NO: 23-5755

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

DEWAYNE JOSEPH,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

REPLY BRIEF OF THE PETITIONER

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I. This Court Should Grant the Petition for Writ of Certiorari to Resolve the Circuit Conflict Regarding Whether District Courts are Required to Calculate the Revised FSA Guidelines to Properly Exercise Their Discretion Under FSA §404(b).

The government does not dispute that there is a circuit split regarding whether a district court must calculate reduced guidelines when exercising its discretion to grant relief under §404(b) of the First Step Act of 2018 ("FSA"), Pub. L. No. 115-391, §404(b), 132 Stat. 5222. *See* Govt br. at 13-15. At present, at least five circuits require as an initial step that the new FSA reduced guidelines be calculated before turning to the other discretionary factors. *United States v. Shields*, 48 F.4th 183 (3rd Cir. 2022); *United States v. Collington*, 995 F.3d 347 (4th Cir. 2021); *United States v. Troy*, 64 F.4th 177, 184 (4th Cir. 2023); *United States v. Corner*, 967 F.3d 662 (7th Cir. 2020); *United States v. Blake*, 22 F.4th 637, 642 (7th Cir. 2022); *United States v. Miedzianowski*, 60 F.4th 1051 (7th Cir. 2023); *United States v. Holder*, 981 F.3d 647 (8th Cir. 2020); *United States v. Shephard*, 46 F.4th 752, 756 (8th Cir. 2022); *United States v. Burris*, 29 F.4th 1232, 1235 (10th Cir. 2022). As demonstrated in Petitioner's case, the Eleventh Circuit does not require such a calculation. *See also, Gonzalez v. United States*, 71 F.4th 881 (11th Cir. 2023), *cert denied*, S.Ct. No. 23-226, 2024 WL 71934 (Jan. 8, 2024).

The government also does not dispute that such a requirement is necessary pursuant to FSA §404(b). Rather, the government acknowledges 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,'" and that the FSA 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." (Gov't br. at p. 13-14, *citing Concepcion v. United States*, 597 U.S. 481, 498 (2022)).

However, the government argues that the circuit split is not implicated in petitioner's case because the district court "assumed that petitioner's proffered Guidelines range was the correct one" for First Step Act purposes. (Govt br. at p. 11). This is not correct. While the district court acknowledged petitioner's arguments regarding a reduced sentence, it explicitly refrained from deciding the proper guideline range under the First Step Act. *United States v. Joseph*, D.Ct. No. 10-cr-20511 (June 17, 2021). After summarizing the parties' respective positions it stated:

> Regardless of whether the relevant quantity of crack cocaine is five grams or 30.3 grams, after considering the sentencing factors under 18 U.S.C. §3553(a), the Court declines to exercise its discretion to reduce Defendant's sentence.

Id.

Based on the district court's failure to decide the issue, the Eleventh Circuit initially recognized that the case implicated the circuit split. *United States v. Dewayne Joseph*, 11th Cir. No. 21-12222, 2022 WL 1008838, *3 (Apr. 4, 2022). After *Concepcion* issued, the Eleventh Circuit reworded its decision to avoid the circuit split. *United States v. Joseph,* 11th Cir. No. 21-12222, 2023 WL 4446356, *4 (July

11, 2023). Regardless of the rewording of the Eleventh Circuit's decision, however, it is clear that the district court did not come to a conclusion about the proper guideline range, and that is in violation of the FSA, *Concepcion*, and the five circuits that require as an initial matter, that the district court properly calculate the FSA guideline range for §404(b) motions.

The Government also attempts to avoid the circuit split by relying on the harmless error doctrine. However, the breadth of the doctrine that the government asserts is in conflict with other circuits that have considered harmless error in the §404(b) context. *See e.g., Burris*, 29 F.4th at 1235 ; *Blake*, 22 F.4th at 642. Both *Burris* and *Blake* agreed that harmlessness could obviate the need to correct an error in a §404(b) proceeding. However, both courts also concluded that a failure to come to a new reduced FSA benchmark guideline range would not generally be amendable to harmlessness review because such a failure indicated that the court's overall sentencing analysis, even with respect to other discretionary factors, was ambiguous and skewed. Likewise, the government's reliance on *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1349 (2016) for its harmlessness argument is misplaced. Although *Molina-Martinez* affirms harmlessness review for sentencing errors, it notes that an "error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." 136 S.Ct. at 1345. And although *Molina-Martinez* finds harmlessness as a viable ground for affirmance in a narrow group of cases, it requires that there be a sufficient explanation establishing the

court's rationale for such a sentence in spite of the error. *Id.* at 1346-47. The type of detailed explanation necessary to excuse such fundamental error was not present in petitioner's case.

Moreover, the government's more broad harmless error standard itself raises a new and different circuit split on the §404(b) issue. *Burris*, 29 F.4th at 1235 (court found that failure to calculate reduced FSA guideline was "by its very nature, [] not harmless"); *Blake*, 22 F.4th at 642 (court found that harmless error did not excuse district court's failure to calculate reduced FSA guideline). Furthermore, the government's arguments for such broad application of the harmless error doctrine in the §404(b) context (see Govt br. p. 16) is indicative of the far-reaching implications of this case such that the government cannot classify the circuit conflict herein as shallow or lacking in practical significance." (Govt p. 17). The circuit split presented in this case is deep and significant, and petition for writ of certiorari should be granted to solve this important disputed federal question.

II. This Court Should Grant the Petition for Writ of Certiorari to Resolve the Circuit Conflict Regarding Whether District Court Orders Can Be Construed as Assuming a Revised FSA Guideline Calculation When Those Orders State That They Are Not Making Such a Decision.

The government also attempts to cast petitioner's second issue as a fact-bound inquiry. It, therefore, claims that the issue has no "prospective significance for future cases." (Govt br. at 18). However, this is a misconstruction of the defendant's argument. Although there may be slight factual variations between

petitioner's case and other circuit cases such as *Burris* and *Blake*, the principle being addressed in these cases is a legal issue. Both *Burris* and *Blake* have found that a district court's consideration of multiple guideline ranges without a final determination as to which one governs constitutes a failure to make a decision, and such failure violates FSA §404(b). The Eleventh Circuit is in conflict with those circuits because it deems consideration of multiple guideline ranges as an implicit adoption of the most beneficial range, even when the district court explicitly states that it is not making any decision about which guideline range is actually the proper one.

To make its argument, the government attempts to distinguish *Burris* and *Blake*. However, it cannot do so because in both *Burris* and *Blake*, the district courts did exactly what was done in petitioner's case. The district courts considered multiple guideline ranges that the parties argued for, but ultimately decided the issues were too difficult to resolve. Thus, the district courts in *Burris* and *Blake* shifted over to the easier discretionary factors under §3553(a) to deny relief.

This basic common circumstance was apparent as evidenced in the *Burris* decision which found:

> [T]he district court 'looked at both proposed [G]uidelines ranges and concluded that it would deny the motion under either [G]uidelines range.' . . . . [T]he district court stated it would deny relief 'whatever the [] result' of the correct Guidelines calculation.

Burris, 29 F.4th at 1238.

Likewise, the *Blake* court found:

> The district court . . . decided not to resolve the drug-quantity dispute. It noted the different guideline ranges that could result from the proposed drug quantities, but it explained: . . . . 'the determination of drug quantities . . . is difficult to resolve.' Both the 1.5- and 13-kilogram figures were flawed. . . but it would not be 'sensible' to 'step into the mire of drug quantities.' The [district] court therefore proceeded directly to assessing whether, as a matter of its discretion, Blake deserved a reduced sentence.

Blake, 22 F.4th at 640.

In *Burris* and *Blake*, however, the district courts' decisions not to make a decision was reversible error. It should be the same in the Eleventh Circuit for a proper application of FSA §404(b). Accordingly, the government's arguments are not well taken. This Court should grant the petition for writ of certiorari and resolve the circuit conflicts that are at issue for the uniform and fair application of FSA §404(b).

Respectfully submitted,

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