

No. 23-5556

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IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM L. GLADNEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in declining to reduce petitioner's life sentence for racketeering under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (10th Cir.):

United States v. Gladney, No. 07-1264 (July 27, 2009)

United States Supreme Court:

Gladney v. United States, No. 10-10759 (June 27, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1, at 1-21)<sup>1</sup> is reported at 44 F.4th 1253. The opinion and order of the district court (Pet. App. A2, at 1-35) is not published in the Federal Supplement but is available at 2021 WL 11723875.

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<sup>1</sup> The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the pages using the internal pagination of the documents within the appendix, with the first page of the document in "Appendix 1" as Pet. App. A1, at 1, the first page of the document in "Appendix 2" as Pet. App. A2, at 1, and the first page of the document in "Appendix 3" as Pet. App. A3, at 1.

## JURISDICTION

The judgment of the court of appeals was entered on August 15, 2022. A petition for rehearing was denied on April 21, 2023 (Pet. App. A3, at 1). The petition for a writ of certiorari was filed on July 18, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and 1963(a); conspiring to distribute more than 50 grams of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) and 846; and using, carrying, or possessing a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) and (2). Pet. App. A1, at 1-2. The district court sentenced petitioner to concurrent terms of life imprisonment on the RICO and drug-conspiracy counts, and a consecutive ten-year term of imprisonment on the firearm count, to be followed by five years of supervised release. Id. at 2; Sent. Tr. 11-12. The court of appeals affirmed, 573 F.3d 1011, and this Court denied a petition for a writ of certiorari, 564 U.S. 1045.

After the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (First Step Act or Act), petitioner moved for a sentence reduction under Section 404 of the Act. The district court denied the motion, Pet. App. A2, at 33, and the

court of appeals dismissed petitioner's appeal for lack of standing, Pet. App. A1, at 2.

1. In 2004, petitioner joined a large crack-dealing ring operating out of the Alpine Rose Motel in Denver, Colorado. See Pet. App. A2, at 2-3. At the operation's peak in 2004, approximately 100 customers visited each day. Pet. App. A1, at 3. A "conservative[] estimate[]" of the amount of crack cocaine that petitioner and his co-conspirators sold that year is 8.4 to 25.2 kilograms. Ibid.

In October 2004, one of petitioner's customers complained that "he had been shorted" during a recent transaction. Pet. App. A1, at 3 (citation omitted). Petitioner "responded by shooting and killing" the customer because, in petitioner's words, he wanted "to set an example for other 'punks.'" Ibid. (citation omitted). Police ultimately apprehended petitioner for the murder. Ibid.

2. Petitioner was charged with three separate offenses stemming from his activities at the Alpine Rose: violating the RICO Act, see 18 U.S.C. 1962(c) and 1963(a); conspiring to distribute more than 50 grams of crack cocaine, see 21 U.S.C. 841(a)(1) and (b)(1)(A) and 846; and using a firearm in relation to a drug-trafficking crime, see 18 U.S.C. 924(c)(1) and (2). Pet. App. A1, at 1-2. Petitioner's RICO charge was based on several underlying acts, including the drug conspiracy and petitioner's first-degree murder of his customer. Presentence Investigation Report (PSR) ¶ 45. The case proceeded to trial, and the jury found

petitioner guilty on each count, including the separate racketeering acts enumerated in the second superseding indictment. Pet. App. A1, at 4.

Before sentencing, the Probation Office calculated petitioner's Sentencing Guidelines range to be life imprisonment, plus a mandatory consecutive sentence of ten years on the firearm count. PSR ¶ 59, 109. In arriving at that calculation, the Probation Office grouped the racketeering and drug-conspiracy counts together and applied a Guideline specifying offense levels for first-degree murder. PSR ¶ 46; see Sentencing Guidelines § 2A1.1 (2006). The district court accepted the Probation Office's calculations and sentenced petitioner to two concurrent terms of life imprisonment on the RICO and drug-conspiracy counts and a term of ten years of imprisonment on the firearm count, to be served consecutively to the other terms of imprisonment, all to be followed by five years of supervised release. Pet. App. A1, at 6; Sent. Tr. 11-12.

Although petitioner asked the district court to vary downward from the applicable Guidelines range and impose a sentence of 360 months, the court rejected that request. Sent. Tr. 19. The court observed, inter alia, that petitioner's crimes "are so serious, are so substantial, are so dangerous, that the guidelines anticipate an extensive sentence to address them." Id. at 10.

The court of appeals affirmed petitioner's convictions, 573 F.3d 1011, and this Court denied a petition for a writ of certiorari, 564 U.S. 1045 (2011).

3. In 2020, petitioner filed a motion for a reduced sentence under the First Step Act. Section 404 of the First Step Act 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." First Step Act § 404(a), 132 Stat. 5222 (citation omitted). 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 five grams, respectively, to 280 and 28 grams). See Terry v. United States, 141 S. Ct. 1858, 1862-1863 (2021).

The district court denied petitioner's motion. Pet. App. A2, at 26. The court agreed that petitioner's drug-conspiracy conviction constituted a "covered offense" under Section 404(a) of the Act, and that petitioner was therefore "eligible for First



Step Act relief.” Id. at 26; see id. at 21. But the court observed that petitioner still had a concurrent life sentence on the RICO count, which the court explained was not a covered offense. Id. at 10. The court thus reasoned that even if it reduced petitioner’s life sentence on the drug-conspiracy count, “such reduction would be only of a technical or symbolic nature because the life sentences [on the RICO count] would continue to control the length of [petitioner’s] incarceration.” Ibid.

The district court also rejected petitioner’s contention that his sentence on the RICO count was itself subject to reduction on the theory that it was based on a drug quantity that no longer required the imposition of a life sentence following the First Step Act. Pet. App. A2, at 11-12. The court explained that “[t]he record at trial established that the drug conspiracy involved the distribution of kilogram-sized quantities of crack on a daily basis for months, well more than the 280 grams necessary to permit the imposition of a life sentence.” Id. at 12.

The district court further stated that even putting that impediment aside, it would deny petitioner’s motion. Pet. App. A2, at 14. The court observed that because the RICO count and drug-conspiracy count were grouped together, the quantity of crack involved had no impact on his total offense level. Id. at 21-22. Instead, petitioner’s offense level was dictated entirely by the first-degree murder. Id. at 22. The court thus determined that petitioner’s “Guideline calculation would be exactly the same

today as it was in 2007, and thus, the First Step Act offers [him] no actual relief.” Ibid. And it added that “even if the Court were to de-couple [the drug-conspiracy count] from [the RICO count] and calculate [petitioner’s] sentence on [the conspiracy count] independently, the result would be the same,” based on the evidence at trial of the amount of crack cocaine involved and additional enhancements under the Guidelines. Ibid.

The district court also stated that based on “the scale and brazenness of the operation, as well as [petitioner’s] culpability for the murder of [his customer], among other factors,” it still would have “impose[d] a life sentence.” Pet. App. A2, at 23. It found such a sentence “appropriate for the lengthy, extensive, and deadly conduct of which [petitioner] was convicted.” Ibid.

4. The court of appeals dismissed petitioner’s appeal for lack of standing. Pet. App. A1, at 1-21. Noting that petitioner did not contend that his RICO offense was itself a covered offense under Section 404, the court “assume[d], without deciding,” that it was not. Id. at 15 & n.4. The court then construed its prior decision in United States v. Mannie, 971 F.3d 1145 (10th Cir. 2020), to establish that “the First Step Act prohibits a district court from reducing the sentence on a non-covered offense, even if \* \* \* the covered and non-covered offenses were grouped together under the Sentencing Guidelines and the covered offense effectively controlled the sentence for the non-covered offense.” Pet. App. A1, at 19. And because “Mannie precluded the district

court from reducing the sentences on [petitioner's] non-covered offenses," the court held that petitioner's injury was not redressable and that his "motion for reduction of sentence under the First Step Act 'does not present a live controversy.'" Id. at 20-21 (citation omitted). And while questioning the soundness of the precedent that required it to frame its disposition as a matter of "jurisdiction," the court accordingly determined that it lacked jurisdiction over petitioner's appeal. Ibid.; see ibid. n.7.

5. Petitioner filed a petition for rehearing. Pet. App. A3, at 1. The court of appeals requested a response from the government, and the government informed the court of its position that although Section 404 "allows courts to reduce sentences for non-covered offenses" in a "narrow subset of cases" involving intertwined sentence packages, petitioner's case did not fall within that subset and did not otherwise warrant rehearing. Gov't C.A. Resp. to Pet. for Reh'g 2. The court subsequently denied rehearing.

#### ARGUMENT

Petitioner renews his contention (Pet. 11-18) that Section 404 of the First Step Act authorizes a sentence reduction for his RICO offense because that offense was "grouped" with the covered conspiracy offense for sentencing purposes. Although the government agrees that Section 404 can, in appropriate circumstances, allow a district court to reduce the sentences for noncovered offenses that were imposed in a package with a covered

offense, this is not such a case, because the life sentence petitioner received on the RICO count was imposed in light of the first-degree murder, not the quantity of crack cocaine. In any event, the district court made clear that irrespective of the issue that petitioner raises, it would still decline to exercise its discretion to reduce petitioner's sentence based on the high quantity of crack cocaine that he dealt and the severity of his conduct. Pet. App. A2, at 22. Thus, while some disagreement exists in the courts of appeals on the extent of a district court's authority under Section 404 to reduce a sentence for a noncovered offense, this case would be an unsuitable vehicle in which to review that issue, which in any event would not warrant this Court's review at this time. This Court has recently denied a petition for a writ of certiorari presenting a similar question. Contrera v. United States, 143 S. Ct. 511 (2022) (No. 21-8111). It should follow the same course here.<sup>2</sup>

1. Section 404 of the First Step Act permits a district court to impose a reduced sentence for an offender "only if he previously received 'a sentence for a covered offense.'" Terry v. United States, 141 S. Ct. 1858, 1862 (2021) (quoting First Step Act § 404(b), 132 Stat. 5222). Section 404(a) defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of

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<sup>2</sup> A similar question is pending in Files v. United States, No. 22-1239 (filed June 22, 2023).

the Fair Sentencing Act of 2010, that was committed before August 3, 2010.” First Step Act § 404(a), 132 Stat. 5222 (citation omitted). Sections 2 and 3 of the Fair Sentencing Act, in turn, prospectively amended certain provisions of the drug laws, increasing the amounts of crack cocaine necessary to trigger certain statutory penalties. See Fair Sentencing Act §§ 2-3, 124 Stat. 2372; Dorsey v. United States, 567 U.S. 260, 273 (2012).

In appropriate circumstances, Section 404 authorizes a district court to reduce a sentence for a noncovered offense to the extent that the noncovered offense formed part of a single, integrated sentencing package with a covered offense. See Gov’t Br. at 32, Concepcion v. United States, 597 U.S. 481 (2022) (No. 20-1650). As a general matter, when the record indicates that the sentencing court imposed what was effectively a single intertwined sentence that took into account the defendant’s convictions for both a covered offense and a noncovered offense, then reducing the defendant’s sentence for the noncovered offense is consistent with the text and purpose of Section 404 of the First Step Act. Section 404 authorizes a sentencing court to “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act” had been in effect at the time of the covered offense. First Step Act § 404(b), 132 Stat. 5222. In sentencing-package cases, the court in essence imposes a single “sentence,” ibid., and revisiting the entire “sentence” may be appropriate to put the defendant in the position

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

2. Such approach, however, would not benefit petitioner here. As the district court explained, petitioner's offense level was dictated entirely by the first-degree murder that formed part of the basis for the RICO charge, not the quantity of crack cocaine involved in the motel operation. See Pet. App. A2, at 21-22.

In any event, even if the district court erred in declining to resentence petitioner, any such error was harmless. The district court explained that the evidence at trial established that petitioner conspired to deal 8.4 kilograms or more of crack cocaine, which corresponds to a Guidelines range of 360 months to life imprisonment. Pet. App. A2, at 12, 22. And the court found that within that range, the seriousness of the offense, coupled with petitioner's brazenness, continued to warrant a life sentence. Id. at 23.

3. Petitioner contends (Pet. 8-18) that the courts of appeals are divided on the question whether Section 404 authorizes a sentence reduction for a noncovered offense, at least to the extent that the noncovered offense formed part of an integrated sentencing package with a covered offense. The government addressed the then-current state of circuit precedent in its brief in opposition in Contrera, 143 S. Ct. 511 (No. 21-8111), see Br. in Opp. at 19-22, Contrera, supra (No. 21-8111), and explained why any disagreement within the courts of appeals did not warrant this

Court's review at that time. Petitioner offers no compelling additional reason why this Court's review is now warranted. Although some tension exists in the case law, petitioner overstates the degree of disagreement and its practical significance.

Petitioner relies (Pet. 6-11) primarily on the Seventh Circuit's decision in United States v. Hudson, 967 F.3d 605 (2020). In Hudson, the Seventh Circuit concluded that a district court was authorized under Section 404 to reduce a sentence for both covered crack-cocaine offenses and noncovered firearms offenses because the latter were "grouped with [the offender's] covered offenses for sentencing" and resulted in an "aggregate sentence" comprising all the offenses. Id. at 610. The court explained that construing Section 404 in that manner "aligns with the text" of the statute and "comports with the manner in which sentences are imposed" in certain cases. Id. at 610-611. Although the Tenth Circuit's decision in this case is at odds with Hudson, that shallow circuit disagreement does not warrant this Court's review.

The other decisions that petitioner identifies (Pet. 10-12, 14-17) do not establish a square conflict of authority warranting further review at this time. Petitioner asserts (Pet. 10) that the Fourth and Sixth Circuits "would follow Hudson[]," but he offers no sound reason why the cases that he cites, addressing other issues, would require those circuits to do so. Indeed, one of the cases that petitioner cites, United States v. Gravatt, 953 F.3d 258 262 (4th Cir. 2020), did not even involve multiple

offenses, but instead concerned a single conspiracy. Gravatt therefore had no occasion to consider the question presented here, which could arise only in a multiple-conviction case.

Petitioner's reliance on decisions from the Second and Eleventh Circuits is similarly misplaced. Contrary to petitioner's assertions, the Second Circuit has not conclusively foreclosed the possibility that Section 404 may authorize a sentence reduction for noncovered offenses in certain cases involving sentencing packages. See Br. in Opp. at 16-19, Contrera, supra (No. 21-8111) (discussing United States v. Young, 998 F.3d 43, 55 (2d Cir. 2021) and United States v. Martin, 974 F.3d 124, 130, 137 (2d Cir. 2020)). And although United States v. Files, 63 F.4th 920, 931 (11th Cir. 2023), petition for cert. pending, No. 22-1239 (filed June 22, 2023), reached the same conclusion that the court of appeals here did regarding a district court's authority to reduce the sentence of a non-covered offense, it did so in a case where the government contended that the defendant's sentences were not part of "one global sentence." Br. in Opp. at 11-12, Files, supra (No. 22-1239). The Eleventh Circuit could accordingly decide to consider the question presented en banc in an appropriate case involving intertwined sentences.

4. The question whether Section 404 authorizes a district court to reduce a sentence for a noncovered offense that was imposed as part of an intertwined sentencing package with a covered offense does not warrant further review, particularly in this case.



As demonstrated above, any disagreement within the courts of appeals is shallow. The issue is also of declining prospective importance and not outcome-determinative here.

The issue can only possibly arise for the ever-dwindling set of defendants who remain incarcerated for crack-cocaine offenses for whom a sentence was imposed before August 3, 2010 (the effective date of the Fair Sentencing Act), and for whom Section 404 proceedings have not yet concluded (after which a new proceeding would be precluded). See First Step Act § 404(b) and (c), 132 Stat. 5222. And within that set of defendants, the issue can only arise if the defendant was sentenced in the same proceeding on both a covered offense and a noncovered offense, and only if the sentence imposed for the noncovered offense has not yet been fully discharged by the time of the Section 404 proceedings. Moreover, even if a court has authority under Section 404 to reduce the sentence for a noncovered offense in some circumstances, the court is never obligated to exercise it in any particular case; the sentence reductions authorized by Section 404 are expressly discretionary. See § 404(c), 132 Stat. 5222. Petitioner has therefore not shown that the sentencing-package question is likely to arise, or -- unlike in his case -- affect the outcome, in any significant number of cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2023

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\* The Solicitor General is recused in this case.