

No. _____

In the
Supreme Court of the United States

TAMIR ABDULLAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 404 of the First Step Act made retroactive the Fair Sentencing Act of 2010's changes to the cocaine-base drug-quantity thresholds in 21 U.S.C. § 841. The majority of the courts of appeals have concluded that eligibility for relief under Section 404 turns on the statute of conviction alone, regardless of the drug quantity involved in the offense. The Eleventh Circuit has held that a defendant is ineligible if a district court's pre-*Apprendi* drug-quantity findings would yield the same statutory sentencing range before and after the Fair Sentencing Act's changes. The panel below adopted the Eleventh Circuit's minority view, at least in cases where a jury made a special finding regarding drug quantity.

The question presented is: does the statute of conviction or a drug quantity in the record determine eligibility for relief under Section 404 of the First Step Act?

RELATED PROCEEDINGS

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

United States v. Abdullah, No. 1:03CR486 (N.D. Ohio), *aff'd*, *United States v. Caver*, 470 F.3d 220 (6th Cir. 2006), *cert. denied*, *Abdullah v. United States*,

No. 06-9796 (Apr. 2, 2007).

Abdullah v. United States, No. 1:03CR486, 2011 WL 1043265 (N.D. Ohio Mar. 18,

2011).

Abdullah v. Kizziah, No. 7:17-048 (E.D. Ky.).

United States v. Abdullah, 119 F.4th 496 (6th Cir. 2024).

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OPINIONS AND ORDERS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit is published at 119 F.4th 496. *See* App. at 1a-6a. The order of the U.S. District Court for the Northern District of Ohio is unpublished. *See* App. at 6a-7a.

JURISDICTION

The court of appeals entered judgment on October 22, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 404 of the First Step Act of 2018 provides:

(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.

First Step Act of 2018, § 404, Pub. Law No. 115-391, 132 Stat. 5194, 5222.

Section 2 of the Fair Sentencing Act of 2019 provides:

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking “50 grams” and inserting “280 grams”; and

(2) in subparagraph (B)(iii), by striking “5 grams” and inserting “28 grams”.

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking “50 grams” and inserting “280 grams”; and

(2) in paragraph (2)(C), by striking “5 grams” and inserting “28 grams”.

Fair Sentencing Act of 2010, § 2, Pub. Law No. 111-220, 124 Stat. 2372, 2372.

STATEMENT OF THE CASE

Tamir Abdullah is serving a sentence of life in prison. A panel of the U.S. Court of Appeals for the Sixth Circuit concluded that he was ineligible for a reduced sentence under the First Step Act because of a special jury finding at trial. In other courts of appeals, and before different panels of the Sixth Circuit, he would have been eligible for relief.

In 2003, a grand jury indicted Abdullah on two counts: (1) conspiracy to possess with intent to distribute 50 grams or more of a mixture containing cocaine base, under 21 U.S.C. §§ 841(b)(1)(A) and 846; and (2) possessing with intent to distribute and distributing approximately 20.8 grams of a mixture containing cocaine base, under 21 U.S.C. § 841(b)(1)(B). A jury convicted him on both counts. In a separate specification, the jury found that he conspired to possess and distribute at least 500 grams but less than 1.5 kilograms of a mixture containing cocaine base. Abdullah's conviction on Count 1 would have carried a statutory range of 10 years to life in prison, but because he had two prior felony drug convictions, the statutory penalty increased to mandatory life in prison. *See* 21 U.S.C. § 841(b)(1)(A) (2003). The district court imposed a mandatory life sentence. The Sixth Circuit affirmed. *See United States v. Caver*, 470 F.3d 220 (2006).

In 2010, Congress modified the statutory penalties for crack-cocaine offenses via the Fair Sentencing Act of 2010. Before 2010, 21 U.S.C. § 841(b)(1)(A)(iii) provided for a sentencing range of 10 years to life if a drug-trafficking offense included as an element that it "involv[ed] . . . 50 grams or more" of a mixture containing cocaine

base, with possible enhancement to 20 years to life with a prior felony drug conviction or mandatory life with two prior felony drug convictions. 21 U.S.C. § 841(b)(1)(A) (2003). Section 2 of the Fair Sentencing Act altered the statutory sentencing range so that those penalties applied only where an offense's elements included "involving . . . 280 grams or more" of a mixture containing cocaine base. *See* Fair Sentencing Act of 2010, § 2, Pub. Law No. 111-220, 124 Stat. 2372, 2372; 21 U.S.C. § 841(b)(1)(A) (2011). For offenses involving 28 grams or more (which, by definition, includes offenses involving 50 grams or more), the statutory sentencing range became 5 to 40 years in prison, or 10 years to life in prison with a prior felony drug conviction. 21 U.S.C. § 841(b)(1)(B) (2011). Those changes did not apply retroactively to defendants, like Abdullah, who were convicted and sentenced prior to the Fair Sentencing Act's enactment.

In 2018, Congress gave defendants who committed crack-cocaine offenses before 2010 an opportunity to benefit from the Fair Sentencing Act's changes. In Section 404 of the First Step Act of 2018, Congress authorized "[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 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed." First Step Act of 2018, § 404, Pub. Law No. 115-391, 132 Stat. 5194, 5222. It defined 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 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." *Id.*

In August 2019, Abdullah moved to reduce his sentence under Section 404 of the First Step Act. The district court appointed counsel, who supplemented Abdullah's motion. Through counsel, Abdullah argued that, despite the jury's drug-quantity specification, he was eligible for relief because his statute of conviction was 21 U.S.C. §§ 841(b)(1)(A)(iii) and 846, which was an offense for which the statutory penalties were modified by Section 2 of the Fair Sentencing Act. The proper analysis based on the First Step Act's text, he explained, focuses on the offense of conviction, and not on a drug quantity that could be gleaned from the record.

In January 2024, more than four years after Abdullah filed his motion, the district court denied it. *See* App. at 7a. Although the court identified the correct docket entry for Abdullah's First Step Act motion, it misidentified it as a "motion for compassionate release." *Id.* The court then proceeded to address Abdullah's motion as if he had sought relief under the compassionate-release statute because of the COVID-19 pandemic, concluding that COVID-19 posed only a "speculative risk" because Abdullah's facility reported only two current cases of the disease. *Id.* at 8a. The order did not address Abdullah's eligibility under Section 404 of the First Step Act, his amended guidelines range under current law, the Section 3553(a) factors, or any other issues raised by Abdullah's First Step Act motion, which he filed before the first reported case of COVID-19.

Abdullah appealed. While his appeal was pending, the Sixth Circuit decided *United States v. Caver*, 101 F.4th 422 (6th Cir. 2024), which determined that defendants like Abdullah were ineligible for relief. In *Caver*, the court of appeals concluded

that if a jury made a special finding regarding the drug amount involved, and if the statute of conviction after the Fair Sentencing Act would mandate a life sentence for a defendant charged and convicted of an offense involving that drug amount, then the defendant was ineligible for a reduced sentence under the First Step Act. *Id.* at 427-29.

The *Caver* panel noted that the Tenth Circuit, and the Sixth Circuit itself (in an unpublished case), had reached the opposite conclusion—that district courts should look only to the offense of conviction to determine the drug quantity involved, even when a defendant admitted in a plea agreement that the offense involved a higher quantity. *Id.* at 430. But the panel concluded that a defendant’s indictment and conviction at trial of a specification alleging a higher drug quantity was different from an admission in a plea agreement to a higher drug quantity. *Id.* at 430-31.

Relying on *Caver*, the court of appeals affirmed the district court’s order denying Abdullah’s motion for relief under Section 404 of the First Step Act. App. at 4a-5a. The court concluded that, although the district court failed to conduct the proper analysis, Abdullah was ineligible for relief. *Id.* at 5a.

REASONS FOR GRANTING THE PETITION

I. The panel decision exemplifies an established circuit split regarding eligibility for relief under Section 404 of the First Step Act.

The decision below conflicts with decisions from other courts of appeals, and with an unpublished decision from the Sixth Circuit itself, regarding a defendant's eligibility for relief under Section 404 of the First Step Act. It exemplifies an established circuit split, joining the Eleventh Circuit in adopting the minority view that eligibility for relief may turn not on the statute of conviction but on a drug quantity found in the record.

Before *Caver*, the Sixth Circuit had previously held that eligibility for relief under Section 404 turns on the statute of conviction alone. *See United States v. Boulding*, 960 F.3d 774, 778-80 (6th Cir. 2020). That was and is the majority view. *See United States v. Smith*, 954 F.3d 446, 448-49 (1st Cir. 2020); *United States v. Johnson*, 961 F.3d 181, 187-90 (2d Cir. 2020); *United States v. Jackson*, 964 F.3d 197, 202 (3d Cir. 2020); *United States v. Wirsing*, 943 F.3d 175, 186-86 (4th Cir. 2020); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United States v. Shaw*, 957 F.3d 734, 738-39 (7th Cir. 2020); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019); *United States v. Broadway*, 1 F.4th 1206, 1211-14 (10th Cir. 2021).

Courts have applied that rule even when a defendant stipulated in a plea agreement to a drug amount that could result in the same statutory sentencing range after the Fair Sentencing Act's changes. *See, e.g., Broadway*, 1 F.4th at 1208 (stipulation to drug amount that could trigger 21 U.S.C. § 841(b)(1)(A) statutory sentencing range before and after Fair Sentencing Act); *Johnson*, 961 F.3d at 184 (same); *United*

States v. Wright, No. 03 CR 362-2, 2019 WL 3231383, *1 (N.D. Ill. Jul. 18, 2019) (same); *United States v. Martin*, No. 03-CR-795, 2019 WL 2571148, *1 (E.D.N.Y. Jun. 20, 2019) (same); *Jackson*, 964 F.3d at 200 (stipulation to drug amount that could trigger 21 U.S.C. § 841(b)(1)(B) statutory sentencing range before and after Fair Sentencing Act). That includes the Sixth Circuit. *See United States v. Wynn*, No. 21-3543, 2023 WL 1305109, *1 (6th Cir. Jan. 31, 2023) (stipulation to drug amount that could trigger 21 U.S.C. § 841(b)(1)(B) statutory sentencing range before and after Fair Sentencing Act). And courts have applied that rule even when a jury made a special finding of a drug amount that could result in the same statutory sentencing range after the Fair Sentencing Act’s changes. *See, e.g., United States v. Foster*, No. 1:09-cr-00013, 2022 WL 5027507, *1 (W.D.N.C. Oct. 4, 2022), *aff’d*, No. 22-7236, 2023 WL 4181321 (4th Cir. Jun. 26, 2023) (special jury finding of drug amount that could trigger 21 U.S.C. § 841(b)(1)(A) statutory sentencing range before and after Fair Sentencing Act).

On the other side of the split, the Eleventh Circuit has held that a court considering a motion under Section 404 of the First Step Act is bound even by “earlier *judge-found* facts that triggered statutory penalties that the Fair Sentencing Act later modified. Those facts include previous findings of drug quantity.” *United States v. Jackson*, 58 F.4th 1331, 1336 (11th Cir. 2023) (emphasis added) (internal quotation marks deleted).

The *Caver* Court acknowledged that “[t]his question has seemingly caused some disagreement between circuits.” *Caver*, 101 F.4th at 430. It then sided with the

Eleventh Circuit’s minority view, at least in circumstances where a jury makes a special finding of drug quantity. *Id.* at 430-31. The panel decision below followed *Caver’s* binding precedent.

II. The question presented raises an important issue of federal law that affects defendants, like Abdullah, serving mandatory life sentences and other mandatory minimum sentences.

Abdullah is serving a sentence of life in prison. Because the district court mistakenly denied his Section 404 motion as if it were a motion for compassionate release, no court has ever employed its direction under the First Step Act to decide whether and, if so, to what extent a reduced sentence is warranted.

The question presented affects not only Abdullah but also others like him serving mandatory life sentences and other mandatory minimum sentences based on pre-Fair Sentencing Act convictions. And although Section 404 motions and appeals have ended for most similarly situated defendants, bills have been introduced making other changes retroactive, some using identical “covered offense” and “as if” language. *See* First Step Implementation Act of 2023, S. 1251, 118th Cong. § 101(c) (2023); Smarter Sentencing Act of 2023, S. 1152, 118th Cong. § 2(c) (2023). Thus, the question presented is important for Abdullah and similar defendants as well as for Congress when enacting retroactive changes to criminal statutes and future defendants seeking reductions based on those changes.

III. The decision below is wrong.

To determine whether a defendant is eligible for relief under Section 404 of the First Step Act, courts must look only to the statute of conviction and decide “whether the Fair Sentencing Act modified a statutory provision, and then match the offense’s minimum drug quantity with the amended statutory provision.” *Broadway*, 1 F.4th at 1212. That conclusion is consistent with the First Step Act’s text, its context, and “the realities of criminal proceedings.” *Id.* at 1211.

Start with the text. Section 404 allows “[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 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.” First Step Act of 2018, § 404, 132 Stat. at 5222. The *Caver* panel focused on the “as if” language to match the jury’s special finding to the post-Fair Sentencing Act statute and conclude that he would still be subject to a mandatory life sentence. *Caver*, 101 F.4th at 428. But in doing so, it elided the rest of the provision, which specifies that the court may impose a reduced sentence “as if section 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the *covered offense* was committed.” First Step Act of 2018, § 404, 132 Stat. at 5222 (emphasis added). As a panel of the Sixth Circuit previously explained, this additional language indicates that “a comparison of the threshold drug amounts listed in the statutes themselves”—that is, the offenses as defined by Congress—“should inform the court about whether there has been a modification that justifies resentencing.” *Wynn*, 2023 WL 1305109, at *1-2. And as this Court noted, the “as if” language “simply enacts the First Step Act’s central goal: to make retroactive the

changes in the Fair Sentencing Act.” *Concepcion v. United States*, 597 U.S. 481, 497 (2022).

Next, the context. “[T]he overarching purpose of the First Step Act is to further the Fair Sentencing Act’s objective of remedying the disproportionately harsh sentences impose for crack cocaine offenses.” *Broadway*, 1 F.4th at 1211. This is reflected in the “broad discretion that the First Step Act affords to district courts.” *Concepcion*, 597 U.S. at 501. The statute’s purpose and discretion “favor[] the approach that yields greater clemency,” *Broadway*, 1 F.4th at 1211, even while a district court retains the ability “to deny sentencing reductions to eligible defendants where appropriate,” including based on its analysis of the defendant’s underlying conduct. *Johnson*, 961 F.3d at 193.

Third, the broader context: the realities of criminal proceedings. At the time of the underlying convictions, defendants like Abdullah knew that they faced a mandatory life sentence if the jury convicted them of an offense involving at least 50 grams of a mixture containing cocaine base. “Thus, to rely on a defendant’s underlying conduct involving more than 50 grams of crack cocaine necessarily requires a First Step Act district court to engage in a counterfactual analysis of the course of action in the earlier proceeding.” *Broadway*, 1 F.4th at 1212; *see also Johnson*, 961 F.3d at 192 (noting “the assumption that there *is* a knowable set of pre-Fair Sentencing Act defendants who would have received the same sentence regardless of the Fair Sentencing Act”). As the Tenth Circuit concluded, “Courts are not time machines which can alter the past and see how a case would have played out had the Fair

Sentencing Act been in effect. We doubt Congress would have imposed such a futile role for us.” *Broadway*, 1 F.4th at 1212.

The *Caver* Court concluded that those problems were of no concern when a jury makes a special finding regarding drug quantity. *See Caver*, 101 F.4th at 431. It stated that “no doubt exists that Caver would have still faced a mandatory life sentence.” *Id.* That does not reflect the realities of criminal proceedings. Given that Caver (and Abdullah) at the time faced a mandatory life sentence for any drug quantity more than 50 grams, they had no incentive to dispute any finding above that amount. *Cf. Broadway*, 1 F.4th at 1213 (noting the concern with relying on pre-Fair Sentencing Act drug quantities where “the defendant lacked much of an incentive to dispute this amount (and did not) because, at the time, it would not have affected his guideline range”). Moreover, it is not a foregone conclusion that Caver (and Abdullah) would have gone to trial at all—given the higher drug quantity threshold that the government would be required to prove to secure a conviction under 21 U.S.C. § 841(b)(1)(A) after the Fair Sentencing Act, it may have been more willing to entertain a plea agreement that did not include a mandatory life sentence. *Cf. Broadway*, 1 F.4th at 1212 (noting the numerous counterfactuals a district court would need to consider to determine that a defendant would stipulate to the same drug quantity after the Fair Sentencing Act’s changes, including whether the defendant “would have bargained for a lower statutory penalty range based on a lower drug quantity in a plea agreement”); *Johnson*, 961 F.3d at 192 (noting similar “mounting assumptions”).

“[I]t was Congress’s decision to confer Section 404 eligibility broadly — and thereby to upset the government’s *ex ante* expectations about what sentences certain defendants would serve.” *Johnson*, 961 F.3d at 181. Even if a jury’s special finding eliminates some counterfactuals, it does not eliminate all. Moreover, “not all cases are this straightforward, and the First Step Act must apply to all eligible defendants.” *Broadway*, 1 F.4th at 1212. For all defendants, eligibility under the First Step Act turns only on the statute of conviction, not on a drug quantity taken from the record. Because the panel interpreted the First Step Act differently, this Court should reverse the judgment of the court of appeals.

“Congress also gave district courts the discretion to deny sentencing reductions to eligible defendants where appropriate,” *Johnson*, 961 F.3d at 193, “which may include consideration of . . . the defendant’s underlying conduct,” *Broadway*, 1 F.4th at 1206. But because the district court mistakenly denied Abdullah’s Section 404 motion as if it were a motion for compassionate release, and because the court of appeals affirmed on the basis that Abdullah was ineligible for relief, no court has ever exercised its discretion to determine whether and, if so, to what extent Abdullah’s sentence should be reduced. This Court should reverse the judgment of the court of appeals and remand for further proceedings, including instructing the district court to exercise its discretion in the first instance.

IV. This case is an ideal vehicle to resolve the question presented.

This case squarely presents whether the statute of conviction or a drug quantity in the record determines eligibility for relief under Section 404 of the First Step

Act. The panel decision relied on that basis alone to reject Abdullah's appeal of the district court's order denying his Section 404 motion. *See* App. at 4a-5a. This case is thus an ideal vehicle for the Court to review and decide the question presented.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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