NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

PATRICK WILLIAMS,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where a district court exercises its discretion under Section 404(b) of the First Step Act to deny a sentence reduction to a defendant with a "covered offense" who is indisputably eligible for a reduction under Section 404(a), does appellate review for "abuse of discretion" necessitate review of that denial for both substantive and procedural reasonableness (the rule in the Fourth, Sixth, Seventh, and Eighth Circuits), or only review of procedural errors such as the failure to "consider" the defendant's arguments and adequately explain the denial of relief—without any review of the substantive reasonableness of maintaining the prior sentence (the rule in the Fifth and Eleventh Circuits)?

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

United States v. Williams, No. 21-12877 (11th Cir. 2023)

United States v. Williams, No. 03-cr-14041-KMM (S.D.Fla. Aug. 6, 2021)

United States v. Williams, No. 03-cr-1401-KMM (S.D.Fla. Sept. 13, 2010)

There are no other proceedings related to this case under Rule 14.1(b)(iii).

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Patrick Williams ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming the district court's denial of a sentencing reduction under Section 404 of the First Step Act, *United States v. Williams,* 63 F.4th 908 (11th Cir. 2023) is included in the Appendix A-1. The decision of the district court is included in Appendix A-15.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals affirming the district court's denial of Petitioner's motion for sentence reduction under Section 404 of the First Step Act was entered on March 23, 2023. On May 31, 2023, Justice Thomas extended the deadline for filing the petition to July 21, 2023. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018, Pub L. No. 115-391, 132 Stat. 5194, states:

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

STATEMENT OF THE CASE

A. Statutory Framework

Prior to August 2010, when Petitioner was charged and originally sentenced, 21 U.S.C. § 841 imposed on an offender convicted of distributing crack cocaine, the same mandatory penalties as an offender convicted of distributing 100 times that amount of power cocaine.

On August 3, 2010, however, Congress enacted the Fair Sentencing Act of 2010 (FSA). The FSA was the result of longstanding and widespread recognition that the 100:1 ratio for crack to powder cocaine under the Anti-Drug Abuse Act was far too harsh and had a disparate impact on African Americans.

Section 2 of the FSA (pertinent here) modified the statutory penalties for crack offenses by increasing the amount of crack necessary to support the statutory ranges for convictions under § 841(b)(1)(A) from 50 to 280 grams; for convictions under § 841(b)(1)(B) from 5 to 28 grams; and for convictions under § 841(b)(1)(C) from less than 5 to less than 28 grams. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010). The change had the effect of lowering the 100:1 crack-to-powder ratio to 18:1, and became effective on the date of passage: August 3, 2010. But the FSA was not retroactive.

To remedy the continuing disparity, on December 21, 2018, Congress enacted the First Step Act of 2018. Pub. L. No. 115-391. Section 404 of the First Step Act made sections 2 and 3 the Fair Sentencing Act fully retroactive to offenders sentenced before its enactment. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841). Under Section 404 of the First Step Act, eligibility for retroactive application of the FSA turned on whether the defendant was previously sentenced for a "covered offense." Congress defined a "covered offense" in Section 404(a) of the Act 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." In Section 404(b), Congress authorized any court that "imposed a sentence for a covered offense" to now "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 [] were in effect." Finally, in Section 404(c), Congress clarified that while Section 404 gave the sentencing court discretion to grant a reduction if the defendant was eligible, the Act did not "require" such a reduction. *See* Section 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."). However, Congress was also clear in Section 404(c) that a First Step Act motion could only be denied "after a complete review on the merits."

B. Proceedings Below

On July 17, 2003, Petitioner was charged with a single count of possession with intent to distribute five (5) grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1). The government filed a previous conviction information under 21 U.S.C. § 851, advising that upon conviction he would be subject to a mandatory sentence of 10 years-life imprisonment and 8 years supervised release, based upon a 1997 conviction for possession with intent to sell cocaine.

On March 3, 2004, Petitioner was convicted after a jury trial on the single count with which he was charged. The jury specifically found in its special verdict that his offense involved "at least 5 grams but less than 50 grams" of crack cocaine.

In the Pre-Sentence Investigation Report (PSR), the probation officer noted that the statutory penalty Petitioner faced under 21 U.S.C. § 841(b)(1)(B) was 10 years-life. In then calculating his Guideline range, the probation officer started with a base offense level of 30 under § 2D1.1(a)(3) because he was "responsible for 38.7 grams of cocaine." However, that offense level rose to a 37 under U.S.S.G. § 4B1.1(b) because Petitioner qualified as a Career Offender

under § 4B1.1(a) (based on priors for battery on a law enforcement officer (BOLEO), and possession with intent to sell cocaine), and his statutory maximum penalty of life. At an offense level of 37 and Criminal History Category of VI as a Career Offender, his then-mandatory Guideline range was 360 months-life imprisonment. On June 29, 2004, the Court sentenced Petitioner to life imprisonment, followed by 8 years supervised release.

Petitioner's first appeal

Petitioner appealed, arguing *inter alia* that that the district court reversibly erred by failing to state any reason for choosing a life sentence, which was a violation of the court's duty under 18 U.S.C. § 3553(c)(1). On February 8, 2006, the Eleventh Circuit agreed, and remanded Petitioner's case to the district court for resentencing. *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006) ("*Williams I*").

Re-imposition of a life sentence at the January 3, 2008 resentencing

By the time of Petitioner's January 3, 2008 resentencing, the Guidelines had become advisory due to the intervening decision in *United States v. Booker*, 543 U.S. 220 (2005); the Florida Supreme Court had held that the Florida crime of BOLEO could be accomplished by a mere touching; and Petitioner's base offense level had been reduced from a 30 to 28 due to the Sentencing Commission's recent amendment to the Drug Quantity Table. None of those intervening changes, however, made a difference to the district court. Rejecting counsel's argument that the BOLEO conviction was not a qualifying "crime of violence" because it did not require "physical force," the court found the opposite based on factual allegations from the BOLEO arrest affidavit incorporated into the PSR. Accordingly, the court found, Petitioner remained a Career Offender with the same 360-life range. And, because he had "den[ied[the offense for which he was found guilty by a jury," and due to his criminal history, the court re-imposed the same life sentence.

Petitioner's second appeal

Petitioner appealed his life sentence a second time challenging the counting of his BOLEO predicate as a Career Offender predicate. And the Eleventh Circuit affirmed, holding that its prior remand had been "limited" to assuring compliance with § 3553(c)(1), and restricted the district court from revisiting issued on which the court had affirmed in the prior appeal. *United States v. Williams*, 563 F.3d 1239, 1242 (11th Cir. Mr. 31, 2009) ("*Williams II*"). It found no intervening change in law that would permit disregard of the mandate rule. *Id.*

Thereafter, however, this Court granted certiorari, vacated the Eleventh Circuit, and remanded Petitioner's case for reconsideration in light of *Johnson v. United States*, 559 U.S. 133 (2010) (holding that a Florida felony battery offense did not qualify as an ACCA violent felony within the elements clause). *Williams v. United States*, 559 U.S. 989 (2010).

On July 22, 2010, the Eleventh Circuit held that after *Johnson*, a Florida BOLEO conviction was no longer categorically a "crime of violence" for purposes of the Career Offender enhancement. *United States v. Williams*, 609 F.3d 1168 (11th Cir. June 22, 2010) ("*Williams III*"). Accordingly, it vacated Petitioner's enhanced sentence and remanded his case back to the district court for resentencing yet again.

Re-imposition of a life sentence at the (post-FSA) September 13, 2010 resentencing

The district court scheduled Petitioner's resentencing for September 13, 2010—approximately a month after the passage of the Fair Sentencing Act (FSA). At that resentencing, defense counsel argued that the Eleventh Circuit's order vacating his sentence mandated a resentencing *de novo* which mandated a new PSR, and the opportunity to file a full set of objections. The district court rejected that request, stating that a new PSR was "unnecessary," since the only issue it would consider at the resentencing was whether Petitioner remained a Career

Offender based upon a resisting with violence conviction in the same case as the BOLEO conviction (a conviction neither Probation nor the government had ever relied upon as a predicate until that time). Based on that alternative predicate, the court found Petitioner's base offense level remained at 37, and his advisory Guideline range remained unchanged at 360-life.

The court allowed counsel to make arguments for a reduced sentence under § 3553(a), but warned that "that doesn't mean [it was] going to consider them." Counsel presented a forceful § 3553(a) argument, urging the court to take into account the changes in the law effected by the FSA, and how similarly situated defendants would be sentenced under that new law, and impose a low-end Guideline sentence of 360 months. But the court rejected that request and simply re-imposed the same life sentence for a third time in a new final judgment.

Petitioner's third appeal

Petitioner appealed his re-imposed life sentence to the Eleventh Circuit. In his brief, filed December 30, 2010, he challenged the court's failure to order an updated PSR, its failure to conduct a *de novo* resentencing, its counting of his resisting with violence conviction as an alternative Career Offender predicate, and its re-imposition of a life sentence for 38.7 grams of crack in 2010 as substantively unreasonable.

On the latter point, he argued *inter alia* that the court had unreasonably failed to consider under § 3553(a) the substantial changes that had occurred in crack cocaine sentencing since 2004, including the recent passage of the Fair Sentencing Act, pursuant to which "going forward" a defendant with similar offense conduct, and a similar record (even a Career Offender) could never face more than 30 years imprisonment. Petitioner did not argue that the FSA actually set the minimum and maximum terms for his case, since the Eleventh Circuit had just held in *United States v. Gomes*, 621 F.3d 1343 (11th Cir. Oct. 1, 2010) that the FSA did *not* apply to offenses that

were committed before the FSA's effective date – even if the defendant was sentenced post-FSA. *See id.* at 1346 ("[B]ecause the FSA took effect in August 2010, after appellant committed his crimes, 1 U.S.C. § 109 bars the Act from affecting his punishment").

On July 13, 2011, the Eleventh Circuit affirmed Petitioner's life sentence yet again. *United States v. Williams*, 434 F. App'x 800 (11th Cir. July 13, 2011) ("*Williams IV*"). It held that the district court did not err by classifying him as Career Offender based on the different resisting with violence conviction. *Id.* at 8-5. Nor did the district court err in refusing to conduct a *de novo* resentencing or by failing to consider Petitioner's arguments concerning the § 3553(a) factors before again imposing a life sentence, because–the court stated–the *Williams III* panel had only vacated the prior sentence "to the extent" that it was predicated on the BOLEO conviction as a "crime of violence." *Id.* at 804 & n. 2 (holding that the remand had only been for "re-sentencing *consistent with* [*that*] *opinion*" and therefore was limited to that issue; the court was only required to re-sentence Petitioner in light of *Johnson*).

Petitioner sought certiorari from that decision. In his petition, he argued *inter alia* that reimposing a life sentence for an offense involving 38.7 grams of crack was substantively unreasonable, irrespective of the advisory 360-life Guideline range. The Court, however, denied review. *Williams v. United States*, 565 U.S 1073 (2011) (No. 11-7057).

Petitioner's motion for imposition of a
reduced sentence under the First Step Act

On February 8, 2019, Petitioner filed a *pro se* motion for imposition of a reduced sentence under Section 404 of the First Step Act of 2018.

In response, the government acknowledged that the offense Petitioner had been charged with and convicted of at trial was possession with intent to distribute 5 or more grams of crack in violation of 21 U.S.C. § 841(a)(1) and § (b)(1)(B). However, the government argued, the FSA

"would have had no impact" on Petitioner's sentence, since irrespective of the jury's special verdict finding of 5 or more grams of crack, "[t]he PS[R] determined that the actual amount of crack cocaine involved in the offense was 38.7 grams;" Petitioner did not object to that determination and the court adopted it at sentencing; and based on the actual amount of crack, "Section 841(b)(1)(B) would still have applied, resulting in the same statutory range of imprisonment of 10 years to life." Because the same statutory maximum of "life" would apply, the government argued, Petitioner's Career Offender level remained unchanged at a level 37, with a range of 360 to life.

In a counseled reply, Petitioner argued he was indeed eligible for relief based on the plain language of the "covered offense" definition in Section 404(a) and settled rules of statutory construction because the statutory penalties for his "offense of conviction" had been reduced by the FSA from 10-life under 21 U.S.C. § 841(b)(1)(B), to 0-30 years under 21 U.S.C. § 841(b)(1)(C). He asked the court to impose a reduced sentence within the now-reduced statutory and 262-327 month Guideline range, with the reduced minimum of 6 years supervised release.

However, the district court rejected the defense reading of Section 404(a) and ruled with the government that eligibility for relief turned on "actual" or "relevant conduct. On August 14, 2019, it issued an order finding Petitioner ineligible for relief under the First Step Act based on the drug quantity (38.7 grams) he was held responsible for at sentencing, pursuant to which his sentencing range remained the same. Thus, the court found, "the First Step Act does not support a reduction in Defendant's sentence." It denied his motion.

Petitioner's fourth appeal:
The reversal and remand in light of *Jones*

In *United States v. Jones*, 962 F.3d 1290 (11th Cir. June, 16, 2020), the Eleventh Circuit rejected the government's reading of the "covered offense" definition in Section 404(a) and agreed

with the position advanced by Petitioner. Specifically, the Court held in *Jones*, where, as here, a defendant has been convicted by a jury of possessing with intent to distribute 5 or more grams of crack under § 841(b)(1)(B), he is eligible for a sentencing reduction under Section 404(a) because the statutory penalties for this offense were reduced by Section 2 of the FSA. Such a defendant now faces the reduced minimum and maximum penalties in § 841(b)(1)(C). 962 F.3d at 1303.

After Petitioner filed *Jones* in a Rule 28(j) letter, the government conceded that he had a "covered offense" within Section 404(a), and that the case should be remanded so that the district court could apply the statutory range in § 841(b)(1)(C) triggered by his "at least 5 grams" amount, and re-calculate his Career Offender range pursuant to the 30-year maximum of that provision.

On September 10, 2020, the Eleventh Circuit vacated the district court's August 14, 2019 order denying Petitioner's motion for a sentence reduction under Section 404 in light of *Jones* which confirmed that—as the government had conceded—his "conviction is a covered offense under the First Step Act [section] 404(a)' and "he is eligible to have the district court consider whether to reduce his sentence in consideration of the statutory and guideline ranges that would apply 'as if' the Fair Sentencing Act's higher crack amount thresholds were in effect." *United States v. Williams*, 820 F. App'x 998 (11th Cir. Sept. 10, 2020) (11th Cir. Sept. 10, 2020) ("*Williams V*"). Having noted its agreement with the government and acceptance of its confession of error, the Eleventh Circuit vacated the district court's order denying relief and remanded to allow the district court to exercise its discretion to impose a reduced sentence under Section 404(b).

The proceedings upon remand

After the mandate issued, the district court directed the government and Probation to respond to Petitioner's motion to reduce sentence and specifically address whether he "is entitled to a sentence reduction under the First Step Act in light of the Eleventh Circuit's decision in *Jones*."

The government responded that Petitioner was indeed "eligible" for a sentence reduction under *Jones* because he did not receive the lowest statutory penalty under the FSA. Nonetheless, the government argued, the court should exercise its discretion to deny Petitioner's motion "in light of the actual amount of crack cocaine involved in the offense and the defendant's criminal history" – noting that the latter had been the basis of the court's previous denials of leniency under § 3553(a).

Petitioner replied to the government's response, emphasizing and asking the court to take account under § 3553(a): his reduced Career Offender range (262-327 months) that had resulted from the reduction of the applicable statutory maximum from life to 30 years; the relatively small amount of crack (38.7 grams) involved in his case; the court's grant of reductions to other Career Offenders whose offenses involved greater quantities of crack; and his post-sentencing rehabilitation as evidenced by a perfect disciplinary record for 5 straight years in a USP. He underscored that he was not seeking a variance below the newly-applicable Career Offender range, but rather a sentence at the top of the reduced Career Offender range.

Petitioner thereafter filed two notices of supplemental authority. In the first (App. A-11), he pointed out that *Dorsey v. United States*, 567 U.S. 260 (June 21, 2012) and *United States v. Hinds*, 713 F.3d 1303 (11th Cir. Apr. 9, 2013) were handed down after his appeal from the September 2010 resentencing had concluded. In *Dorsey*, he noted, this Court held that defendants who committed their crimes before August 3, 2010 (the effective date of the FSA), but who were sentenced after that date, were entitled to have the FSA's "new, more lenient penalties" applied at their post-FSA sentencings. *See id.* at 279-81. And thereafter in *Hinds*, the Eleventh Circuit applied the rule of *Dorsey* to re-sentencings. Significantly, the Court held in *Hinds*, "there is no meaningful difference between an initial sentence and a resentencing post-Act," and "the FSA

applies in both cases" since "[t]he 'general rule is that a defendant should be sentenced under the laws in effect at the time of sentencing, and when a sentence is vacated there is no sentence in effect." 713 F.3d at 1305 (emphasizing that "at the time a defendant is resentenced, he is in a materially indistinguishable position from the defendant in *Dorsey*; concluding that "*Dorsey*'s analysis is equally applicable") (internal citations omitted).

Dorsey, he explained, had directly abrogated *Gomes* which had governed at the time of his direct appeal from the 2010 resentencing, and even after certiorari in his case had been denied. However, any Eleventh Circuit defendant still in the pipeline on direct appeal at the time *Dorsey* was decided was able to immediately have his pre-FSA sentences vacated and be resentenced under the post-FSA penalty structure. *See, e.g., United States v. Hudson*, 685 F.3d 1260, 1260-61 (11th Cir. July 2, 2012) (en banc). Since he was not still in the pipeline when *Dorsey* and *Hinds* were decided, he explained, he did not receive any benefit from those decisions.

However, he noted, a sentence above the 30-year statutory maximum was a non-waivable jurisdictional defect. And therefore, he argued, the "*minimum* relief" that he should be accorded under Section 404(b) was a reduction to the 30-year statutory maximum that should have governed his offense at the 2010 resentencing, as per *Dorsey* and *Hinds*.

The government moved to strike that notice of supplemental authority under Southern District of Florida Local Rule 7.1(c), claiming it advanced new legal arguments. But in response, Petitioner clarified this was *not* a new legal argument seeking to vacate the sentence due to the just-perceived jurisdictional defect in the current sentence. Rather, he argued, that defect had "direct bearing" on his pending request for the court to exercise its discretion to impose a reduced sentence under Section 404(b); because it was now clear from *Dorsey* and *Hinds* that the court did not have the power to impose a life sentence at the September 2010 resentencing and in retrospect

that was now an illegal sentence, a reduction to the post-FSA 30-year maximum should be the *minimum* relief granted him under Section 404(b). Indeed, he argued, the now applicable maximum confirmed what sentence – in the estimation of Congress – is "sufficient but not greater than necessary" to comply with all of the purposes of sentencing in § 3552(a)(2) at this time.

In his second notice of supplemental authority (App. A-14), Petitioner advised the court of the Fourth Circuit's then-recent decision in *United States v. Collington*, 995 F.3d 347 (4th Cir. 2021), holding that the district court abused its discretion and reversibly erred in exercising its discretion under Section 404(b) of the First Step Act by declining to reduce—and simply maintaining—an eligible defendant's sentence that exceeded the reduced statutory maximum that he faced after the Fair Sentencing Act. To properly exercise its authority under Section 404(b), Petitioner noted, the Fourth Circuit held the district court was required to sentence Collington to "at most" the statutory maximum he faced under § 841(b)(1)(C).

The district court's order denying relief under Section 404(b)

Four months later, on August 6, 2021, the district court issued an order denying Petitioner's motion for a reduction in his sentence. (App. A-15). The court recognized as a threshold matter that Petitioner was convicted of a covered offense under Section 404(a), was eligible for a reduction under Section 404(b), and that he faced a reduced Career Offender range of 262-327 months imprisonment today. Nonetheless, the court found that any reduction in Petitioner's life sentence was "unwarranted" under § 3553(a).

The court acknowledged that the need to avoid unwarranted disparities under § 3553(a)(6) weighed in Petitioner's favor because his Guideline range today would be 262-327 months. But, the court found, this factor did "not weigh heavily" and ultimately was "not dispositive" because

his criminal history weighed heavily against a reduction. In the court's view, Petitioner's criminal history trumped every other § 3553(a) consideration.

According to the court, the small amount of crack–38.7 grams–weighed only "slightly" against reducing Petitioner's sentence because it "increases the seriousness of Defendant's conduct in comparison to the offense for which he was sentenced." Moreover, the court found, Petitioner's evidence of rehabilitation—his perfect disciplinary record for the last 5 years—was only "token evidence" which did not outweigh his substantial criminal history which confirmed his recidivist tendencies. Finally, the court stated, reductions it had given other Career Offenders did not require consistency here, because Petitioner's "significant criminal history presents considerations that are unique to this case and weigh heavily against a reduction [in] sentence."

One factor that the court did *not* specifically address in its § 3553(a) analysis was the reduced 30 year maximum Petitioner faced under the FSA for a § 841(b)(1)(C) rather than a § 841(b)(1)(B) offense—even though that reduced maximum was clearly relevant to multiple § 3553(a) factors, and Congress' overarching mandate to impose a sentence "sufficient but not greater than necessary to comply with the purposes" of sentencing in § 3553(a)(2). Instead, the court addressed Petitioner's "supplemental arguments" for a reduced sentence to "at least" the 30-year maximum in a separate portion of the order,[1] and found those arguments "without merit."

With regard to *Dorsey* and *Hinds*, the court did not dispute that these decisions confirmed that the FSA in fact governed at the 2010 re-sentencing. However, the court noted that *Gomes* governed at the time Petitioner was resentenced, and this Court had properly upheld the re-imposed life sentence "under then-applicable law."

[1] In a footnote, the court denied the government's motion to strike and found Petitioner's "new" arguments properly before the court.

The court noted that Petitioner had not cited any case applying *Hinds* to a motion to reduce sentence under the First Step Act. And it found his arguments based on *Hinds* under Section 404(b) "improperly made" because the Act "does not provide a mechanism for a Defendant to challenge the legality of his sentence." Rather, the court stated:

> "The Act makes clear that the relief in subsection (b) is discretionary: 'Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.'" *Jones*, 962 F.3d at 1298 (quoting § 404(c)). "[A] sentence reduction based on the First Step Act is a limited remedy, and the district court is not called upon to answer questions it did not consider at the original sentencing." *United States v. Denson*, 963 F.3d 1080, 1099 (11th Cir. 2020) (citing *United States v. Brown*, 879 F.3d 1231, 1239-40 (11th Cir. 2018).
>
> Thus, the First Step Act does not provide Defendant with a forum to raise general challenges to the legality of his sentence. Rather, it simply provides the Court with the discretion to reduce Defendant's sentence, under certain circumstances. In other words, nothing under the First Step Act allows or requires the Court to apply *Hinds* to Defendant's sentence. To the contrary, the First Step Act provides the Court clear discretion to leave intact Defendant's original sentence. *Jones*, 962 F.3d at 1298 (citing § 404(c)).
>
> Therefore, for the reasons discussed above, the Court declines to exercise its discretion and finds that *Hinds* does not require a reduction of Defendant's sentence for the purposes of the instant Motion under First Step Act.

With specific regard to the Fourth Circuit's decision in *Collington* finding a clear abuse of discretion in failing to reduce a defendant's sentence to "at least" the reduced statutory maximum under the FSA, the court found *Collington* "unpersuasive."

Petitioner's fifth appeal

Petitioner again appealed to the Eleventh Circuit, this time arguing that the district court abused its discretion under Section 404(b) by (1) leaving intact his life sentence that was illegal when re-imposed in 2010 because it exceeded the reduced statutory maximum of the Fair Sentencing Act (FSA), which the intervening decisions in *Dorsey* and *Hinds* had confirmed applied at that resentencing, and (2) declining to reduce his sentence to at least the new statutory

maximum of 30 years under 21 U.S.C. § 841(b)(1)(C). Relevant to the issue raised herein, he argued in his Initial Brief that as a threshold matter, the district court's suggestion of limitless discretion to deny relief under Section 404 was inconsistent with the concept of "meaningful appellate review," which the court—in *United States v. Stevens*, 997 F.3d 1307, 1317 (11th Cir. 2021) and *United States v. Potts*, 997 F.3d 1142 (11th Cir. 2021)—had mandated in Section 404 cases. Moreover, he argued, the district court had over-read Section 404(c) in suggesting that the statute supported unchecked discretion to deny a reduction under Section 404(b). Next, he argued, that the Court had already recognized—in *Stevens*, 997 F.3d at 1312 and in *United States v. Gonzalez*, 9 F.4th 1327 1331 (11th Cir. 2021)—that in Section 404 proceedings just as in an original sentencing, the court would abuse its discretion if it committed a "clear error in judgment." He noted with significance that in Gonzalez, the court had cited *United States v. Irey*, 612 F.3d 1160, 1188-89 (11th Cir. 2010) (en banc) for that proposition. And finally, he noted with significance, in *Hicks v. United States*, 137 S.Ct. 2000 (June 26, 2017), this Court had GVR'ed a defendant's sentence imposed after the FSA as "plain error" when—due to an erroneous Fifth Circuit precedent similar to *Gomes*, he did not receive the benefit of the FSA at his sentencing, and instead, "was wrongly sentenced to a 20-year mandatory minimum under a now defunct statute." *Id.* at 2000-01 (Gorsuch, J., concurring). On similar grounds, he argued, overlooking a clear error of law under the FSA should be deemed a classic abuse of discretion under Section 404(b).

Since the thrust of the government's argument in its Answer Brief that the district court's order was procedurally sound, in his reply brief Petitioner argued specifically that "procedural reasonableness does not end the abuse of discretion analysis under Section 404(b). He stated, "The government wrongly ignores that under this Court's precedent," namely, *Gonzalez* (which had

cited *Irey* for a "abuse of discretion" equating to a "clear error of judgment"), "the substantive reasonableness of a district court's Section 404 ruling is independently reviewable."

After briefing concluded but before oral argument, this Court handed down its decision in *Concepcion v. United States*, 142 S.Ct. 2389 (June 27, 2022) clarifying that "[n]othing in the First Step Acts" "limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence" under Section 404(b) of the First Step Act." *Id.* at 2396, 2400. Specifically, the Court held:

> Because district courts are always obligated to consider nonfrivolous arguments presented by the parties, the First Step Act *requires district courts to consider intervening changes* [*of fact or law*] *when parties raise them*. By its terms, however, the First Step Act does not compel courts to exercise their discretion to reduce any sentence based on those arguments.

Id. (emphasis added).

Prior to oral argument, the government filed three letters of supplemental authority pursuant to Fed. R. App. P. 28(j). In the first (App. A-16), the government cited *Concepcion*, arguing that because *Concepcion* held that courts must only "consider" a party's non-frivolous arguments, the First Step Act "does not compel courts to exercise their discretion to reduce any sentence based on those arguments." As such, the government argued, *Concepcion* "refute[d] Appellant's argument" that the district court necessarily abused its discretion by declining to reduce his sentence to the FSA maximum.

Petitioner responded (App. A-17) that the government had ignored *Concepcion*'s confirmation that nothing in the First Step Act, including Section 404(c), "limits the information" a court may consider under Section 404(b), or prohibited courts from considering "any arguments in favor of" sentence modification. 142 S.Ct at 2402. He underscored that *Concepcion* had held "the First Step act not only 'allows' but '*requires* district courts to consider intervening changes

[in law] when parties raise them." *Id.* at 2396, 20404 (emphasis added). In this respect, he argued, *Concepcion* abrogated the contrary "independent holding" of *United States v. Denson*, 963 F.3d 1080, 1089 (11th 2020) (in a Section 404 proceeding "the district court is not called upon to answer questions it did not consider at the original sentencing"). And since the district court cited *Denson* for this precise point, Petitioner argued, it may not have understood that it was indeed authorized under Section 404 to reduce his sentence based on the intervening changes in the law effected by *Dorsey* and *Hinds*.

The government's second Rule 28(j) letter (App. A-18) cited *United States v. Jackson*, 58 F.4th 1331 (11th Cir. 2023)[2] as recognizing the "limited effect" *Concepcion* had on the Court's "404 jurisprudence." In addition, the government argued, *Jackson* "also held that prisoners 'cannot use a motion for reduced sentence to relitigate an earlier drug-quantity finding.'" "Just as Jackson's range could not be recalculated because his case was pending when *Apprendi v. New Jersey*, 530 U.S 466 (200) issued," the government argued, "Appellant's range is not recalculated because he was resentenced after the FSA's effective date under Dorsey."

Petitioner responded (App. A-19) that *Jackson* had no bearing on his case because his drug quantity was determined by a jury consistent with *Apprendi*, and he was not trying to use *Apprendi* to redefine his "offense." Unlike *Jackson*, he explained, there was no question here that he was eligible for relief, and the district court had discretion to reduce his sentence at the second step of the inquiry under Section 404(b). The only question before the court in his case, Petitioner clarified, was whether a court "must consider an intervening change of law, if raised by a defendant; that question was governed by *Concepcion*, not *Jackson*; and pursuant to *Concepcion*

[2] A petition for certiorari was filed in *Jackson* on June 5, 2023 (Case No. 22-7728), and remains pending at this time.

the district court was "required" to consider his arguments for a reduction based on *Dorsey* and *Hinds* that his life sentence was actually illegal under the FSA when re-imposed in 2010.

In the government's final Rule 28(j) letter (App. A-20), the government cited the Fourth Circuit's decision in *United States v. Reed*, 58 F.4th 816, 822 (4th Cir. 2023) as confirming that *Concepcion* had rendered "untenable" the holding of *United States v. Collington*, 995 F.3d 347 (4th Cir. 2021), that "the district court abused its discretion by maintaining a sentence that exceeded the revised statutory maximum, established by the Fair Sentencing Act."

But Petitioner responded (App. A-21), *Reed*'s recognition that *Concepcion* had undermined *Collington* did not impact his case which was neither factually nor procedurally similar to *Collington*; his argument for reduction in the district court was not identical; and his abuse of discretion arguments on appeal were not dependent on *Collington* either. He explained:

> *Collington* held a district court abuses its discretion *per se* by failing to reduce an eligible defendant's sentence—*legal when imposed*—to the Fair Sentencing Act's (FSA's) statutory maximum. 995 F.3d at 351-52, 358. But Williams is not asking the Court to so hold. Rather, he asks it to simply hold, under his unique facts, that the district court abused its discretion under §404(b) by failing to reduce his sentence, *illegal when reimposed*, as clarified by intervening law.
>
> The government concedes an abuse of discretion occurs under §404 if the district court *either* makes a clear error of law *or* a clear error in judgment. Ans. Br. at 15, 23. And the district court abused its discretion in both respects here.
>
> The court erred as a matter of law in refusing to even "consider" the *Dorsey/Hinds* change in law, confirming the illegality of Williams' sentence *at the time reimposed*, as a ground for a discretionary reduction under §404(b). *See* DE172:10. Due to the court's misunderstanding of its broad authority under §404(b) to consider nonfrivolous arguments based on intervening changes in law, as clarified by *Concepcion*, the court by definition abused its discretion and remand is required.
>
> Second, the court committed a "clear error in judgment" by refusing to exercise its discretion under §404(b) to reduce Williams' sentence—indisputably *illegal when reimposed* under the FSA—to the FSA's legal maximum. *Reed* recognized, post-*Concepcion*, that an appellate court may not affirm a §404(b) denial that is "substantively unreasonable." 58 F.4th at 820. And, maintaining a sentence indisputably illegal under the FSA when reimposed, when the court clearly had

> discretion under §404(b) to reduce that sentence to the legal maximum, was a substantively unreasonable decision. There was no "reasoned basis" for it.

At the February 28, 2023 oral argument, Petitioner pressed these same arguments.

However, within a month, the Eleventh Circuit issued a published decision affirming the district court. *United States v. Williams*, 63 F.4th 908 (11th Cir. 2023) ("*Williams VI*"). Relevant to the issue here, the court held that "the district court had the discretion to leave William's sentence intact." *Id.* at 911. Indeed, it found, "[t]he text of the First Step Act"—specifically, Section 404(c)—"foreclose[d]" Williams' contrary argument, by stating: "[n]othing in this section shall be construed to require a court to reduce *any sentence* pursuant to this section." *Id.* at 912 (emphasis added by the court). It explained:

> It cannot be, as Williams argues, "a *per se* abuse of discretion" for a district court "to leave an illegal sentence intact under [s]ection 404(b)." No argument for a reduced sentence can make denying relief a *per se* abuse of discretion.
>
> While this appeal was pending, the Supreme Court confirmed the plain meaning of section 404(b), and the Fourth Circuit recognized that the *Collington* decision on which Williams relies is no longer good law. The Supreme Court explained that "a district court is not required to modify a sentence *for any reason*." *Concepcion*, 142 S.Ct. at 2402 (emphasis added). Instead the First Step Act imposes on district courts only "the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments" in "a brief statement of reasons." *Id.* at 2404. The Fourth Circuit later acknowledged that "*Concepcion* makes clear that district courts ... are not required to reduce any sentence. ... Thus, *Collington*'s reasoning and holding conflict with the Supreme Court's reasoning in Concepcion. *United States v. Reed*, 58 F.4th 816, 821 (4th Cir. 2023).
>
> Williams' argument that the district court committed a *per se* abuse of discretion is a veiled collateral attack on the legality of his sentence. But Williams "cannot use a motion for a reduced sentence to relitigate" the statutory maximum penalty for his offense, just as movants cannot use First Step Act motions to relitigate factual predicates for sentencing enhancements. *See Jackson*, 58 F.4th at 1338. Instead, a motion to vacate is the proper vehicle for collateral challenges to the legality of a federal sentence, and Williams missed his chance for that relief by faiolng to raise *Dorsey* in his 2012 motion.

Williams, 63 F.4th at 912.

REASON FOR GRANTING THE WRIT

The circuits are in conflict as to whether "abuse of discretion" review of a denial of a sentencing reduction to an eligible defendant under Section 404(b) of the First Step Act is reviewable for substantive reasonableness.

The Circuit courts of appeals are in agreement that a district court's "discretionary" denial of a sentence reduction to an eligible defendant under Section 404(b) of the First Step Act is reviewable for an "abuse of discretion." They are also in agreement that after *Concepcion v. United States*, 142 S.Ct. 2389 (2022), "abuse of discretion" review necessitates review for procedural errors such as the court's failure to at least "consider" a defendant's argument under Section 404(b) based upon an intervening change in the law, and a failure to adequately explain its decision. They are in sharp disagreement, however, particularly after *Concepcion*, as to whether "abuse of discretion" review additionally requires review of the decision to maintain a pre-existing sentence for "substantive reasonableness."

I. The circuits are intractably divided over whether "abuse of discretion" review of a Section 404 denial requires review for substantive reasonableness

Prior to *Concepcion*, two circuits—the Sixth, and the Eighth—held that appellate review of a district court's discretionary denial of a Section 404 motion for "abuse of discretion" necessitates review for substantive as well as procedural reasonableness. *See United States v. Ware*, 954 F.3d 482, 487 (6th Cir. 2020) (holding that the district court's grant or denial of an eligible defendant's motion for sentence reduction under Section 404 is reviewable for "abuse of discretion," which requires "review for both procedural and substantive reasonableness"); *United States v. Harris*, 960 F.3d 1103, 1106-07 (8th Cir. 2020) (reviewing for substantive unreasonableness an defendant's argument under Section 404(b) that his sentence was almost ten years higher than his range of 100-137 months under the current advisory guidelines).

Between these two circuits, however, the reasoning of the Sixth Circuit was the most fulsome and its inquiry the most searching. In *United States v. Johnson II*, 26 F.4th 726 (6th Cir. 2022), the Sixth Circuit not only cited its prior circuit precedent in holding that a First Step Act sentencing decision is "like all sentences imposed by the district court" in necessitating that the sentence must be "substantively reasonable." The court added that a prior sentence left intact "may be substantively unreasonable" because it is "too long." It explained that in a Section 404 proceeding, "the substantive reasonableness inquiry considers the totality of the circumstances." And it held that a sentence maintained is indeed "substantively unreasonable" and a clear "abuse of discretion" where—as in the case before it—the district court gave undue weight to § 3553(a) factors such as "the nature of the offense," the defendant's criminal history, and the need to deter future criminal conduct and protect the public from future times, while giving too little weight to another § 3553(a) factor—namely, "the need to avoid unwarranted disparities among defendants with similar records who have been found guilt of similar conduct." *Id.* at 734-741.

Notably, after *Concepcion*, two additional circuits—the Fourth and the Seventh—have joined the Sixth and Eighth in requiring "substantive reasonableness" review of a Section 404(b) denial. In *United States v. Swain*, 49 F.4th 398 (4th Cir. 2022), the Fourth Circuit held expressly that "substantive reasonableness review applies to all section 404 proceedings," not merely those in which a reduction is granted. *Id.* at 401-02. Indeed, the Fourth Circuit explained in *Swain*, such review is necessary "to ensure the broad remedial purposes of the Fair Sentencing Act and First Step act are effected in the section 404 context." *Id.* at 402. It stated: "[S]entence reductions are not a mere side effect of this legislation, but one of its primary purposes. While Congress certainly gave district courts the discretion under section 404 not to impose sentenced reductions," *see Concepcion*, 142 S.Ct at 2402, "that discretion must be reviewed in light of the First Step Act's

remedial purpose." *Id.* The Fourth Circuit, notably, embraced a "totality of the circumstances" approach similar to the Sixth Circuit in *Johnson II*. *See id.* at 402. And under that approach, it found the district court's decision to maintain the defendant's pre-FSA sentence was "substantively unreasonable" because "the district court relied on largely the same factual basis" to deny his requested reduction as it did in imposing the original sentence at the bottom of the Guideline rangey—despite that under the FSA, the defendant's Guideline range "decreased by five to ten years. In addition, the court placed too little weight on the remedial aims of the First Step Act." *Id.* at 403. *See also United States v. Reed*, 58 F.4th 816, 820 (4th Cir. 2023) (acknowledging that *Concepcion* had rendered "untenable" the holding of *United States v. Collington*, 995 F.3d 347, 358 (4th Cir. 2021) that a district court necessarily abuses its discretion whenever it fails to reduce a defendant's sentence to the new FSA maximum; but nonetheless following *Swain* in reaffirming that a court exercising "abuse of discretion" review of a Section 404(b) denial can only affirm if it is sure the court's decision is neither procedurally or substantively unreasonable).

While the Eighth Circuit's post-*Concepcion* analysis was not as involved as the Fourth's, in *United States v. Moore*, 50 F.4th 597 (7th Cir. 2022), it is notable that the Eighth Circuit expressly reviewed an argument for a Section 404(b) reduction based on an unwarranted sentencing disparity with a co-defendant for substantive unreasonableness as well. *See id.* at 603-04.

By contrast to these four circuits, the Fifth and Eleventh Circuit have squarely rejected any form of substantive reasonableness review for Section 404(b) denials. Prior to *Concepcion*, the Fifth Circuit expressly found "substantive reasonableness" review inapplicable in Section 404 proceedings. *See United States v. Batiste*, 980 F.3d 466 (5th Cir. 2020) (reasoning that Section 404 proceedings are "similar" to 18 U.S.C. § 3582(c)(2) proceedings which are not "full

resentencings," and because substantive reasonableness review is derived from *United States v. Booker*, 543 U.S. 220 (2005), this type of review does not apply in Section 404 proceedings).

And post-*Concepcion*, the Eleventh Circuit followed suit in Petitioner's case by finding that Section 404(c) of the First Step Act, and the Court's reasoning in *Concepcion*, "foreclosed" Petitioner's argument that leaving intact an illegal sentence is a *per se* "abuse of discretion." *See United States v. Williams*, 63 F.4th 908, 912 (11th Cir. 2023) (holding that Petitioner's argument was a "veiled collateral attack," and he had missed his opportunity to challenge the illegality of his sentence in § 2255). Although the Eleventh Circuit in *Williams* did not expressly use the term "substantive reasonableness," given that Petitioner expressly argued for "substantive reasonableness" review, and the court rejected his request, its rejection of substantive reasonableness review was implicit.

And indeed, as described by one candid Eleventh Circuit judge prior to the decision in *Williams*, the "abuse of discretion" rule applied in the Eleventh Circuit amounts to nothing more than "unbridled discretion." *United States v. Gonzalez*, 9 F.4th 1327, 1337-40 (11th Cir. 2021) (Tjoflat, J. concurring) (noting that the Eleventh Circuit has "never actually found that a district court abused its discretion under Section 404(b);" the so-called "review" now exercised by the court is completely "unanchored") (*Gonzalez I*). Although that opinion was ultimately GVR'ed by the Court for further consideration in light of *Concepcion*, *see Gonzalez v. United States*, 142 S.Ct. 2900 (2022), the Eleventh Circuit's opinion upon remand found the district court's minimal explanation of its refusal to reduce the defendant's sentence sufficient under *Concepcion*. *United States v. Gonzalez*, 71 F.4th 881, 887 (11th Cir. 2023). Thus, Judge Tjoflat's recognition that the Court has never found any Section 404(b) denial to be an actual "abuse of discretion" remains true to this day.

Had Petitioner raised his same challenge in the Fourth and Sixth Circuits, those courts would undoubtedly have found the district court's Section 404(b) ruling to be "substantively unreasonable," and a clear abuse of discretion for that reason. And indeed Petitioner might have succeeded in the Seventh and Eighth Circuits as well.

II. The Eleventh Circuit's decision is wrong

The Eleventh Circuit's rejection of "substantive reasonableness" review is wrong for the reasons stated by the Fourth and Sixth Circuits, and for other reasons as well.

First, as a textual matter, the Eleventh Circuit misread Section 404(c) by viewing a single sentence in that subsection in isolation—failing to consider that sentence against the broader context of Section 404. For instance, the court ignored that the term "impose" was used twice in Section 404(b), and the fact that variations of the verb "impose" are likewise used in 18 U.S.C. § 3553(a). This Court has recognized that whenever a district court is instructed to "impose" a sentence, it must consider the § 3553(a) factors. *See, e.g,, Chavez-Meza v. United States*, 138 S.Ct. 1959, 1963 (2018). Moreover, in also stating in Section 404(c) that "No court shall entertain a motion made under this section to reduce a section if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act," Congress was making clear that Section 404(c) presupposed that the sentence was either legal under the FSA when originally imposed, or the defendant had already received a FSA-reduced sentence. And since Petitioner did *not* meet *either* condition, nothing in Section 404(c) barred the district court from using its discretion under Section 404(b) to reduce his sentence to the FSA maximum which should have applied at his 2010 sentencing.

Finally, the Eleventh Circuit in the case below both over-read and misread *Concepcion*. The only issue before the Court in *Concepcion* was procedural reasonableness. The decision

cannot be read to more broadly hold, as the Eleventh Circuit claimed, there can never be a *per se* "abuse of discretion" such as maintaining an sentence that in fact was illegal when imposed. It is well-settled that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S 507, 511 (1925). And indeed, since the Court was clear in *Concepcion* that Section 404(c) itself does *not* prohibit district courts from considering "*any arguments* in favor of or against sentence modification" based upon intervening changes in law. 142 S.Ct. at 2401-02. In reading that precise provision to do so, the Eleventh Circuit misread and misapplied *Concepcion*.

III. This case is the perfect vehicle to resolve the circuit conflict and any confusion left by *Concepcion*

This case is a perfect vehicle for resolving whether "abuse of discretion" review in Section 404 cases requires substantive reasonableness review, for multiple reasons.

First, interpretation of the plain text of Section 404 of the First Step Act and proper application of Section 404 must be uniform in this country. Presumably, that was the reason for the grant of certiorari in *Concepcion*. And plainly, the type of appellate review an eligible defendant receives after a Section 404(b) "discretionary" denial must be uniform as well. It cannot be a function of geography—which is currently the case since no Section 404(b) denials have ever been reviewed for substantive reasonableness in the Fifth and Eleventh Circuits, when the opposite is the case in the Fourth, Sixth, Seventh, and Eighth Circuits. As noted *supra*, in the Fourth and Sixth Circuits, it is likely that Petitioner's sentence would have been reversed as substantively unreasonable. And in the Seventh and Eighth, Petitioner would at least have had a chance at a reversal on substantive unreasonableness grounds as well.

Second, this is the ideal case to follow *Concepcion*, given that the only question before the Court in *Concepcion* involved procedural reasonableness. The Court declined during the same term to resolve a related circuit split on whether a district court must consider the §3553(a) factors, identified in the petition for certiorari in *United States v. Houston*, 2021 WL 1578104 (Apr. 19, 2021) (No. 21-1479). Presumably, that was because, as the government pointed out in its Brief in Opposition in *Houston*, 2021 WL 3128057 (Jul 21, 201), that even circuits like the Eleventh that did not *require* the district court to consider § 3553(a) factors in exercising its discretion under Section 404(b), still permitted the court to consider § 3553(a) arguments, and required that a district court's explanation for denial be sufficient to "allow for meaningful appellate review." But the underlying split identified in the *Houston* petition has direct bearing on, and linkage to, the substantive reasonableness issue here. It can and should be resolved here as well.

Third, it makes sense for the Court to take an Eleventh Circuit case to resolve the Circuit conflict on the issue presented, since the Eleventh Circuit is one of the most inhospitable courts in the country for defendants seeking substantive reasonableness review—even for original sentences. After *Gall v. United States*, 552 U.S. 38 (2007), most circuits have found upward variances to be "substantively unreasonable" because "greater than necessary," that is, simply too harsh.[3] And notably, most circuits have reversed within-Guideline sentences (including within-

[3] *See, e.g., See United States v. Ofray-Campos*, 534 F.3d 1, 42-44 (1st Cir. 2008); *United States v. Aldeen*, 792 F.3d 247, 255-256 (2nd Cir. 2015); *United States v. Howard*, 773 F.3d 519, 522, 536 (4th Cir. 2014); *United States v. Tucker*, 473 F.3d 556, 563-564 (4th Cir. 2007); *United States v. Chandler*, 732 F.3d 434, 438-440 (5th Cir. 2013); *United States v. Gerezano-Rosales*, 692 F.3d 393, 401-02 (5th Cir. 2012); *United States v. Payton*, 754 F.3d 375, 376–77 (6th Cir. 2014); *United States v. Aleo*, 681 F.3d 290, 299-302 (6th Cir. 2012); *United States v. Walker*, 649 F.3d 511, 513-24 (6th Cir. 2011); *United States v. Poynter*, 495 F.3d 349, 351-356 (6th Cir. 2007); *United States v. Bradley*, 628 F.3d 394, 400-401(7th Cir. 2010); *United States v. Miller*, 601 F.3d 734, 739-740 (7th Cir. 2010);); *United States v. Cruz-Valdivia*, 526 F. App'x 735, 737 (9th Cir. 2013); *United States v. Smith*, 540 F. App'x 854, 861-63 (10th Cir. Oct.24, 2013) (Ebel, J. concurring).

Guideline sentences at the statutory maximum), or supervised release restrictions for like reasons.[4] But the Eleventh Circuit has consistently rejected *all* such claims. Indeed, while frequently agreeing with the government that downward variances are substantively unreasonable because they are simply too low, in the fifteen years since *Gall* the Eleventh Circuit has *never once* agreed with a defendant that *any* sentences was substantively unreasonable as too high or harsh. Since 2007, there have been *only two reversals* for Eleventh Circuit defendants on "substantive unreasonableness" grounds. *See United States v. Plate*, 839 F.3d 950, 957 (11th Cir. 2016); *United States v Killen*, 729 F. App'x 703, 717-18 (11th Cir. Mar. 29, 2018). And notably, the reversal in *Plate* resulted from the district court's basing the sentence on an improper factor, while the reversal in *Killen* resulted from its failure to consider a proper factor—both of which are actually procedural errors under *Gall*.

Fourth, Petitioner vigorously preserved the substantive unreasonableness issue raised herein in his briefing to the Eleventh Circuit; in response to the government's Rule 28(j) letter citing *Reed*; and at oral argument. This Court requires that the issue be "pressed *or* passed on" by the court of appeals, *United States v. Williams*, 504 U.S. 36, 42-43 (1992), and there can be no dispute that the question presented herein was "pressed." Moreover, the issue raised herein was implicitly—if not explicitly passed on—by the Eleventh Circuit for the reasons stated *supra*, including that the court cited (and therefore obviously read) *Reed* and the parties' dueling letters

[4] *See*, e.g,, *United States v. Reyes-Santiago*, 2015 WL 5598869, at **10-16 (1st Cir. Sept. 23, 2015); *United States v. Dorvee*, 616 F.3d 174, 184, 186-188 (2nd Cir. 2010); *United States v. Olhovsky*, 562 F.3d 530, 549-553 (3d Cir. 2009); *United States v. Miller*, 594 F.3d 172, 175 (3d Cir. 2010) *United States v. Laznby*, 439 F.3d 928, 933-934 (8th Cir. 2006); *United States v. Phillips*, 785 F.3d 282 (8th Cir. May 5, 2015); *United States v. Paul*, 239 Fed. Appx. 353, 354-355, 2007 WL 2384234 at *2 (9th Cir. Aug. 17, 2007); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009); *United States v. Robles-Ayala*, 201 Fed. Appx. 447, 448, 2006 WL 2612686 at * 1 (9th Cir. Sept. 12, 2006); *United States v. Marroquin-Frias*, 365 F.3d. Appx. 791, 2010 WL 510640 (9th Cir. Feb. 12, 2010); *United States v. Allen*, 488 F.3d 1244, 1261-62 (10th Cir. 2007); *United States v. Russell*, 600 F.3d 631, 638 (D.C. Cir. 2010).

about its significance. Petitioner, in fact, asked the court specifically to apply substantive reasonableness review as the Fourth Circuit did in *Reed.*

Finally, it makes sense for the Court to take *this* particular case to resolve an intractable circuit split because Petitioner's case is an extremely compelling one on many levels. Petitioner was originally sentenced to life for only 38.7 grams of crack, at a time when the Guidelines were mandatory. Even though the court had discretion to choose any sentence between the then-mandatory 360-life range for a relatively small amount of crack, it chose the harshest possible sentence: life. Petitioner has appealed and had his case remanded for resentencing multiple times. But with each reversal and remand—even after the Guidelines became advisory, and the district court had discretion to impose a much lower sentence for other reasons—it continued to rigidly re-impose life. Notably, Petitioner challenged the substantive reasonableness of his sentence in his 2011 petition for certiorari to this Court. But at that time, before *Dorsey* and *Hinds*, he had no basis to argue he was actually serving an *illegal* sentence. But now he does. And neither the government nor the district court nor the Eleventh Circuit have disputed that Petitioner is indeed serving a sentence that intervening law has clarified was illegal under the FSA when it was reimposed in 2010. The court's final refusal to exercise discretion to correct that error was truly unconscionable, because the error is jurisdictional Moreover, Petitioner is the precise type of low-level crack defendant, disadvantaged by the original 100:1 powder:crack disparity, whom Congress targeted in both the FSA and the First Step Act.

If "abuse of discretion" review in Section 404 proceedings is to have any meaning, there has to be case *some case* where maintaining a prior sentence is substantively unreasonable. And indeed, as Petitioner argued below, maintaining his 2010 life sentence which (as thereafter clarified by *Dorsey* and Hinds) was illegal-when-reimposed, is such a case. The Court should so find here.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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