No. 24-

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY HOLLAND,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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February 7, 2024

QUESTIONS PRESENTED

In *Concepcion v. United States*, 597 U.S. 481, 142 S. Ct. 2389, 2404 213 L. Ed. 2d 731 (2022), this Court held that the First Step Act "allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." 597 U.S. at 500. This Court also held in *Concepcion* that "[t]he only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution." *Id.* at 494.

Whether consistent with this Court's decision in *Concepcion*, and following a defendant's request, a district court *can refuse* to review intervening changes in facts – arising from a trial transcript available only after the original sentencing – which contradict and undermine presentence report findings that the original sentencing court used to apply a sentence enhancement leading to life imprisonment for the distribution of 1.5 kilograms of crack cocaine.

Whether the district court failed to follow the Court's directives to sentence defendant based on accurate information available from a variety of sources.

Whether the re-imposition of a life sentence based on a murder cross-reference, following a jury's failure to reach a verdict on the murder count, violates the Fifth and Sixth amendment rights to due process, fair trial and trial by jury.

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellant below, is Jeffrey Holland.

The Respondent, the appellee below, is the United States of America.

RELATED PARTIES AND PROCEEDINGS

This case raises the same issues as Petitioner's co-defendant Harvey Holland raises and the Third Circuit consolidated the two cases for purposes of disposition (court of appeals docket entry 26):

United States v. Harvey Holland, No. 22-2764 (3d Cir.) and No. 1:01-CR-00195-006 (M.D.P.A.).

Harvey Holland filed a petition for *certiorari* on December 29, 2023, docketed at No. 23-6418.

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PETITION FOR A WRIT OF *CERTIORARI*

The petitioner, Jeffrey Holland, petitions this Court for a writ of *certiorari* to review the final order of the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion affirming the district court judgment is not reported but is available at 2023 WL 6635072; the Third Circuit's order denying rehearing is not reported. Petition Appendix ("Pet. App.") 1a-12a. The memorandum order of the U.S. District Court for the Middle District of Pennsylvania is unreported but available at 2022 WL 4096874. Pet. App. 16a-52a.

JURISDICTION

The district court had jurisdiction over Petitioner's case under 18 U.S.C. § 3231 and jurisdiction to consider his motion under 18 U.S.C. § 3582(c)(1)(B) and § 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222. The Third Circuit had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

This Court has jurisdiction under 28 U.S.C. § 1254(1), as Petitioner is filing this Petition within 90 days of the Third Circuit's decision denying rehearing (Pet. App. 1a-2a), following its affirmance of the district court decision. *See* Sup. Ct. R. 13.1, 13.3., 29.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

U.S. Const. amend. V.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation * * * and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The relevant portion of Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222, codified at 21 U.S.C. § 841 note, provides:

> (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.

INTRODUCTION

A longstanding tradition for federal sentencing in this nation is that judges have broad discretion in the kind of information and sources of information that they may consider at sentencing. *Concepcion v. United States*, 597 U.S. 481, 491 (2022) (citing *Dean v. United States*, 581 U.S. 62, 66 (2017)); *see also United States v. Tucker*, 404 U. S. 443, 446 (1972); *Williams v. New York*, 337 U. S. 241, 246 (1949). Whether a defendant appears for sentencing or resentencing, the sentencing court considers the defendant on that day, not on the date the offense occurred or the date of conviction. *Pepper v. United States*, 562 U. S. 476, 492 (2011). Due process requires that a defendant's sentence rest on accurate facts. *Koon v. United States*, 518 U. S. 81, 113 (1996); *Townsend v. Burke*, 334 U.S. 736, 741 (1948).

Against this backdrop, Congress enacted the First Step Act of 2018 which, among other things, authorizes courts to reduce certain sentences imposed under the former "100-to-1" crack-to-powder-cocaine sentencing ratio.

Petitioner Jeffrey Holland was convicted in 2002 of conspiracy to possess with intent to distribute more than 50 grams of crack, in violation

of 21 U.S.C. §§ 846 and 841, and possession of a firearm, in violation of 18 U.S.C. §§ 924(c) & 2. Although the jury expressed difficulty in calculating the specific drug quantity at issue, the presentence report ("PSR") attributed 1.5 kilograms of crack to Mr. Holland, based on the unsworn statements of co-conspirators. PSR at 23 (Addendum to the PSR 10/10/02).

The government had also charged Mr. Holland with use of a firearm in relation to a drug crime resulting in a murder. The jury did not reach a verdict on that count, and the government later dismissed it. Despite that lack of a jury finding, the PSR recommended applying the murder cross-reference, which led to a Guidelines sentence of life (PSR ¶ 113) and a statutory sentence of mandatory life because of prior felony drug convictions (PSR ¶¶ 4 & 112). The district court adopted the PSR over objection and sentenced Mr. Holland to serve life in prison.

In 2019, Mr. Holland moved for a reduction in sentence pursuant to the First Step Act. The First Step Act does not require the district court to reduce any sentence. But in *Concepcion*, the Court held that the First Step Act allows district courts to consider intervening changes of law or

fact in exercising their discretion to reduce a sentence pursuant to the Act. 597 U.S. at 486, 500.

This Court wrote in *Concepcion* that, "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." 597 U.S. at 486-87. Nothing in § 404 of the First Step Act contains such a limitation. 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 when parties raise them." *Id.* at 501.

In his First Step Act motion, Petitioner cited changed circumstances, chief among them the intervening availability of the trial transcript, which was prepared only after the original sentencing. Facts within that transcript contradicted many of the sentencing court's factual findings, which it used to support the sentence enhancement for murder, despite the not guilty verdict on that count. The district court did not grant First Step Act relief, affirming Mr. Holland's life sentence.

In failing to grant relief, the district court agreed that the original sentencing court did not have access to the trial transcript at sentencing (Pet. App. 31a), but held that it was prohibited from considering intervening facts regarding the murder cross-reference enhancement: "[T]he Court cannot, and will not, review the specific facts underlying the sentencing court's decision from twenty years ago that the USSG § 2A1.1 [murder cross-reference Guideline] enhancement applied." Pet. App. 32a. Similarly, the court stated that it was prohibited from reviewing the amount of crack cocaine the PSR attributed to Mr. Holland (Pet. App. 39a-40a), as well as balancing factors under 18 U.S.C. § 3553 (Pet. App. 47a).

The district court either misinterpreted this Court's First Step Act precedents or defied them. The lower court's decision is irreconcilable with this Court's holding in *Concepcion*. So, too, is the Third Circuit's affirmance, which perpetuates the misinterpretation (or defiance) and permits a life sentence – that rested on unsworn co-conspirator statements in a PSR later contradicted by a trial transcript – to stand.

This Court should grant a writ of *certiorari* to make clear that, at the request of a First Step Act defendant, sentencing courts must review

intervening facts that call into question the continued legitimacy of sentencing enhancements and factors upon which the initial sentencing court relied. Nothing in the First Step Act prohibits a court from reviewing a newly available trial transcript, nor relieves a court from reviewing a 20-year-old sentence.

STATEMENT OF THE CASE

A. Legal Background

1. Federal law imposes mandatory minimum penalties for drug offenses based on drug quantity. *See* 21 U.S.C. 841(b). For many years, "Congress set the quantity thresholds far lower for crack offenses than for powder offenses." *Terry v. United States*, 593 U.S. 486, 488 (2021). When Mr. Holland was sentenced in 2002, the ratio of those thresholds was 100 to 1. In other words, "an offender convicted of possessing with intent to distribute 500 grams of powder cocaine" and "an offender convicted of possessing with intent to distribute 5 grams of crack" both faced the same five-year minimum penalty. *Dorsey v. United States*, 567 U.S. 260, 263-264 (2012).

2. In 2010, Congress passed the Fair Sentencing Act to ameliorate that disparity on a prospective basis. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372. Section 2(a) of the Fair Sentencing Act "increas[ed] the crack quantity thresholds from 5 grams to 28 for the 5-year mandatory minimum and from 50 grams to 280 for the 10-year mandatory minimum." *Terry*, 593 U.S. at 491; *see* Pub. L. No. 111-220, § 2, 124 Stat. 2372. But the Fair Sentencing Act did not apply retroactively to

individuals, such as Mr. Holland, who had committed their offenses before enactment.

3. In 2018, Congress fixed that additional disparity when it enacted the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194. Section 404(b) of the First Step Act made the relevant provisions of the Fair Sentencing Act retroactive, allowing courts to "impose[]" a reduced sentence "as if " the revised penalties for crack cocaine were in effect at the time the offense was committed. *Id.*; *see Terry*, 593 U.S. at 491.

4. In *Concepcion*, the Court resolved a conflict among the courts of appeals "as to whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact" (597 U.S. at 490), deciding that they *may* (*id.* at 486, 500). It reiterated, however, that district courts in exercising their discretion to grant or deny relief *must* consider all nonfrivolous arguments made by movants based on "intervening changes of law or fact." *Id.* at 500-01. The Court also made clear that there are no restraints on the scope of information a district court may consider apart from any limitation that Congress or the Constitution may have placed. *Id.* at 486-87.

5. The Court added that "[i]t follows, under the Court's sentencing jurisprudence, that when deciding a First Step Act motion, district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments." *Id.* The Court also observed that "the First Step Act directs district courts to calculate the [Sentencing] Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense," because the Guidelines range should " 'anchor[]' the sentencing proceeding." *Id.* at 498 n.6 (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013)).

B. Factual and Procedural Background

1. Mr. Holland was charged with distribution and possession with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), and conspiracy to do so, in violation of 21 U.S.C. § 846. Mr. Holland was also charged with use of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. §§ 924(c) & 2, and with causing the death of another through the use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(j).

2. Informants and co-conspirators provided unsworn statements to law enforcement claiming to tie Mr. Holland to the murder. But under

oath at trial, these witnesses' stories were very different. Based on the evidence the government presented, the jury was unable to reach a verdict on the § 924(j) murder charge. The district court declared a mistrial, and the government eventually moved to dismiss that count. Pet. App. 53a ("The defendant has been found not guilty of count(s) 4SS.").

3. The jury found Mr. Holland guilty of the drug-trafficking and drug conspiracy counts, as well as the use of a firearm. The probation officer's presentence report ("PSR") recommended a finding that a victim was killed during Mr. Holland's drug trafficking crime under circumstances constituting murder under 18 U.S.C. § 1111. That finding triggered Sections 2D1.1(d)(1) and 2A1.1 of the U.S. Sentencing Guidelines, which required a Guidelines sentence of life imprisonment. U.S.S.G. § 2A1.1 & 2D1.1(d)(1) (2002); PSR ¶¶ 47 & 113.

4. Mr. Holland objected, noting that in recommending the finding that he was involved in a murder, the probation officer was relying on the government's version of events and unsworn co-conspirator statements in police investigation reports – not trial testimony. At the time, the transcript of the trial had not been prepared. The sentencing

court overruled the objection and, in reliance upon probation's PSR, applied the cross-referenced murder enhancement, and ordered that Mr. Holland serve the remainder of his life in prison. Pet. App. 54a.

5. Mr. Holland moved for resentencing under the First Step Act. First, he asserted that under *Concepcion* there had been changes in circumstances since the time of his original sentencing hearing. Namely, the trial transcript – which was not available at the time of sentencing – showed that the fact statements the witnesses made at trial regarding the murder contradicted many of the statements the PSR attributed to those same witnesses and upon which the district court relied when applying the murder cross-reference.

6. Second, beyond simply citing the intervening facts, Petitioner objected to the sentencing court's use of information that the record now showed to be inaccurate or plainly false. Third, Petitioner asserted that his Fifth and Sixth Amendment rights were violated as a result of a sentence for an offense (murder) for which the jury could not reach a verdict and the judgment stated he was "not guilty." Pet. App. 53a.

7. In response to Mr. Holland's First Step Act motion, the government urged the district court to deny the requested relief, relying

on the PSR and sentencing order from the time of the conviction, twenty years before. It ignored the newly available trial transcript, replete with facts contradicting and undermining the PSR and the original sentence, arguing that the sentencing court could not reconsider the facts as they stood at the initial sentencing.

8. The district court granted Mr. Holland's motion in part, finding him eligible for resentencing, but then rejected his request to reduce his life sentence. In rejecting his request, the court fully credited the facts in the 20-year-old PSR and sentencing order, and expressly found that it did not have the authority to consider the evidence Mr. Holland adduced reflecting intervening facts directly relevant to the historic facts on which the court was relying: "[T]he Court cannot, and will not, review the specific facts underlying the sentencing court's decision from twenty years ago." Pet. App. 32a.

9. The district court also ruled that Petitioner's constitutional rights would not be violated through being sentenced on uncharged or dismissed conduct. *Id.* ("There are no 'Sixth Amendment [or] due process' concerns with a sentencing court considering conduct of which a

defendant has been acquitted or has not been convicted to determine his or her appropriate guidelines range and sentence.").

10. The Third Circuit affirmed the district court on October 12, 2023, and denied rehearing on November 9, 2023. Pet. App. 1a-12a.

REASONS FOR GRANTING THE PETITION

In denying Mr. Holland relief under the First Step Act, the district court (1) ignored or refused to follow the Court's directive in *Concepcion* that courts hearing First Step Act motions must consider intervening facts and law if requested, (2) affirmed the previous life sentence in reliance upon inaccurate facts which the unassailably accurate intervening trial transcript brought to light, and (3) imposed a sentence that violated the Fifth and Sixth Amendments by including an increase in sentence based on the murder allegation and § 924(j) charge for which the jury could not reach a verdict and which the court subsequently dismissed.

a. The Court should grant *Certiorari* to address and resolve the district court's refusal to follow the Court's precedent in *Concepcion* by expressly ruling it cannot review the specific facts underlying the original sentence despite intervening changes.

In its opinion affirming Mr. Holland's life sentence, the district court concluded that it "cannot, and will not, review the specific facts underlying the sentencing court's decision from twenty years ago" (Pet. App. 32a), a review which Mr. Holland asked it to do in light of the intervening transcript with its conflicting facts. The court ruled as if *Concepcion* and its directive – that "the First Step Act requires district

courts to consider intervening changes when parties raise them" (*id.* at 486) – did not yet exist.

When a district court *recognizes its sentencing discretion* but then denies a reduction or other relief, the appellate courts do not interfere. *See, e.g.*, *United States v. Robertson*, 371 F. App'x 699, 700 (8th Cir. 2010) (involving district court recognizing discretion under *Kimbrough v. United States*, 552 U.S. 85 (2007), and 18 U.S.C. § 3553(a)). But when, as here, a district court contrary to law *does not recognize its sentencing discretion* and denies relief believing it cannot consider prior facts in light of intervening contrary facts, remand is appropriate. *See United States v. Gibbs*, 506 F.3d 479, 488 (6th Cir. 2007) (involving district court's failure to recognize discretion to impose concurrent sentences); *United States v. Gozes-Wagner*, 977 F.3d 323, 393 (5th Cir. 2020) ("A district court commits procedural error when it fails to recognize its discretion to vary from the Guidelines.") (citing *Nelson v. United States*, 555 U.S. 350, 352 (2009) (per curiam)).

The First Step Act does not "require a district court to make a point-by-point rebuttal of the parties' arguments," *Concepcion* 597 U.S. at 502, but the district court must demonstrate that it has considered the factors

presented to it in favor of relief. As this Court stated, "All that is required is for a district court to demonstrate that it has considered the arguments before it." *Id.* In this case, the district court demonstrated the opposite – stating that it was refusing to consider Mr. Holland's argument that the intervening availability of the transcript led to a change in factual circumstances, which undermined application of the murder cross-reference in 2002. Pet. App. 32a.

Since 2002, the trial transcript has become available, and it details how the witnesses, whom the PSR cited in support of the murder cross-reference, testified at trial in conflict to what the PSR claimed.[1] Mr. Holland asked the district court to consider these newly available facts.

The district court conceded that the original sentencing court did not have access to the trial transcript at sentencing. Pet. App. 31a. But despite the existence of the newly available facts in the transcript, showing that the factual basis for the original sentence had been

[1] The unsworn investigative statements, upon which probation relied, portrayed Mr. Holland as having admitted his involvement in the murder to witnesses cooperating with the government. PSR at ¶¶ 34, 36, 38-39. These statements that made it into the PSR on which the original judge relied to impose the murder cross-reference. But most of those government witnesses testified very differently at trial. According to the newly available transcript, for example, witness Sharonda Posey testified at trial that Mr. Holland told her that he did *not* murder the victim (Third Circuit Appendix at 283-84), but according to the PSR: "Posey remembered Jeffrey Holland later telling her that he, Harvey Holland, and Anderson shot Harrigan" (PSR at ¶ 36).

profoundly inaccurate, the district court refused to consider and compare them to "the facts underlying the sentencing court's decision from twenty years ago." Pet. App. 32a.

This refusal defies *Concepcion*, which holds that Congress did not place any limitations on district court discretion when considering a sentence reduction pursuant to § 404(b) of the First Step Act. *Concepcion*, 597 U.S. at 497. It also defies previous decisions of the Court. *See, e.g.*, *United States v. Tucker*, 404 U.S. 443, 446 (1972) (stating that a federal judge in deciding to impose a sentence "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."); *Williams v. New York*, 337 U.S. 241, 246 (1949) (finding that when a defendant is sentenced or resentenced, federal courts are granted wide discretion in the sources and types of evidence used to craft appropriate sentences). Further, the district court's refusal ignores *Concepcion*'s directive that the First Step Act "requires" courts to consider nonfrivolous arguments. *Id.* at 487, 501.

The district court relied on a Third Circuit decision, *United States v. Murphy*, instead of on *Concepcion*, in refusing to revisit the underlying

facts of the original sentence. Pet. App. 31a-33a (citing *United States v. Murphy*, 998 F.3d 549, 555 & n.6 (3d Cir. 2021)). In addition, the court suggested that the intervening transcript was irrelevant because the original sentencing judge was present at the trial and based his sentencing on findings independent from the PSR. Pet. App. 31a-32a.

The district court ignored Mr. Holland's argument that, to the contrary, while charging the jury the original judge acknowledged that he did not remember the testimony linking the murder to the drug conspiracy, the requisite factor in order to apply the murder cross-reference enhancement:

> And the government argues that [the victim] was killed in furtherance of that conspiracy to either protect drug territory, to drive out competition or perhaps to collect a drug debt. *I don't remember the testimony on that point.*

Third Circuit Appendix at 639 (italics added). In the absence of independent memory, in 2002 the original sentencing judge relied exclusively on the PSR to find the unproven murder to be in furtherance of the drug conspiracy, in order to enhance the Guidelines range to life; and the judge at the 2022 resentencing found that it had no authority to deviate from that 20-year-old decision.

In sum, the Court's decision in *Concepcion* makes clear that while "[t]he First Step Act does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it," "it does require the court to consider them." 597 U.S. at 502. The district court erred in refusing to consider the intervening facts and Mr. Holland's nonfrivolous arguments. The district court had the discretion to look at this change of circumstances and expressly refused to do so. This decision conflicts with the Court's precedent.

The Third Circuit affirmed that ruling, relying alternately on *Concepcion* and its own decision in *Murphy*, instead of solely on *Concepcion*. Specifically, while it accepted *Concepcion*'s holding regarding changes in law, it ignored the part of *Concepcion*'s holding that sentencing courts may consider intervening changes of *fact* in exercising their discretion (*id.* at 500), and must consider intervening *changes of fact* when parties raise them (*id.* at 486-87):

> When exercising its discretion to resentence a defendant under the First Step Act, a district court must consider any changed circumstances raised by the parties, *Concepcion*, 142 S. Ct. at 2404, including (1) "new, relevant facts that did not exist, or could not reasonably have been known by the parties, at the time of the first sentencing," *Murphy*, 998 F.3d at 555, (2) intervening changes in the law, such as nonretroactive Guidelines amendments, *Concepcion*, 142 S. Ct. at 2403-04,

> (3) post sentencing developments, such as rehabilitation, prison misconduct, or health issues, [*United States v.*] *Shields*, 48 F.4th [183] at 190 [(3d Cir. 2022)], and (4) the § 3553(a) factors, *Murphy*, 998 F.3d at 555. While it is "not required to be persuaded by every argument [the] parties make," a district court "bear[s] the standard obligation" to "consider the parties' nonfrivolous arguments" and "explain [its] decision []." *Concepcion*, 142 S. Ct. at 2404. The District Court complied with these requirements. It correctly held that it could not consider Holland's factual objections to (1) the murder cross-reference, (2) the drug weight attributable to him, and (3) the obstruction of justice enhancement because the relevant facts in the trial transcript were known to the parties at the time of Holland's first sentencing, *Murphy*, 998 F.3d at 555.

Pet. App. 10a (underline added).

By side-stepping *Concepcion*, and relying instead on its own earlier decision in *Murphy*, the Third Circuit was able to apply a narrower definition of facts, which the district court was required to consider, than allowable under *Concepcion*. *Compare Murphy*, 998 F.3d at 555 ("new, relevant facts that did not exist, or could not reasonably have been known by the parties, at the time of the first sentencing") *with Concepcion*, 597 U.S. at 490, 500 ("intervening changes of . . . fact"). Applying its own narrower definition of facts that a district court must consider, the Third Circuit could affirm the district court's decision not to consider the facts in the intervening transcript on the grounds that the district court

"complied" with the "requirements" "because the relevant facts in the trial transcript were known to the parties at the time of Holland's first sentencing." Pet. App. 10a. (citing *Murphy*, 998 F.3d at 555).

First, it does not make sense that "the relevant facts in the trial transcript were known to the parties" at the initial sentencing, because this would mean that the government allowed probation to submit a PSR that it knew was replete with inaccurate and false facts contradicted at trial – as the transcript now demonstrates. Second, regardless of whether the facts in the transcript were or should have been known at the initial sentencing, the initial sentencing court was ignorant of them and relied on the PSR. The transcript's facts are now effectively intervening *new* facts for the court at resentencing. *Concepcion* makes clear that there is no limitation on the scope of intervening changes in fact that a court must consider when a party raises them, *id.* at 486-87, and overrides *Murphy*.

In relying on *Murphy*'s narrower definition of facts that courts must consider on a First Step Act motion, the Third Circuit's decision conflicts with *Concepcion*, a relevant decision of this Court, and thus review on *certiorari* is appropriate. *See* Sup. Ct. R. 10(c). Mr. Holland asks the

Court to grant this petition and either remand the case with instructions to consider the intervening and accurate facts or, in the alternative, order full briefing.

b. The Court should grant *Certiorari* to address and resolve the district court's refusal to impose a new sentence based on accurate information.

Due process requires a defendant's sentence to rest on accurate facts. *Townsend*, 334 U.S. at 741. Circuit courts agree that, when entering a new sentence, including when a new sentence is entered as a result of § 404 of the First Step Act, the new sentence must be procedurally and substantively reasonable. *See, e.g.*, *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021). Reasonableness review includes whether the district court made a procedural error such as "selecting a sentence based on clearly erroneous facts." *Gall v. United States*, 553 U.S. 38, 51 (2007).

In this case, the preparation of the trial transcript following sentencing demonstrated that the allegations on which the district court relied to increase Petitioner's sentence through a murder cross-reference were simply not accurate. Witnesses' sworn testimony before the jury directly contradicted the unsworn hearsay claims in investigative reports

on which the PSR, and consequently the district court, relied. Only with the preparation of the transcript was Petitioner able to point to and quote specific testimony of specific witnesses, compare them to what the PSR stated, and show that the district court's previous findings were inaccurate and not supported by proof by even a preponderance of the evidence. The fact that the original sentencing judge was present for trial did not negate that the court based its factual findings on false allegations. The post-sentencing preparation of the trial transcript and its significance for Mr. Holland's argument presented an intervening circumstance justifying review, consideration, and relief.

When Petitioner filed his First Step Act motion and asked the district court to review and consider the intervening facts and impose sentence based on accurate facts, the district court refused to do so, claiming it was not permitted to do so, and imposed a new sentence that was again based on inaccurate facts in violation of *Townsend* and *Koon*. There is no cognizable principle of law, arising under the First Step Act or from any other source, that would promote the use of 20-year-old sentencing findings, subsequently exposed as false, to support the denial of a sentence reduction motion.

Intervening circumstances and new information showed that Mr. Holland's sentence, enhanced on account of an unsubstantiated murder allegation, was unconstitutional. The district court's decision, and the Third Circuit's affirmance, conflict with this Court's precedent in *Gall* and *Concepcion* and review on *certiorari* is appropriate. *See* Sup. Ct. R. 10(c). Mr. Holland asks the Court to grant this petition and either remand the case with instructions to consider the intervening and accurate facts or, in the alternative, order full briefing.

c. The Court should grant *Certiorari* to address the unconstitutional increase of punishment based on a charge for which the jury could not reach a verdict and which the district court dismissed.

The Constitution affords defendants the "right to a speedy and public trial, by an impartial jury." U.S. CONST., amend. VI. Our constitutional system relies upon the jury as the "great bulwark of [our] civil and political liberties." *Apprendi v. New Jersey*, 530 U.S. 446, 477 (2000) (quoting 2 J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-541 (4th ed. 1873)). That right is "designed to guard against a spirit of oppression and tyranny on the part of rulers[.]" *United States v. Gaudin*, 515 U.S. 506, 510-511 (1995) (quotation marks omitted); *see also Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) ("A right

to jury trial is granted to criminal defendants in order to prevent oppression by the Government."). The Due Process Clause of the Fifth Amendment denies governments the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. *See In re Winship*, 397 U.S. 358, 364 (1970) (relating to a state's power and the limitations placed by the Fourteenth Amendment's Due Process Clause).

The Court's case law already strongly suggests that increasing a defendant's sentence based on conduct for which the defendant was not charged, or as is the case here, for which a jury could not reach a verdict, violates the Fifth and Sixth Amendment rights to due process, a fair trial, and trial by jury. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court described the rule of *Apprendi* as requiring that the government prove "every accusation" and "any particular fact" "essential to the punishment" to a jury beyond a reasonable doubt:

> This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," and that "an accusation which lacks any particular fact which the law makes essential to the punishment is * * * no accusation within the requirements of common law, and it is no accusation in reason."

Blakely, 542 U.S. at 301-02 (citing 4 W. Blackston, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769), and 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872). "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring v. Arizona*, 536 U.S. 584 (2002)), or any aggravating fact (as in *Blakely*), it remains the case that the jury's verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305.

Taking the *Blakely* language at face value appears to lead to the conclusion that the rule of *Apprendi* must apply to the Federal Sentencing Guidelines:

> Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors – no matter how much they may increase the punishment – may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it – or of making an illegal lane change while fleeing the death scene.

Blakely, 542 U.S. at 306. This is almost exactly what occurred to Mr. Holland, who received a life sentence for murder even though the jury instead convicted him of illegally possessing a firearm. The drug

convictions, which were the conduit through which the court could get to the life sentence, lacked sufficient connection to the murder – even the judge himself could not recall the proof. Third Circuit Appendix at 639.

The *Blakely* Court continued:

> Not even *Apprendi*'s critics would advocate this absurd result. *Cf.* 530 U.S., at 552-553 (O'Connor, J., dissenting). The jury could not function as circuit breaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.

Blakely, 542 U.S. at 306- 07. "Taken to its logical conclusion, the *Blakely* approach would require a jury to find beyond a reasonable doubt the conduct used to set or increase a defendant's sentence, at least in structured or guided-discretion sentencing regimes." *United States v. Bell*, 808 F. 3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc). A judge "could not rely on uncharged conduct to increase a sentence, even if the judge found the conduct proved by a preponderance of the evidence." *Id.* at 928.

Punishment based on a judge's finding of fact, when a jury has not heard or has rejected an allegation, is unconstitutional even if the term of incarceration is within the statutory range. This is because the

Guidelines remain the lodestar of sentencing. Early commentary suggested that everything had changed after the remedial decision in *United States v. Booker*, 543 U.S. 220 (2005). But as a practical matter, very little changed. The Guidelines remain the law of the land for sentencing. "[T]here is no denying that the post-*Booker* system in substance closely resembles the pre-*Booker* Guidelines system in constitutionally relevant respects." *See United States v. Henry*, 472 F.3d 910, 919 (D.C. Cir. 2007) (Kavanaugh, J., concurring).[2] Although *Booker* declared the Guidelines advisory, the Guidelines remain what they were before *Booker* – the expected range of punishment and final range of punishment in all but a very small percentage of cases.

This Court has so far held otherwise – that increased punishment when a jury has not found guilt beyond a reasonable doubt is

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[2] "[T]he current system – in practice – works a lot like the pre-*Booker* system." *Henry*, 472 F.3d at 922 (Kavanaugh, J., concurring). *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 678 (2006) ("All the things that troubled Sixth Amendment purists about the pre-*Booker* Guidelines system are unchanged."); Douglas A. Berman & Stephanos Bibas, Making Sentencing Sensible, 4 OHIO STATE J. CRIM. L. 37, 53 (2006); Douglas A. Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 347-55 (2006). "Four of the five Justices who joined the *Booker* remedial opinion, including its author Justice Breyer, did not find any constitutional problem with the Guidelines to begin with. So, it is understandable that the current system as applied is not a major departure from the pre-*Booker* Guidelines system." *Id.* *See Booker*, 543 U.S. at 312-13 (Scalia, J., dissenting in part) (stating that *Booker* remedial opinion may convey message that "little has changed" from mandatory Guidelines system).

constitutional if within the statutory range. In *United States v. Watts*, 519 U.S. 148 (1997), the Court said that there is no "prohibition against considering certain types of evidence at sentencing," including "uncharged or acquitted conduct." *Id.* at 152-55; *see also McClinton v. United States*, 143 S. Ct. 2400, 2405 (2023) (Alito, J., concurring in the denial of *certiorari*). But distinguished jurists have called *Watts* into question. In *Jones v. United States*, 574 U.S. 948 (2014), Justice Scalia encouraged the Court to decide whether the Due Process Clause and the Sixth Amendment's jury trial right permit judges to sentence defendants based on uncharged or acquitted conduct. *Id.* at 949-50 (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from denial of certiorari); *see also Bell*, 808 F. 3d at 928 (Kavanaugh, J., concurring in denial of rehearing en banc) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *United States v. Sabillon-Umana*, 772 F. 3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.); *Watts*, 519 U.S. at 170 (Kennedy, J., dissenting).

In the end, judges should not be able to use uncharged conduct to increase a sentence, and this case involves charged conduct for which the

jury could not reach a verdict, for which the court granted a mistrial and dismissed the charge, arguably even more of a violation than a decision not to charge in the first place.

Mr. Holland asks the Court to grant this petition for writ of *certiorari* on this important legal question that is the subject of a circuit split and an issue that the Court has not addressed but should address.

CONCLUSION

Petitioner Jeffrey Holland submits that the Court should grant his petition for writ of *certiorari* for the compelling reasons noted above and under Supreme Court Rule 10(c). He asks the Court to grant his Petition and either (1) remand the case with instructions to consider the intervening and accurate facts, to include the trial transcript, or in the alternative, (2) grant full briefing in this important matter to address and resolve these important legal questions.

Respectfully submitted,

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February 7, 2024

APPENDIX