanced Guidelines range. *See* App. 12A-13A. This Court should grant certiorari, conclude that retroactive changes in the law must be considered in a First Step Act proceeding, and remand to the

Fourth Circuit for reconsideration of Mr. Troy's substantive unreasonableness argument in light of Mr. Troy's correctly calculated Guidelines range.

STATEMENT OF THE CASE

In 2004, Mr. Troy attempted to rob Clifton Blackstock, a drug dealer. Mr. Troy and others acted as police officers, initiated a traffic stop of Mr. Blackstock, and intended to rob him of drugs. When Mr. Troy approached Mr. Blackstock, however, he thought he saw Mr. Blackstock reach for a firearm, so he shot Mr. Blackstock. Mr. Troy and his confederates then left the scene. Mr. Blackstock survived his injuries. *See* App. 2A.

The federal government charged Mr. Troy with several offenses stemming from his role in the robbery, including conspiring to possess with intent to distribute crack cocaine in violation of 21 U.S.C. § 841, attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a), and possession of a firearm during the commission of a controlled substance offense in violation of 18 U.S.C. § 924(c). Mr. Troy entered into a plea agreement with the government. *See* App. 3A.

At sentencing, the district court concluded Mr. Troy was a career offender pursuant to U.S.S.G. § 4B1.1 due, in part, to his prior North Carolina conviction for possession of cocaine with intent to sell. As a result of the enhancement, Mr. Troy's Guidelines range was 382-447 months' imprisonment. The district court ultimately imposed a 276-month sentence after granting a downward departure motion made pursuant to U.S.S.G. § 5K1.1. *See* App. 3A.

Following the passage of the First Step Act, Mr. Troy moved for a sentence reduction pursuant to § 404. Mr. Troy argued, and the government agreed, that he

was no longer a career offender based on the Fourth Circuit's retroactive decision in *Simmons*.[1] Mr. Troy's Guidelines range without the enhancement was 121-151 months' imprisonment. *See* App. 3A-4A.

Despite the significant difference between Mr. Troy's initial Guidelines range and his recalculated range in light of *Simmons*, the district court denied relief. *See* App. 15A-21A. The district court largely concluded the facts of Mr. Troy's offenses and his prior record warranted keeping his 276-month sentence. App. 16A-18A.

On appeal to the Fourth Circuit, Mr. Troy argued the district court's sentence was substantively unreasonable because the district court failed to provide a sufficient explanation to justify retaining Mr. Troy's sentence that was well above his recalculated range in light of *Simmons*. As they had before the district court, the parties agreed that Mr. Troy's benchmark Guidelines range was 121-151 months' imprisonment. Moreover, the parties agreed this Court's decision in *Concepcion* "did not abrogate in any way" the Fourth Circuit's prior decision in *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020), which held that retroactive Guidelines errors must be corrected in a First Step Act proceeding. App. 6A n.2.

Despite the parties' agreement, the Fourth Circuit concluded *Concepcion* abrogated *Chambers*. The Fourth Circuit reviewed *Concepcion*'s Footnote 6 and found that the only readjustment a district court must make to a defendant's Guidelines range is that called for by the Fair Sentencing Act. App. 6A. Since

[1] The Fourth Circuit held *Simmons* applied retroactively in *Miller*.

Chambers compelled district courts to recalculate Guidelines ranges in light of all retroactive errors, "that holding of *Chambers* does not survive *Concepcion*." App. 7A.

Armed with Mr. Troy's original Guidelines range of 235-293 months' imprisonment, the Fourth Circuit concluded the district court's decision not to reduce Mr. Troy's sentence was substantively reasonable. *See* App. 12A-13A. The Fourth Circuit found his sentence was "presumptively reasonable" and that the district court's explanation, particularly "the weight the district court placed on the violence of Troy's offense," was substantively reasonable in light of his Guidelines range compelled by the Fourth Circuit's reading of *Concepcion*. App. 12A-13A. The Fourth Circuit did not conclude that Mr. Troy's sentence would be substantively reasonable had Mr. Troy's Guidelines range been 121-151 months' imprisonment.

REASONS FOR GRANTING THE PETITION

I. The First Step Act requires district courts correct retroactive errors.

"Statutory interpretation … begins with the text." *Ross v. Blake*, 578 U.S. 632, 638 (2016). Here, § 404(b) of the First Step Act directs district courts to "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" (emphasis added). The phrase "as if" directs district courts to apply the Fair Sentencing Act retroactively. *See Concepcion*, 142 S. Ct. at 2402 ("The term 'as if' simply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act."). In effect, therefore, the First Step Act requires district courts to reconsider the sentence by placing the district court back "as if" the Fair Sentencing Act had been in effect at the time of the commission of the offense and the original sentencing.

It follows, then, that district courts must account for other retroactive changes in the law. After all, retroactive errors were wrong at the time they were made. *See*, *e.g.*, *Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[D]ecisions of this Court holding that a substantive criminal statute does not reach certain conduct … necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal." (quotation marks and citation omitted)). If district courts are required by the text of the First Step Act to turn back the clock to the commission of the offense, then district courts are not free to ignore other retroactive changes in the law. *Cf. United States v. Woods*, 61 F.4th 471, 480 (6th Cir. 2023) ("[T]here is something unusual about asking a court, in stitching together old and new versions of the Guidelines, to give retroactive effect

only to the Fair Sentencing Act."). Consequently, a district court cannot sentence a defendant "as if" the Fair Sentencing Act applied while maintaining retroactive errors.

Moreover, requiring district courts to ignore retroactive changes leads to absurd results. *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's new-found reading of 2 U.S.C. § 692 would produce an absurd and unjust result which Congress could not have intended." (quotation marks and citation omitted)). For example, since the passage of the Fair Sentencing Act, the United States Sentencing Commission has promulgated additional retroactive amendments to the Guidelines. One such amendment is Amendment 782, which generally lowered all base offense levels by two under U.S.S.G. § 2D1.1. If the only retroactive recalculation required by the First Step Act is "the Fair Sentencing Act's amendments" made by the Sentencing Commission, then a district court may not recalculate a defendant's Guidelines range to include Amendment 782's changes to § 2D1.1. *Concepcion*, 142 S. Ct. at 2402 n.6. Instead, the district court must include Amendment 782's changes to § 2D1.1 with any other "nonretroactive changes in selecting or rejecting an appropriate sentence." *Id.* This means that a defendant who files a First Step Act motion, but who did not receive the benefit of Amendment 782 during his First Step Act resentencing, may then file a second motion for resentencing pursuant to U.S.S.G. § 1B1.10 to receive the retroactive benefit of Amendment 782. Congress would not have intended a result

which essentially requires the same district court to perform the same work twice, particularly given the First Step Act's focus on retroactivity.

This case presents another absurd result. Everyone—Mr. Troy, the government, the district court, and the Fourth Circuit—agrees that Mr. Troy's career offender enhancement was wrong when it was made. Yet the Fourth Circuit concluded the district court could ignore that error when determining what sentence Mr. Troy should serve. Moreover, when reviewing whether the district court's decision was substantively unreasonable, the Fourth Circuit effectively found it could also ignore that retroactive error. *See* App. 12A ("Because Troy's original Guidelines range of 235 to 293 months is the appropriate benchmark for our review, the 276-month sentence retained by the district court is presumptively reasonable."). It defies explanation to conclude that a sentence based on an enhancement that was unlawfully applied is "presumptively reasonable," yet that is the conclusion reached by the Fourth Circuit. App. 12A. The First Step Act required the district court correctly calculate Mr. Troy's Guidelines range after accounting for retroactive changes in the law, and for the Fourth Circuit to review the district court's decision based on a correct calculation of that range. Turning a blind eye to those retroactive developments is absurd, and the Fourth Circuit was wrong to willfully blind itself to the retroactive errors present in Mr. Troy's case.

II. The Fourth Circuit's decision is wrong.

In 2020, the Fourth Circuit reviewed the text of the First Step Act and correctly concluded that "any Guidelines error deemed retroactive … must be

corrected in a First Step Act resentencing." *Chambers*, 956 F.3d at 668. The Fourth Circuit did not apply *Chambers* in Mr. Troy's case, however. Instead, in Mr. Troy's decision, the Fourth Circuit found that this Court's decision in *Concepcion* abrogated *Chambers*. *See* App. 7A ("Because *Chambers* instructed district courts to recalculate a movant's Guidelines range based on 'intervening case law' unrelated to the Fair Sentencing Act, 956 F.3d at 672-75, that holding of *Chambers* does not survive *Concepcion*."). The Fourth Circuit was wrong to reach that conclusion.

In *Concepcion*, this Court did not hold that retroactive changes must, or must not, be corrected in a First Step Act proceeding. Instead, this Court assiduously avoided the issue, focusing only on whether *non*retroactive changes may or must be considered. *See Concepcion*, 142 S. Ct. at 2400 ("In many cases, a district court is prohibited from recalculating a Guidelines range in light of nonretroactive Guidelines amendments, but the court may find those amendments to be germane when deciding whether to modify a sentence at all, and if so, to what extent."); at 2402 n.6 ("The district court may then consider postsentencing conduct or nonretroactive changes in selecting or rejecting an appropriate sentence, with the properly calculated Guidelines range as the benchmark."); at 2403 ("[W]hen raised by the parties, district courts have considered nonretroactive Guidelines amendments to help inform whether to reduce sentences at all, and if so, by how much."); at 2403 n.8 ("The dissent contends that permitting a district court to consider nonretroactive Guidelines amendments will create a disparity between First Step Act-eligible movants and other defendants.").

Given this Court's specific focus on nonretroactivity, how did the Fourth Circuit conclude that *Concepcion* not only answered whether retroactive changes in the law need not be corrected but also abrogated *Chambers*' holding that retroactive changes must be corrected? The answer comes from the Fourth Circuit's reading of Footnote 6, which stated that "[a] district court cannot … recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act." *Concepcion*, 142 S. Ct. at 2402 n.6. According to the Fourth Circuit, this footnote rejected the reasoning in *Chambers* because the Guidelines range must only be recalculated "to the extent it adjusts for the Fair Sentencing Act." App. 6a (quoting *United States v. Shields*, 48 F.4th 183, 192 (3d Cir. 2022)).

The Fourth Circuit read too much into Footnote 6. Footnote 6 is, obviously, a footnote. While it is certainly possible that this Court could create binding precedent in a footnote, that is not this Court's general practice. *See*, *e.g.*, *Wainwright v. Witt*, 469 U.S. 412, 422 (1985) ("This Court has on other occasions similarly rejected language from a footnote as 'not controlling.'" (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981))). It would be odd for this Court's holding that retroactive changes in the law need not be corrected appear only in a footnote. The more appropriate way to read Footnote 6 is to interpret it in the context in which the case was presented regarding nonretroactive changes in the law.

To that end, the only change in the law addressed *Concepcion* was nonretroactive. *See Concepcion*, 142 S. Ct. at 2397 n.1 (noting that Concepcion's

argument was based on a nonretroactive change to the Guidelines). While this Court has the "power to decide important questions not raised by the parties," *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971), this Court generally limits its consideration of issues only to those "questions set out in the petition, or fairly included therein." Sup. Ct. R. 14.1(a). Whether retroactive changes must be corrected was not an issue explored by the parties in *Concepcion*. Indeed, it could not have been presented by the parties, given that there were no retroactive changes in the law present in *Concepcion*.

Consequently, this Court did not hold that district courts must not correct retroactive Guidelines errors in *Concepcion*. The issue was neither presented nor decided. Furthermore, this Court certainly did not reach that holding in a footnote. The Fourth Circuit was wrong to conclude otherwise, and it should have maintained its previously correct conclusion in *Chambers* that retroactive changes in the law must be accounted for. As explained above, the text of the First Step Act compels this reading. This Court should grant certiorari to answer the question, which was not presented in *Concepcion*, of whether the First Step Act requires the correction of retroactive Guidelines errors.

III. This case presents a good vehicle to address this issue.

Mr. Troy's case is an excellent vehicle to review this issue. The issue was presented to the Fourth Circuit and directly addressed in its opinion in Mr. Troy's case. *See* App. 5A-6A. Moreover, whether Mr. Troy's correct Guidelines range was 121-151 months or 235-293 months has a significant bearing on the Fourth Circuit's

substantive reasonableness ruling. *See*, *e.g.*, *Gall v. United States*, 552 U.S. 38, 50 (2007) ("[A] major departure [from the Guidelines range] should be supported by a more significant justification than a minor one."). The Fourth Circuit's decision found that Mr. Troy's sentence was "presumptively reasonable" because it was within the 235-293-month range; the Fourth Circuit could not begin with the same presumption if Mr. Troy's sentence was over one hundred months in excess of the highest end of his correct Guidelines range of 121-151 months' imprisonment.

Furthermore, this issue is likely to recur in the future. The Sixth Circuit has already reviewed a similar claim and reached the same result as the Fourth Circuit. *See Woods*, 61 F.4th at 478-480. The Sixth Circuit noted that while it found itself bound by its interpretation of *Concepcion*, "there is something unusual about asking a court, in stitching together old and new versions of the Guidelines, to give retroactive effect only to the Fair Sentencing Act." *Id.* at 480. By contrast, the Eighth Circuit, though not addressing *Concepcion* specifically, has found that no error occurred when "[t]he district court applied the 292-365 month guidelines range from the PSR addendum, based on the retroactive change in Amendment 782 but not on the nonretroactive change in Amendment 742." *United States v. Shephard*, 46 F.4th 752, 756 (8th Cir. 2022). Therefore, this Court should grant certiorari because the Fourth Circuit "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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