No. 23-226

In the Supreme Court of the United States

ANTONIO SOUL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to appellate relief on his claim that the district court erred in failing to calculate an advisory Sentencing Guidelines range before denying petitioner's motion for a sentence reduction under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

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

United States v. *Gonzalez*, No. 18-cr-179 (July 25, 2018)

Gonzalez v. *United States*, No. 19-cv-756 (Aug. 5, 2019)

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

United States v. *Gonzalez*, No. 08-15107 (Aug. 28, 2009)

Gonzalez v. *United States*, No. 19-13190 (Dec. 3, 2019)

Supreme Court of the United States:

Gonzalez v. *United States*, No. 21-6376 (June 30, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 71 F.4th 881. A prior opinion of the court of appeals (Pet. App. 12a-35a) is reported at 9 F.4th 1327. The order of the district court (Pet. App. 36a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2023. The petition for a writ of certiorari was filed on September 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of possessing 50 grams or more of cocaine base (crack cocaine) with intent to distribute, in viola-

tion of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2000 & Supp. IV 2005). Pet. App. 2a. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. *Ibid.* Petitioner did not appeal.

The district court later reduced petitioner's term of imprisonment twice, first to 151 months and then to 76 months, pursuant to Federal Rule of Criminal Procedure 35(b) and 18 U.S.C. 3582(c)(2). Pet. App. 2a. In 2015, petitioner was released from prison and began serving his term of supervised release. *Ibid.* In 2018, the district court revoked petitioner's supervised release and required him to serve an additional 57 months of imprisonment for violations of his release conditions, to be served consecutively to a 93-month sentence imposed in a separate criminal case. *Id.* at 2a-3a. Petitioner did not appeal.

After the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved to reduce his 57-month revocation sentence under Section 404 of that Act. The district court denied petitioner's motion, Pet. App. 36a-37a, and the court of appeals affirmed, *id.* at 12a-21a. This Court granted a petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded for further consideration in light of *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022). 142 S. Ct. 2900 (No. 21-6376). On remand, the court of appeals again affirmed. Pet. App. 1a-11a.

1. In March 2005, petitioner agreed to sell crack cocaine to an individual who was covertly working with law enforcement. Presentence Investigation Report (PSR) ¶ 9. Petitioner agreed to meet the would-be buyer at a restaurant in Hillsborough County, Florida. *Ibid.* Pe-

titioner was arrested when he arrived, and 125 grams of crack cocaine were found in his car. PSR ¶ 10.

In May 2005, a federal grand jury in the Middle District of Florida returned an indictment charging petitioner with possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2000 & Supp. IV 2005). Indictment 1. At the time, Section 841(b)(1)(A)(iii) prescribed a default statutory penalty range of "not less than 10 years" of imprisonment and not "more than life," to be followed by "a term of supervised release of at least 5 years," for that offense. 21 U.S.C. 841(b)(1)(A) (2000 & Supp. IV 2005). For a violation committed "after a prior conviction for a felony drug offense has become final," the statute specified enhanced penalties of "not less than 20 years" of imprisonment and not more than "life," to be followed by "a term of supervised release of at least 10 years." *Ibid.*

Before trial, the government gave notice under 21 U.S.C. 851 of its intent to seek the enhanced penalties based on petitioner's prior conviction in state court for a felony drug offense. D. Ct. Doc. 3, at 1 (May 25, 2006). Petitioner pleaded guilty and agreed that his prior felony drug conviction triggered the enhanced penalties. D. Ct. Doc. 30, at 1 (Aug. 4, 2006). The district court sentenced petitioner to the statutory-minimum sentence of 20 years of imprisonment, to be followed by ten years of supervised release. 2006 Judgment 2-3. The conditions of supervision included that petitioner "not commit another federal, state, or local crime" and that he not "illegally possess a controlled substance." *Id.* at 3. Petitioner did not appeal.

2. In 2014, the district court reduced petitioner's sentence of imprisonment to 151 months based on his

"extensive and substantial assistance to the United States after his sentencing." D. Ct. Doc. 52, at 1 (Dec. 2, 2014); see Fed. R. Crim. P. 35(b); 18 U.S.C. 3582(c)(1)(B). The court did not modify any of the other "terms and conditions" of petitioner's original sentence, including his term of supervised release. D. Ct. Doc. 52, at 2.

In 2015, the district court further reduced petitioner's sentence of imprisonment to 76 months pursuant to 18 U.S.C. 3582(c)(2), based on certain retroactive changes to the advisory Sentencing Guidelines. D. Ct. Doc. 69, at 1 (Aug. 19, 2015). The court again left "unchanged" all other aspects of petitioner's original sentence. *Ibid.*

3. In August 2015, petitioner was released from prison and began serving his ten-year term of supervised release. D. Ct. Doc. 80, at 1 (Apr. 30, 2018). Within three months, petitioner violated the conditions of his release by testing positive for cocaine. *Id.* at 2. In 2017, after petitioner failed additional drug tests and stopped communicating with his probation officer, the district court issued a warrant for his arrest on supervised-release violations. *Ibid.*; see D. Ct. Doc. 74, at 1 (Apr. 24, 2018).

In 2018, while that warrant remained active, petitioner "fled from law enforcement officers at a high rate of speed after he spotted the officers' patrol vehicle approaching his vehicle." 18-cr-179 PSR ¶ 11. The officers pursued and ultimately arrested him. *Id.* ¶ 12. "At the time of his arrest, [petitioner] was in possession of a Smith & Wesson 9 mm handgun, several rounds of ammunition, more than 500 grams of cocaine, more than 28 grams of crack cocaine, 686 alprazolam tablets, two digital scales, and one pill grinder." *Id.* ¶ 13.

After his arrest, petitioner was charged in a separate federal prosecution in the Middle District of Florida

(No. 18-cr-179) with three drug-trafficking offenses: possessing 500 grams or more of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A); possessing 28 grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B); and possessing a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). 18-cr-179 PSR ¶¶ 1-4. Petitioner pleaded guilty to those offenses. 18-cr-179 Judgment 1. The district court overseeing that case sentenced him to 93 months of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3.

In this case, the Probation Office petitioned to revoke petitioner's supervised release. D. Ct. Doc. 80, at 1-2. When a defendant violates a condition of his supervised release, the sentencing court may "revoke [the] term of supervised release" and "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term," subject to a statutory maximum based on the classification of the offense for which the supervised release term was imposed. 18 U.S.C. 3583(e)(3). Here, the offense for which petitioner's term of supervised release was imposed qualified as a Class A felony because the statutory-maximum term of imprisonment for the offense was life. 18 U.S.C. 3559(a)(1); see p. 3, *supra*. For Class A felonies, the maximum term of imprisonment that a defendant may be required to serve upon revocation of supervised release is five years. 18 U.S.C. 3583(e)(3).

At a revocation hearing, petitioner admitted each of the violations alleged by the Probation Office. See 18-cr-179 D. Ct. Doc. 41, at 4 (July 15, 2019) (Revocation

Tr.) ("We are admitting all nine.").[1] The district court determined that the Guidelines recommended a range of 46 to 57 months of additional imprisonment for petitioner's supervised-release violations. *Id.* at 4, 15; cf. 18 U.S.C. 3553(a)(4)(B), 3583(e). The court required petitioner to serve an additional 57 months, to run consecutively to the 93-month sentence imposed in his other case. Revocation Tr. 17; see 2018 Judgment 3.

3. In 2019, petitioner moved under Section 404 of the First Step Act to reduce his 57-month revocation term. D. Ct. Doc. 88, at 2-3 (Apr. 8, 2019).

Section 404 permits "[a] court that imposed a sentence for a covered offense" to "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." First Step Act § 404(b), 132 Stat. 5222 (citation omitted). Section 404 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." § 404(a), 132 Stat. 5222 (citation omitted). "Nothing in [Section 404]," however, "shall be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222.

Petitioner's motion relied on Section 2 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which modified the statutory penalties for offenses punishable under Section 841(b)(1)(A)(iii) and (B)(iii) by raising the quantity of crack cocaine necessary to trigger the penalties prescribed in those provisions from 50 and 5 grams, respectively, to 280 and 28

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[1] The cited document is a transcript of the revocation hearing in this case (No. 05-cr-188), although the transcript was docketed only in petitioner's separate 2018 criminal case (No. 18-cr-179).

grams. See *Terry* v. *United States*, 141 S. Ct. 1858, 1862-1863 (2021). Petitioner maintained that, if the Fair Sentencing Act had been in effect at the time of his underlying offense conduct, the penalties for his Section 841(a) violation would have been specified by Section 841(b)(1)(B) rather than (b)(1)(A); that his violation would have been classified as a Class B felony rather than a Class A felony; and that, as a result, the maximum term of imprisonment that he could have been required to serve upon revocation of his supervised release would have been three years rather than five years. D. Ct. Doc. 105, at 1 (Sept. 24, 2019); see 18 U.S.C. 3583(e)(3).

The district court denied petitioner's motion. Pet. App. 36a-37a. The court concluded that petitioner was "ineligible for a reduction" of his 57-month revocation sentence. *Id.* at 37a. The court also determined that, "even if [petitioner] were eligible," it would "decline to reduce [his] term of imprisonment because of [his] continued lawless behavior." *Ibid.* The court observed that petitioner's 57-month revocation term had been "based in part on new criminal conduct" involving powder and crack cocaine and gun possession. *Ibid.* The court also observed that, even while in prison on his original sentence, petitioner's disciplinary record was replete with "drug offenses and numerous incidences of insubordination." *Ibid.* The court accordingly explained that petitioner's "conduct while incarcerated and while on supervision demonstrate[d] an unwillingness or inability to abide by the law." *Ibid.*

4. The court of appeals affirmed in an opinion issued in August 2021, with Judge Tjoflat concurring. Pet. App. 12a-35a. This Court then granted a petition for a writ of certiorari, vacated the judgment, and remanded

for further consideration in light of *Concepcion* v. *United States*, *supra.* On remand, the court of appeals affirmed in a revised, unanimous opinion. Pet. App. 1a-11a.

a. In its initial decision, the court of appeals agreed with both parties that a term of imprisonment imposed for a supervised-release violation may be reduced under Section 404 "when the underlying crime" for which the term of supervised release had been imposed was itself "a covered offense under the Act." Pet. App. 12a; see *id.* at 14a-17a; see Gov't C.A. Br. 7-12.[2] The court then determined that petitioner's underlying crime was a covered offense because the statutory penalties for his violation were specified by Section 841(b)(1)(A)(iii) and the Fair Sentencing Act later modified those penalties. Pet. App. 15a (citing *Terry*, 141 S. Ct. at 1862-1863).

The court of appeals instead based its affirmance of the denial of petitioner's Section 404 motion on the district court's "alternative ground[]" that petitioner does not warrant a discretionary sentence reduction, given his "'continued lawless behavior.'" Pet. App. 14a; see *id.* at 17a-21a. Petitioner contended that the district court had abused its discretion either by not "adequately explain[ing] its decision," *id.* at 17a, or by not first calculating his "new range under the Sentencing Guidelines," *id.* at 19a. The court of appeals rejected both contentions, finding that the district court's reasons for declining to grant a reduction "were clear, supported by the record, and did not constitute an abuse of discretion," *id.* at 18a, and that while "it may be the better practice * * * to calculate the new sentencing range

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[2] The government acknowledged that it had taken a contrary position on that issue in the district court but explained that its position had since evolved. See Gov't C.A. Br. 5 n.2, 7-8.

before deciding whether to grant or deny a First Step Act motion" in some cases, harmless-error principles apply, *id.* at 19a; see *id.* at 19a-21a. The court declined to grant relief in petitioner's case. *Id.* at 21a.

Judge Tjoflat concurred to express the view that, if circuit precedent were not to the contrary, he would have held that a district court's exercise of discretion under Section 404 is not reviewable on appeal. Pet. App. 22a-35a.

b. After the court of appeals' initial decision, this Court granted a petition for a writ of certiorari in *Concepcion* to address "whether a district court adjudicating a motion under the First Step Act may consider other intervening changes of law (such as changes in the Sentencing Guidelines) or changes of fact (such as behavior in prison) in adjudicating a First Step Act motion." 142 S. Ct. at 2396. The Court held in *Concepcion* that a court considering a Section 404 motion may take such changes into account. *Ibid.* The Court also held that, in the Section 404 context, district courts "bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments." *Id.* at 2404.

While *Concepcion* was pending on certiorari, petitioner filed a petition for a writ of certiorari in this case. 142 S. Ct. 2900. After issuing the decision in *Concepion*, this Court granted the petition in this case, vacated the court of appeals' judgment, and remanded for further consideration in light of *Concepcion*. *Ibid.*

c. On remand, the court of appeals again affirmed. Pet. App. 1a-11a. The court adhered to its prior determination that petitioner is eligible for a Section 404 reduction of his 57-month revocation term because the "underlying crime" for which he had been serving a

term of supervised release was itself "a covered offense." *Id.* at 5a. The court also adhered to its prior view that, notwithstanding petitioner's eligibility, the district court "did not abuse its discretion in denying [his] First Step Act motion." *Id.* at 7a.

As in its original decision, see Pet. App. 19a, the court of appeals "decline[d] to * * * to fashion[] a hard-and-fast rule of automatic reversal" when a district court does not calculate a revised Guidelines range "before deciding whether to grant or deny a First Step Act motion," *id.* at 9a. The court disagreed with the Seventh Circuit's reading of Section 404(c)'s preclusion of "a second motion for reduction if the first motion was 'denied after a complete review of the motion on the merits'" as requiring recalculation of the Guidelines range. *Id.* at 8a (quoting First Step Act § 404(c), 132 Stat. 5222). The court instead reiterated that although "it may be that the better practice is * * * to calculate the new [Guidelines] sentencing range before deciding whether to grant or deny a First Step Act motion" in some cases, harmless-error principles apply, and the court again declined to grant relief in petitioner's case. *Ibid.*; see *id.* at 8a-10a.

ARGUMENT

Petitioner contends (Pet. 18-22) that the district court abused its discretion by denying his motion for a sentence reduction under Section 404 of the First Step Act without first recalculating his Sentencing Guidelines range. Petitioner further contends (Pet. 10-18) that the decision below, in which the court of appeals declined to adopt a rule of automatic reversal for failure to recalculate a Guidelines range before denying a Section 404 motion, conflicts with the approach that other courts of appeals have adopted. Those contentions do

not warrant further review. The decision below is correct and does not implicate any substantial conflict of authority. This case, which involves a revocation term, would also be an unsuitable vehicle in which to consider the question. The petition for a writ of certiorari should be denied.[3]

1. The court of appeals correctly declined to adopt "a hard-and-fast rule of automatic reversal" whenever a district court does not calculate a Guidelines range before exercising its discretion to deny a motion for a sentence reduction under Section 404 of the First Step Act. Pet. App. 9a; see *id.* at 8a-10a.

a. Section 404 creates a mechanism for certain crack-cocaine offenders who were sentenced before the effective date of the Fair Sentencing Act of 2010 to benefit from the changes that Sections 2 and 3 of that Act made to mandatory-minimum sentencing for crack-cocaine offenses. See *Terry* v. *United States*, 141 S. Ct. 1858, 1861-1863 (2021). If the offender has a qualifying "covered offense" as defined in Section 404(a), the court that previously imposed a sentence for that 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." First Step Act § 404(b), 132 Stat. 5222. Any such reduction is discretionary; "[n]othing" in Section 404 "require[s] a court to reduce any sentence." § 404(c), 132 Stat. 5222.

In *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022), this Court held that a district court adjudicating a Section 404 motion may "consider intervening changes of law or fact" as a matter of "discretion," even if those changes are unrelated to the Fair Sentencing Act. *Id.*

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[3] A similar question is presented in *Joseph* v. *United States*, petition for cert. pending, No. 23-5755 (filed Oct. 6, 2023).

at 2404. The Court also observed, however, that Section 404 "requires district courts to apply the legal changes in the Fair Sentencing Act when calculating the Guidelines if they cho[o]se to modify a sentence." *Id.* at 2402. The Court elaborated in a footnote that "[a] district court cannot, however, recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act. Rather, the First Step Act directs district courts to calculate the Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense." *Id.* at 2402 n.6.

b. Here, petitioner claimed that he was entitled to appellate relief because the district court denied his Section 404 motion to modify his 57-month revocation term without calculating the Guidelines range that accounted for the changes in the Fair Sentencing Act. The court of appeals did not err in rejecting that claim. As petitioner acknowledges (Pet. 22), any procedural error in failing to calculate a benchmark Guidelines range in a Section 404 proceeding is subject to "harmless-error review." Rule 52(a) instructs that any error "that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). "[P]rocedural errors at sentencing" are "routinely subject to harmlessness review." *Puckett* v. *United States*, 556 U.S. 129, 141 (2009).

This Court has identified one example of nonprejudicial error in the context of calculating a Guidelines range as a case in which "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." *Molina-Martinez* v. *United States*, 578 U.S. 189, 200 (2016). This is such a case. So long as it falls within the range of revocation terms permitted

by the statute of conviction, the Guidelines range for a supervised-release violation is solely a function of the violation's severity and the criminal history category that was used when the term of supervised release was originally imposed. See Sentencing Guidelines § 7B1.4. Here, the Fair Sentencing Act's changes did not affect either the nature of petitioner's violations or his criminal-history categorization. His argument for a Section 404 reduction instead relied on a claim that the First Step Act downgraded his drug crime from a Class A felony to a Class B felony, thereby lowering the maximum authorized term of supervised release from five years to three years. See D. Ct. Doc. 105, at 2.

That argument is wrong. In fact, petitioner's violation would have remained a Class A felony, even taking into account the changes made by the Fair Sentencing Act, because he was subject to the enhanced statutory penalties for recidivists. See Gov't C.A. Br. 12-13.[4] But the government did not explain that until the case was on appeal. Compare *ibid.*, with D. Ct. Doc. 106 (Oct. 8, 2016). If the district court nonetheless figured that out on its own, then it recognized that the Guidelines range would not have changed. If the court failed to recognize it, then it believed that keeping the 57-month term in place was warranted *even though* it would have ex-

[4] Specifically, after the amendments made by the Fair Sentencing Act, Section 841(b)(1)(B) continued to prescribe a maximum statutory penalty of life imprisonment for a violation of Section 841(a) involving 28 grams or more of crack cocaine, if committed "after a prior conviction for a felony drug offense has become final." 21 U.S.C. 841(b)(1)(B)(iii) (2012). Petitioner admitted as part of his plea agreement that he had a qualifying prior felony drug conviction. D. Ct. Doc. 30, at 1. His violation would therefore have been a Class A felony even if the Fair Sentencing Act had been in effect at the time of the offense. See 18 U.S.C. 3559(a)(1).

ceeded the statutory maximum for a Class B felony (three years). 18 U.S.C. 3583(e)(3).

The district court's failure to recalculate the Guidelines range—which, if done correctly, would not have changed—had no effect on the court's determination that "even if [petitioner] were eligible" for a reduction in his revocation term, it "would decline to reduce [petitioner's] term of imprisonment because of [his] continued lawless behavior." Pet. App. 37a. Petitioner's challenge accordingly provides no basis for appellate relief.

c. The court of appeals in this case declined to adopt an "automatic reversal rule" when a district court fails to recalculate the Guidelines range in light of the Fair Sentencing Act when deciding whether to grant or deny a Section 404 motion. Pet. App. 10a. The opinion is somewhat unclear as to whether the court found no reversible error here because it did not view this as a case in which recalculation of the Guidelines was necessary, because any error was harmless, or a combination of the two. See *id.* at 8a-10a. But whatever the case, its affirmance is correct. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam). It was, as a practical matter, unnecessary in this circumstance to recalculate the Guidelines range if it had not changed. And it was harmless not to recalculate an unchanged Guidelines range that plainly had no effect on the district court's determination not to reduce petitioner's revocation term.

2. Petitioner contends that the decision below conflicts with the decisions of other courts of appeals, which he describes as "requir[ing] a district court to recalculate a movant's sentencing range * * * before exercising its discretion to reduce the movant's sentence under the First Step Act." Pet. 10; see Pet. 10-18. That con-

tention does not warrant further review. Like the Eleventh Circuit here, the other circuits whose decisions petitioner invokes all recognize that procedural errors in Section 404 proceedings are subject to harmless-error principles. Petitioner therefore fails to establish any substantial conflict between the law of those circuits and the decision below. Nor does he show that this case would have come out differently in any other circuit.

Petitioner principally relies (Pet. 11) on the Seventh Circuit's decision in *United States* v. *Corner*, 967 F.3d 662 (2020) (per curiam). In that case, the Seventh Circuit vacated an order denying a Section 404 motion and remanded for further proceedings after the district court had denied the motion without first determining "the new statutory penalties" that would have applied at a revocation proceeding if the Fair Sentencing Act had been in effect when the movant committed the underlying covered offense. *Id.* at 665; see *id.* at 663. The Seventh Circuit stated that failing to "consider[] the lower statutory penalties" before adjudicating the Section 404 motion was "procedural error." *Id.* at 666. The court also recognized, however, that any such procedural error "is not reversible" if the error is "harmless," although it declined to find harmless error on the particular facts of that case. *Ibid.*

As petitioner acknowledges (Pet. 12), the Seventh Circuit has confirmed in other cases that procedural errors in Section 404 proceedings, including with respect to the Guidelines, are subject to harmless-error principles—just as procedural errors involving the Guidelines at sentencing are subject to those same principles. See, *e.g.*, *United States* v. *Moore*, 50 F.4th 597, 602 (2022) (applying harmless-error principles to asserted procedural error in Section 404 proceeding);

United States v. *Blake*, 22 F.4th 637, 643-644 (2022) (per curiam) (same); *United States* v. *Sanders*, No. 21-2643, 2022 WL 4104024, at *2 (Sept. 8, 2022) (same; observing that "any errors in calculating the advisory guideline range are subject to harmless error analysis"). Accordingly, the Eleventh Circuit was mistaken in the decision below insofar as it understood the Seventh Circuit to have "fashion[ed] a hard-and-fast rule of automatic reversal" in *Corner*. Pet. App. 9a. In both circuits, any procedural errors in Section 404 proceedings "must be disregarded" if the errors are harmless. Fed. R. Crim. P. 52(a).

Petitioner also relies (Pet. 12-15) on decisions from the Third, Fourth, Eighth, and Tenth Circuits. But each of those circuits applies harmless-error principles to asserted errors involving the Guidelines in Section 404 proceedings—just as the Eleventh Circuit indicated it would do here. Pet. App. 10a; see, *e.g.*, *United States* v. *Shields*, 48 F.4th 183, 192 n.6 (3d Cir. 2022) (finding that error in district court's consideration of career-offender guideline was not "merely harmless"); *United States* v. *Murphy*, 998 F.3d 549, 560 (3d Cir. 2021) (similar), abrogated on other grounds by *Concepcion*, *supra*; *United States* v. *Troy*, 64 F.4th 177, 184 n.3 (4th Cir.) (finding that district court erred in recalculating Guidelines range but the "error was harmless"), cert. denied, No. 22-7832 (Oct. 2, 2023); *United States* v. *Williams*, No. 20-7802, 2022 WL 7973696, at *2 (4th Cir. Oct. 14, 2022) (per curiam) (concluding that although "the district court did not accurately recalculate the Guidelines range," "any error is harmless"); *United States* v. *Anderson*, 11 F.4th 697, 700 (8th Cir. 2021) (per curiam) (stating that "significant procedural error" warrants reversal "unless the error is harmless or * * *

forfeited") (citations omitted); *United States* v. *Shepard*, 8 F.4th 729, 733 (8th Cir. 2021) (finding that "[a]ny error was also harmless"); *United States* v. *Holder*, 981 F.3d 647, 651 (8th Cir. 2020) (applying harmless-error principles to "error in calculating the Fair Sentencing Act amended guidelines range"); *United States* v. *Burris*, 29 F.4th 1232, 1238-1239 (10th Cir. 2022) (finding that district court's "fail[ure] to calculate the Guidelines range" was "not harmless * * * [b]ased on this record").[5]

As petitioner recognizes (Pet. 15), the additional decisions that he invokes from the Second, Fifth, Sixth, and Ninth Circuits address the question presented only "in dicta" and therefore could not create a circuit conflict warranting this Court's review. In the decisions cited by petitioner (Pet. 15-17), the courts either did not directly review a Guidelines calculation or simply rejected a claim that the district court should have recalculated the Guidelines range to account for intervening developments *other* than the Fair Sentencing Act—thus anticipating this Court's later decision in *Concepcion*, holding that the consideration of such intervening developments is discretionary, not mandatory, in Section 404 proceedings. See *United States* v. *Moore*, 975 F.3d 84, 92 (2d Cir. 2020); *United States* v. *Hegwood*, 934 F.3d 414, 418 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019); *United States* v. *Domenech*, 63 F.4th 1078, 1083

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[5] As petitioner notes, the Tenth Circuit in *Burris* "rejected the government's argument that an error is harmless simply because 'the district court stated it would deny relief 'whatever the[] result' of the correct Guidelines calculation.'" Pet. 15 (quoting *Burris*, 29 F.4th at 1238-1239) (brackets in original). But the Tenth Circuit nonetheless recognized that "procedural error can be harmless." *Burris*, 29 F.4th at 1238; see *id.* at 1239 ("[W]e are not persuaded, on this record, that the error was harmless.").

(6th Cir. 2023); *United States* v. *Kelley*, 962 F.3d 470, 475, 479 (9th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021), abrogated on other grounds by *Concepcion*, *supra*. None of those decisions suggests that any other circuit has adopted a rule of automatic reversal for procedural errors in Section 404 proceedings.

3. In any event, even if the question presented warranted review, this case would not provide a suitable vehicle.

First, petitioner has failed to show that a decision in his favor on the question presented in the petition would have any effect on the correct disposition of the case. As explained above, petitioner's contention in the lower courts that his statutory-maximum term of imprisonment for his supervised-release violation would have been lower, had the Fair Sentencing Act been in effect at the time of his offense, was mistaken. See p. 13 & n.4, *supra*. Petitioner does not renew that contention in this Court. Nor does he otherwise seek to explain how taking into account the Fair Sentencing Act would have altered the Guidelines range for his revocation sentence or would have had any bearing on the district court's determination that his "continued lawless behavior" was itself a compelling and sufficient basis for denying his Section 404 motion. Pet. App. 37a.

Second, this case involves a Section 404 motion seeking a reduction of a revocation sentence, differentiating it from the mine run of Section 404 motions, which involve a sentence to a term of imprisonment for a crack-cocaine offense. Although the government agrees with the court of appeals' conclusion that Section 404 also authorizes a district court to reduce a revocation sentence where the revoked term of supervised release was itself imposed for a "covered offense," Pet. App. 5a, the revo-

cation context would complicate further review of any question about the procedures for considering a Section 404 motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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