

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CARLOS CONCEPCION, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 20-1650  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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Pages: 1 through 86  
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Date: January 19, 2022

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CARLOS CONCEPCION, )

Petitioner, )

v. ) No. 20-1650

UNITED STATES, )

Respondent. )

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Washington, D.C.

Wednesday, January 19, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:31 a.m.

APPEARANCES:

CHARLES L. McCLOUD, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

MATTHEW GUARNIERI, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 20-1650, Concepcion versus United States.

Mr. McCloud.

ORAL ARGUMENT OF CHARLES L. McCLOUD

ON BEHALF OF THE PETITIONER

MR. McCLOUD: Mr. Chief Justice, and may it please the Court:

The First Circuit held below that district courts are barred from considering intervening law and facts when deciding whether to impose a reduced sentence under the First Step Act. That holding conflicts with the law's text, and it flouts background principles of sentencing and judicial decision-making.

The First Circuit's rule would also require courts to ignore information that is critical to the reasoned exercise of their sentencing discretion. Under the First Circuit's approach, the fact that a defendant was suspected in the murder of a prison guard would be an impermissible consideration when deciding whether to reduce that defendant's

1 sentence.

2           The government does not defend the  
3 First Circuit's rule. The judgment should  
4 therefore be vacated because the district court  
5 in this case plainly did not recognize its  
6 authority to consider intervening developments.

7           The question for this Court is, what  
8 rule should apply on remand? The first option  
9 is that courts must consider relevant  
10 intervening law and facts, just as they do in  
11 other sentencing proceedings. This is a modest  
12 requirement. Under a "must consider" rule, the  
13 court has to pay respectful attention to  
14 arguments about intervening developments made  
15 by the parties. But the court, of course, does  
16 not have to be persuaded by those arguments,  
17 and it does not have to reduce the defendant's  
18 sentence.

19           Our backup option, which the  
20 government endorses, is that courts may  
21 consider intervening law and facts.

22           We think that a "must consider" rule  
23 will lead to more consistent results in  
24 district courts and be more consistently  
25 reviewable on appeal. But either alternative

1 before the Court today is preferable to the  
2 First Circuit's rule, and the bottom line for  
3 both is the same. The First Step Act does not  
4 require courts to ignore relevant information.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. McCloud, if you  
7 are going to make the "must" or "mandatory"  
8 argument, on what language do -- do you rely?

9 MR. McCLOUD: Justice Thomas, we have  
10 two textual bases for the "must consider"  
11 argument. The first is Congress's use of the  
12 phrase "impose a reduced sentence." We think  
13 that that's a clear textual indication that  
14 what Congress wanted courts to do is to apply  
15 the Section 3553(a) factors, the factors that  
16 courts consider when they impose a sentence  
17 more generally.

18 And many of those factors incorporate  
19 consideration of intervening legal and factual  
20 developments because they go to things like the  
21 history and characteristics of the defendant  
22 and the severity of the defense -- of the  
23 offense.

24 The alternative textual basis we would  
25 say for the "must consider" rule is that

1 Section 404 clearly sets up a statutory scheme  
2 where district courts are supposed to exercise  
3 their discretion. And in the sentencing  
4 context, courts, of course, must be reasonable  
5 in exercising their discretion, and the way  
6 that Congress has established for courts to be  
7 reasonable is to apply the 3553(a) factors.

8 JUSTICE THOMAS: Don't -- do you think  
9 that your discretionary or "may" permissive  
10 argument is a better -- stronger argument than  
11 the "mandatory" argument?

12 MR. McCLOUD: Your Honor, I think that  
13 they're -- they're both strong arguments. I  
14 guess the one advantage I would say that the  
15 "must consider" argument has is that we think  
16 it would be more predictable for district  
17 courts because the parties will know that the  
18 court is going to pay attention to arguments  
19 about intervening developments. And I think  
20 the same is probably true for appellate courts.  
21 They will have the hook of the 3553(a) factors  
22 when they review the case.

23 But just to be clear, Your Honor, we  
24 would be perfectly happy with an opinion that  
25 said courts may consider these developments.

1 That's certainly better than the First  
2 Circuit's rule.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: I don't really  
5 understand, either through your presentation or  
6 the government's, what this "may" argument is.  
7 I understand the idea that you must consider  
8 the different things, and at the end of the  
9 day, you can come out and say, well, I'm not  
10 going to change anything. Judge -- judges now  
11 do that all the time.

12 And I understand the argument that you  
13 can't look at the things and change it, but  
14 what is -- what is the "may"? You've already  
15 got the "may" in the "must" part. You have to  
16 consider it, but you don't have to do anything.

17 It -- it sounds to me like we're  
18 delegating to -- or Congress or somebody's  
19 delegating to individual district judges the  
20 authority to determine what the law is. It's  
21 like a police officer -- you know, you can't  
22 park here or you pay -- you have to pay, you  
23 know, \$20. You know, it's one thing to say you  
24 have the officer can say, you know, I'm not  
25 going to give you a ticket, I see you're coming



1 down the street or whatever it is. Doesn't  
2 have to, you know, enforce whatever discretion  
3 he has. But the officer can't say I think  
4 people ought to be able to park here, so I'm  
5 never going to give anybody a ticket for that.

6 What is -- what is this "may"  
7 argument?

8 MR. McCLOUD: Well, Mr. Chief Justice,  
9 I think it stems from the fact that Congress  
10 clearly has set up a discretionary scheme in  
11 this statute. Courts have discretion to decide  
12 whether to impose a reduced sentence or not.  
13 And so, when they're making that decision, we  
14 don't see anything in the text of the statute  
15 or in sentencing practice more generally that  
16 would suggest that courts are required to put  
17 certain information off limits.

18 CHIEF JUSTICE ROBERTS: Well, right,  
19 but what you're saying is Congress passed this  
20 discretionary rule, but the people in this  
21 "may" category are saying I'm not going to  
22 exercise my discretion, I am never going to  
23 give a -- a reduction to the sentence.

24 Is that all right? That's -- that's  
25 -- I don't think that would be something that

1 we would accept in any other area of the law  
2 where people have discretion.

3           You would say, yes, in this particular  
4 case, you don't have to give a discretion -- an  
5 adjustment. You have discretion not to do  
6 that. But the idea for somebody to decide I --  
7 I am not going to exercise discretion, I'm just  
8 not going to look at it, I don't understand  
9 what -- where that authority comes from.

10           MR. McCLOUD: So, Mr. Chief Justice, I  
11 would agree with you that district courts do  
12 not have that authority. I think that courts  
13 could not erect categorical rules that they  
14 would never look at intervening developments or  
15 that they would never reduce a sentence under  
16 the First Step Act. I think it has to be an  
17 individualized defendant-by-defendant  
18 determination that may --

19           JUSTICE GORSUCH: But, counsel, where  
20 does that come from? I mean, if it's "may" and  
21 it is divorced and free-floating from 3553 and  
22 anything goes, I don't know on what basis this  
23 or any court would find an abuse of discretion  
24 under that standard that you're proposing.

25           MR. McCLOUD: Justice Gorsuch, I agree

1 with you it would be difficult to find an abuse  
2 of discretion under that standard. The courts  
3 that apply --

4 JUSTICE GORSUCH: But isn't the Chief  
5 Justice's intuition absolutely right, that if a  
6 court simply said we would never -- I will  
7 never do these things, I know Congress said I  
8 may, but I'm not going to do it, I -- you know,  
9 I'd prefer not to, we -- we would find that to  
10 be an abuse of discretion, I -- I'm pretty  
11 confident.

12 Likewise, if -- if the district court  
13 said I know that my original sentence had an  
14 egregious guidelines error that -- previously  
15 undiscovered, but absolutely egregious, results  
16 in a grave injustice, but I prefer not to,  
17 really?

18 MR. McCLOUD: So, Justice Gorsuch, I  
19 agree with you and with the Chief Justice that  
20 in the first scenario, where the district court  
21 has erected a categorical rule that they will  
22 not reduce a sentence or look at intervening  
23 developments, that would be arbitrary and that  
24 would be an abuse of discretion.

25 I think it is a much closer question

1 in a case where, in a "may consider" world, the  
2 court looks at all of the evidence and says I  
3 just don't want to take consideration of this  
4 situation.

5 JUSTICE GORSUCH: Even in a guidelines  
6 -- an egregious guidelines error case, you're  
7 going to say that that too, that's just --  
8 that's fine, we can just pass that one over?

9 MR. McCLOUD: Justice Gorsuch, our  
10 position is that if "may consider" means "may,"  
11 then, yes, the district court has that  
12 discretion. That's one of the reasons why we  
13 think that the "must consider" rule is the  
14 better rule.

15 JUSTICE KAVANAUGH: Well, under your  
16 --

17 JUSTICE ALITO: You know --

18 JUSTICE KAVANAUGH: Go ahead.

19 JUSTICE ALITO: Is there any  
20 difference between your argument and a statute  
21 that says that the district court simply must  
22 conduct a new sentencing? Because that's what  
23 you want, isn't it? You want a new sentencing  
24 with the law as -- as changed by the First Step  
25 Act, right?

1           MR. McCLOUD: Justice Alito, we do  
2 think there are significant differences between  
3 this proceeding and a plenary resentencing.  
4 For example, in this proceeding, rules of  
5 waiver and forfeiture and law of the case would  
6 apply.

7           And so, from our perspective, the  
8 scope of the proceeding is defined by the --  
9 the new arguments and new information that are  
10 presented to the court by the parties. The  
11 court doesn't have to work from the ground up.

12           We also would take the perspective  
13 that the court looks at the changes from the  
14 Fair Sentencing Act as the starting point. We  
15 just don't think that that's the end point for  
16 the analysis.

17           JUSTICE BREYER: Well, why -- why are  
18 you -- why are you just pretending, not really  
19 pretending, but that sentencing starts from  
20 scratch? Where does the judge's come from, the  
21 discretion, to impose a sentence? It comes  
22 from statutes which say zero to 20 years, and  
23 they say nothing more within that.

24           And this is the same. It says "may."  
25 Same thing. Okay. Now you've left out the

1 giant actor in this. It's called the  
2 Sentencing Commission, and that applies because  
3 of 3553. And so why doesn't -- all the answers  
4 to these questions are, of course, the  
5 questioners are right. You could abuse your  
6 discretion, District Judge, and so can the  
7 Sentencing Commission abuse its discretion.

8           So far, I don't think it has, but  
9 maybe. The -- the -- and so this is just the  
10 same. If you want to treat this word "may,"  
11 which was written against the background of  
12 there being several actors -- district court,  
13 Sentencing Commission, courts of appeals -- if  
14 we're going to treat this the same way, which I  
15 think the "may" would give us the -- the --  
16 what Congress wanted, then there we are. The  
17 case is only worth a paragraph. It's "may."  
18 That's what the statute says.

19           (Laughter.)

20           JUSTICE BREYER: How do you do it?  
21 The same way you do everything else in  
22 sentencing where you have discretion. And, by  
23 the way, if you look at what the Sentencing  
24 Commission has done -- unfortunately, there  
25 aren't any members except, I think, for one --

1 but the -- the -- the -- the -- its office has  
2 written about 20 pages on this.

3 And they say here's what you do,  
4 Judge, at the moment. What you do is you look  
5 to 3553. I think that's what the Office of  
6 Education says. So this isn't so tough.

7 Now you're going to agree with me  
8 because it ends up with "may," but maybe you  
9 won't because you want "must," but I don't know  
10 where you get the "must" from.

11 JUSTICE KAGAN: Well, I don't know  
12 where you get the "may" from.

13 JUSTICE BREYER: It's the statute.

14 JUSTICE KAVANAUGH: How about the --

15 JUSTICE BREYER: It's the statute says  
16 "may."

17 JUSTICE KAGAN: The statute --

18 JUSTICE KAVANAUGH: I know where we  
19 get "may not."

20 JUSTICE KAGAN: -- with "may" is not  
21 the "may" that Justice Breyer thinks is in the  
22 statute.

23 JUSTICE BREYER: Fair.

24 JUSTICE KAGAN: The statute says "may  
25 impose a reduced sentence."

1 JUSTICE BREYER: Yes.

2 JUSTICE KAGAN: May impose a reduced  
3 sentence or you cannot impose a reduced  
4 sentence, but the statute says nothing about  
5 what you have to consider in deciding whether  
6 to impose a reduced sentence. It says you may  
7 or you may not impose a reduced sentence. It  
8 says nothing about the consideration you have  
9 to undertake and the factors that you have to  
10 address.

11 So I would think that a normal way to  
12 think about that question is, what do we  
13 usually do in resentencing procedures -- in  
14 resentencing proceedings? So what's the answer  
15 to that question? What do we usually do in  
16 resentencing proceedings?

17 MR. McCLOUD: Your Honor, the answer  
18 is that courts usually apply the 3553(a)  
19 factors and they usually look to intervening  
20 legal and factual developments.

21 JUSTICE KAGAN: And feel obliged to do  
22 that, right? They don't think it's like, oh,  
23 it's something I can do if I'm feeling up to it  
24 and not do if I'm sort of feeling stressed.

25 MR. McCLOUD: That's -- that's right,



1 Your Honor. And I do think that that's, again,  
2 one advantage of the "must consider" rule, is  
3 that --

4 JUSTICE ALITO: I don't know. Is that  
5 completely -- well, I -- I -- I don't want to  
6 cut off your answer. I'm sorry.

7 MR. McCLOUD: Well, I was just going  
8 to say --

9 JUSTICE ALITO: You were answering  
10 Justice Kagan, so go ahead.

11 MR. McCLOUD: -- one advantage of the  
12 "must consider" rule is that it does not lead  
13 to a situation where courts are able to ignore  
14 information that everyone would agree is  
15 relevant.

16 To go back to the example that I gave  
17 in my introduction, it's inconceivable to me  
18 that Congress would have wanted a court to make  
19 a decision about sentencing without accounting  
20 for the fact that the defendant is suspected in  
21 the murder of the prison guard. That --

22 JUSTICE ALITO: Well, that was really  
23 -- that's an intriguing observation, because do  
24 you think that that would be -- there would be  
25 a constitutional problem with that?

1 MR. McCLOUD: No, I don't think so,  
2 Justice Alito.

3 JUSTICE ALITO: Now somebody's been  
4 sentenced to, let's say, 10 years for an  
5 offense but behaves really badly in -- while in  
6 prison, and so Congress says, under those  
7 circumstances, you can bring that person back  
8 before the sentencing judge and impose a new  
9 sentence so that the person is sentenced to a  
10 longer term?

11 MR. McCLOUD: Justice Alito, I do  
12 think there would be constitutional questions  
13 if the court were able to impose a longer term.  
14 That is not an option under the First Step Act  
15 because the sentence has to be reduced.

16 JUSTICE ALITO: Well, but you said in  
17 your -- in your introductory remarks it would  
18 be unthinkable for the court not to be able to  
19 take into account bad behavior in prison in --  
20 in resentencing somebody under this, but it --  
21 it is unthinkable because it's  
22 unconstitutional.

23 MR. McCLOUD: Yes, Justice Alito, I  
24 agree with you that if there were a situation  
25 where a court was increasing the sentence that

1 was given to the defendant based solely on  
2 conduct in prison, that could raise  
3 constitutional questions.

4 Those questions are not presented in  
5 this case because, as I said before, it is not  
6 possible to increase a defendant's sentence.  
7 You can only decline to give them a reduced  
8 sentence.

9 JUSTICE KAVANAUGH: Mr. McCloud --

10 JUSTICE ALITO: So --

11 JUSTICE KAVANAUGH: Oh, sorry. Go  
12 ahead.

13 JUSTICE ALITO: Yeah. Just one -- one  
14 last thing. So I come back to my original  
15 question. I think it was my first question.  
16 If what Congress wanted to say was, in these  
17 cases covered by the First Step Act, you just  
18 resentence the defendant, why didn't they just  
19 say that? Why did they use this formulation?

20 MR. McCLOUD: Justice Alito, I think  
21 it's because Congress did not want a plenary  
22 resentencing. As I said before, we think that  
23 rules like waiver and forfeiture and law of the  
24 case would still apply.

25 So Congress was not wiping the slate

1 clean. It was giving district courts the  
2 option to make an exception to finality and to  
3 give the defendant a new sentence that's lower  
4 relative to their prior sentence.

5 JUSTICE KAVANAUGH: Mr. McCloud --

6 JUSTICE BREYER: So here's the  
7 example. Look, 3553(a) applies to most  
8 sentencing because almost all sentencing  
9 statutes don't list factors. They simply say  
10 the district court may sentence between zero  
11 and 20 years, and they don't even say that.  
12 They say the sentence is zero to 20 years.

13 So we go to the Sentencing Commission  
14 to try to regularize it, but the district court  
15 has lots of discretion reviewed by a court of  
16 appeals.

17 And my real question -- I shouldn't  
18 have sounded so definite and so -- so forth,  
19 and I'm sorry about that -- but -- but -- but,  
20 look, what I don't see is why we wouldn't treat  
21 this the same way. And, of course, sometimes  
22 they could abuse their discretion. Sometimes  
23 they couldn't. So why -- there must be a  
24 reason that you can answer me on that because  
25 nobody's really been arguing that.

1           And so I come to this and say I -- I  
2           don't understand why. There must be a reason  
3           because nobody's arguing it.

4           MR. McCLOUD: Well, Justice Breyer, I  
5           agree that you should treat it the same. This  
6           is not a mechanical adjustment of the sentence.  
7           Let's take Mr. Concepcion's --

8           JUSTICE BREYER: So you just suddenly  
9           started to argue this because you wanted to  
10          agree with me, but I -- but nobody in the  
11          briefs or nobody said, look, this isn't such a  
12          tough case. The First Circuit writes an  
13          opinion that seems to me to make it tougher  
14          than necessary.

15          But is there any answer to what I've  
16          -- you -- you see where I'm coming from?

17          MR. McCLOUD: I -- I think I take your  
18          question -- Your Honor's question to be how  
19          have courts come to this different conclusion.  
20          And the textual hook that the First Circuit  
21          relied on is the reference in Section 404(b) to  
22          imposing a reduced sentence as if Sections 2  
23          and 3 of the Fair Sentencing Act were in effect  
24          at the time of the covered offense.

25          And, in our view, the First Circuit

1 misread that language as a limitation on  
2 district courts' authority. It is not a  
3 limitation.

4 JUSTICE GORSUCH: But --

5 MR. McCLOUD: It actually --

6 JUSTICE GORSUCH: -- let me -- oh, I'm  
7 sorry, go ahead.

8 JUSTICE KAVANAUGH: We start with the  
9 principle of finality, right? You -- you --  
10 you mentioned that, Mr. McCloud. And then the  
11 First Step Act is an exception to that  
12 principle of finality and refers to adjusting  
13 sentences, as you say, as if Sections 2 and 3  
14 of the Fair Sentencing Act, right, and what  
15 concerns me, we have a "must" and we have a  
16 "may."

17 We're not discussing "may not," but I  
18 want to at least make sure that's on the table  
19 and why you think that's wrong, on "may not  
20 consider."

21 And the issue, as I understand it, is  
22 can the defendant coming in trying to get the  
23 benefit of the change in the crack guideline  
24 also get the benefit of a change in the career  
25 offender guideline based on subsequent

1 developments, even though the Commission in  
2 Amendment 798 is not retroactive? That's kind  
3 of the big ticket issue as I see it here.

4           And my concern about saying, oh, yeah,  
5 you can come in and get the benefit of the  
6 change in the career offender guideline is that  
7 what about the defendants who are in prison for  
8 armed robbery or what have you? They can't use  
9 2255 or 3582 to come in and get the benefit of  
10 the change in the career offender guideline.

11           So the people who are coming in for  
12 the crack/powder issue are being treated  
13 differently than those people in getting an  
14 extra benefit compared to those people by being  
15 able to take advantage of the change in the  
16 career offender guideline, even though it's not  
17 retroactive.

18           That concerns me about the disparity.  
19 That also makes me think the "as if" language  
20 has some -- some bite here or at least it  
21 should.

22           And I wanted to give you a chance to  
23 respond to all that.

24           MR. McCLOUD: So, Justice Kavanaugh,  
25 let me start with the "as if" language, and

1 then I'll turn to the question about disparity.

2           We agree that the "as if" language  
3 plays an important role in the statute, but  
4 it's a very limited role. The "as if" language  
5 is critical for getting around 1 -- U.S.C. 109,  
6 the federal savings statute, and making  
7 Sections 2 and 3 of the Fair Sentencing Act  
8 retroactive. And that's clear from the  
9 reference in the clause to the time of the  
10 covered offense. As this Court explained in  
11 *Dorsey*, that is the point at which criminal  
12 penalties affix to a defendant.

13           So all Congress was trying to do in  
14 the "as if" clause was to make clear that when  
15 a court imposes a new sentence, it doesn't have  
16 to be bound by the statutory penalties that  
17 were previously in effect for that defendant.  
18 So it is not a limitation.

19           There are, in fact, limitations in the  
20 First Step Act, contained in Section 404(c).  
21 So I think, to the extent that there's an  
22 attempt to read the "as if" clause as a  
23 limitation, that really is inconsistent with  
24 canons like *expressio unius* --

25           JUSTICE KAVANAUGH: Right. But, if



1 Congress wanted these defendants to be able to  
2 take advantage of changes in the career  
3 offender guideline, I have two thoughts. One,  
4 why didn't they say that? And, two, why is  
5 that not available to the thousands of other  
6 defendants who are out there who are not in the  
7 crack/powder situation but could really benefit  
8 from the change in the career offender  
9 situation, but they're not allowed to? They  
10 can't get it under 2255 or 3582, so they're  
11 stuck. What about those two things?

12 MR. McCLOUD: So, Justice Kavanaugh,  
13 as to why Congress didn't single out the career  
14 offender issue, I think that it's because  
15 Congress recognized there were a lot of issues  
16 with these defendant sentences. The  
17 crack/powder ratio really permeated every  
18 aspect of their sentencing, and so what  
19 Congress did was to create an individualized  
20 process where district courts could go through  
21 and correct those sorts of problems if it was  
22 warranted to do so in a particular case.

23 On the question about disparity, I  
24 recognize there may be some difference in  
25 treatment between the covered offenders in this

1 case and, for example, a powder offender, but I  
2 don't think that disparity is an unwarranted  
3 disparity, and that's because Congress has  
4 acted here in a very significant way to give a  
5 substantial benefit to the crack offender.

6 So I -- I think, in a real sense, the  
7 powder defendant that you're talking about is  
8 not similarly situated to the crack defendant,  
9 who's covered by this law.

10 I would also note that the powder  
11 defendant is probably out of jail at this point  
12 because the sentences that were given to the  
13 crack offenders were so substantially longer  
14 than sentences for any other kind of drug.

15 JUSTICE KAVANAUGH: Last one on this.  
16 It wasn't just powder but all the other  
17 defendants who were in for robbery or whatever  
18 and could take advantage of the change in the  
19 career offender guideline, I guess that's it,  
20 but it's a pretty huge difference, the crack  
21 advantage that you get coming back, the change  
22 in that guideline gives you some advantage. It  
23 gives you from 262 to 327, drops to 188 to 235.  
24 But, when you throw in the career offender  
25 change, you get to 57 to 71. That's enormous,

1 but that's because of the career offender  
2 change, not because of the crack powder.  
3 Correct me if I'm wrong on that.

4 MR. McCLOUD: No, that's -- that's  
5 correct, Justice Kavanaugh. Two things on that  
6 point. The first is we have to remember this  
7 is still a discretionary system, and so, if the  
8 district court finds that reducing Mr.  
9 Concepcion's sentence based on the changes in  
10 his career offender status is unwarranted, it  
11 can do that.

12 The other point I would make on  
13 disparity is that our rule actually addresses  
14 that disparity concern by requiring courts to  
15 look at 3553(a)(6), which explicitly calls for  
16 courts to consider the potential for  
17 unwarranted disparity.

18 JUSTICE GORSUCH: Counsel, along the  
19 same lines, I -- I understand what -- I'm --  
20 I'm hearing basically a lenity argument, right?  
21 Don't -- don't assume that we should not give  
22 the benefit to some people just because others  
23 don't -- don't -- don't get it. And I  
24 understand that argument.

25 But the government has a slightly

1 different policy argument in this field too  
2 that I -- I want your -- hear you on, and that  
3 is that this is going to be enormously  
4 burdensome for district courts. It may be more  
5 regular. It may be more administrable. I  
6 understand those arguments, so no need to  
7 repeat those.

8           But this is just going to be  
9 burdensome for having to pull out old PSRs out  
10 of storage and recreate probation reports and  
11 the like. So what are -- what are your  
12 thoughts about that?

13           MR. McCLOUD: Justice Gorsuch, let me  
14 talk about the burden in general, and then I'll  
15 go to this specific case.

16           So we don't think there is much  
17 substantial additional burden in the typical  
18 First Step Act case where arguments about  
19 intervening developments are made. The parties  
20 submit briefs on those issues. It's a very  
21 limited record, and so it's not a large volume  
22 of additional work for the district court.

23           And however the Court comes out on the  
24 question presented today, these motions are  
25 still procedurally available to defendants, and

1 so courts will have to do some amount of work  
2 at the end of the day to resolve the motions.

3 In this particular case, we think the  
4 analysis is actually not as complicated as the  
5 district court suggested because we don't think  
6 that the statutes that are at issue are  
7 divisible, and so there's no need to consult  
8 Shepard documents. But, if the district court  
9 disagrees, I think what I would say is that is  
10 just part and parcel of the job of a district  
11 court judge, to resolve complicated sentencing  
12 issues. And this one is no different.

13 JUSTICE SOTOMAYOR: Counsel, it seems  
14 to me that generally, as a general matter,  
15 district courts have a wide range of discretion  
16 to impose an appropriate sentence, even based  
17 on disagreements with the guidelines, correct?

18 MR. McCLOUD: That's correct.

19 JUSTICE SOTOMAYOR: And so my  
20 experience -- and perhaps you can correct me if  
21 I'm wrong -- that when Congress wants to limit  
22 that discretion, that Congress usually  
23 explicitly does so, correct?

24 MR. McCLOUD: That's correct, Justice  
25 Sotomayor. An example is 3742(g), which limits

1 district courts' ability to consider current  
2 guidelines on resentencing.

3 JUSTICE SOTOMAYOR: And so it seems to  
4 me that your argument, if I'm correct, is that  
5 there's no language in this statute that limits  
6 the district court from considering factual or  
7 legal changes, correct?

8 MR. McCLOUD: That's right, Justice  
9 Sotomayor. As I was discussing with Justice  
10 Breyer and Justice Kavanaugh, the only language  
11 that could -- could conceivably serve that  
12 purpose would be the "as if" clause in  
13 Section 404(b), and I think that that's an  
14 incorrect interpretation of that clause for all  
15 the reasons I was explaining.

16 JUSTICE SOTOMAYOR: And it's incorrect  
17 and it feels illogical to me. Even the  
18 government is arguing that district courts can  
19 consider factual changes but not legal changes,  
20 correct?

21 MR. McCLOUD: Your Honor, I understand  
22 the government's position to be that there are  
23 some legal changes that courts could take  
24 account of. There are some courts -- the Ninth  
25 Circuit in the Kelley case is an example --

1 that have held that courts can consider factual  
2 changes but not legal changes.

3 I think that's an illogical --

4 JUSTICE SOTOMAYOR: But the -- I  
5 agree, it doesn't -- it doesn't make any sense.  
6 Neither does it make any sense that when a --  
7 when a statute says a district court may reduce  
8 a sentence, that a district court isn't going  
9 to naturally ask itself, is this a person  
10 that's deserving of a change?

11 And someone with a very long  
12 disciplinary record in prison or someone, as  
13 Justice Alito mentioned, who has killed  
14 somebody, that a district court wouldn't say to  
15 itself, well, I can't raise his sentence, but I  
16 certainly don't think that I should reduce it.  
17 And once I accept that that kind of changed  
18 circumstance from the original sentencing might  
19 influence my decision, that changes in law and  
20 there's a lot of other variety of arguments  
21 that could be made that would enter into my  
22 consideration, correct?

23 MR. McCLOUD: That's right, Justice  
24 Sotomayor. And I would note that changes in  
25 law can be just as relevant as changes in fact.

1 Changes in law go to the nature and  
2 characteristics of the defendant.

3 I would also point out that changes in  
4 law will not be uniformly defendant-friendly.  
5 So the rule that we're advocating is really an  
6 equal opportunity rule that would allow both  
7 defendants and the government to point to  
8 changes in law that they think are relevant and  
9 that bear on whether this individual should get  
10 a reduced sentence or not.

11 JUSTICE SOTOMAYOR: I think --

12 CHIEF JUSTICE ROBERTS: Counsel, I --

13 JUSTICE SOTOMAYOR: -- by that, you're  
14 meaning if -- if guideline ranges have  
15 dramatically increased the sentence, a district  
16 court might look at that and say, you know, I  
17 might not have thought this crime was so  
18 serious back then, but today I understand, for  
19 whatever reasons, because of the increased  
20 guidelines, things that I didn't appreciate and  
21 I don't think a change is warranted today,  
22 correct?

23 MR. McCLOUD: That's right, Your  
24 Honor. You could also think of the example of  
25 the reverse of this case, where a defendant was



1 not sentenced as a career offender initially,  
2 perhaps because of some ambiguity in the law.  
3 And if that ambiguity is clarified, we think it  
4 would be valid for the district court to say  
5 you got a lucky break the first time around  
6 because I didn't recognize you really were a  
7 career offender.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: I think you're  
10 making it a little too easy on yourself when  
11 you focus on the "as if," as if it were just  
12 those two words. The whole point of the  
13 statute, the background, the structure, the  
14 purpose, was limited. It was to change the  
15 disparities that were corrected in the Fair  
16 Sentencing Act.

17 I don't see anything in this statute  
18 that says because of that fortuity, that you  
19 benefit or may benefit from that, all bets are  
20 off and we're back to the beginning and I could  
21 look at anything I want. That seems to me to  
22 be a pretty -- you're putting an awful lot of  
23 weight on the "as if" when I think the  
24 structure of the statute really doesn't show  
25 any objective other than to correct a

1 particularly egregious problem.

2 MR. McCLOUD: May I respond, Your  
3 Honor?

4 CHIEF JUSTICE ROBERTS: Sure.

5 MR. McCLOUD: The reason that we think  
6 that Congress would have wanted that result or  
7 at least would have allowed that result is  
8 because we don't see any language of limitation  
9 in the statute that would depart from the  
10 normal rule that courts consider relevant  
11 information during sentencing.

12 Sentencing is a very difficult  
13 process. Many district judges say it's the  
14 most difficult thing they do. And in that  
15 process, more truthful information about a  
16 defendant is always to the better.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Thomas, anything further?

19 Justice Breyer?

20 Justice Alito?

21 JUSTICE ALITO: Justice Sotomayor  
22 correctly said that district judges generally  
23 have a lot of discretion in deciding what  
24 sentence to impose at least while they have it  
25 insofar as it's allowed under the Sentencing

1 Reform Act and our Court's decisions, but isn't  
2 it true that the backdrop here is that there  
3 has been a sentence and there would be no  
4 ground for reconsidering the sentence were it  
5 not for this one provision?

6 So, when you have a background rule of  
7 prohibition and then you say you may do this  
8 thing, isn't it un- -- isn't it generally  
9 understood that the -- the thing that you may  
10 do is just the thing that's set out? It  
11 doesn't say, well, that means you can go back  
12 and redo the whole thing over again.

13 MR. McCLOUD: Well, Justice Alito, the  
14 thing that is set out is imposing a new  
15 sentence that's lower than the previous  
16 sentence.

17 JUSTICE ALITO: Imposing a new  
18 sentence is -- well, we're back to the -- to  
19 the structure and to the "as if." But do you  
20 deny the fact that the background rule here is  
21 that you generally would not be resentenced,  
22 regardless of intervening changes of the law,  
23 in the law, regardless of whether your conduct  
24 in the intervening years might justify a  
25 different sentence?

1           MR. McCLOUD: I don't dispute that at  
2 all, Justice Alito. And we respect the value  
3 of finality in our criminal system. But  
4 Congress has done something momentous here with  
5 the First Step Act; that is to disrupt finality  
6 and to give defendants the opportunity to get a  
7 new reduced sentence.

8           And in that process, as I was saying  
9 to the Chief Justice, we think that more  
10 information about the defendant is always going  
11 to benefit the district court and the system as  
12 a whole.

13           CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor?

15           JUSTICE SOTOMAYOR: No. Thank you.

16           CHIEF JUSTICE ROBERTS: Justice Kagan?

17           JUSTICE KAGAN: You know, I guess, in  
18 thinking about the challenge that Justice Alito  
19 has posed to you, I would think it's -- it's  
20 relevant to ask whether there are analogous  
21 kinds of resentencings. In other words, are  
22 there resentencings that have been prompted for  
23 one -- because of one particular thing but that  
24 enable or require a judge to take into account  
25 the world more broadly?

1           And so I -- I don't know the answer to  
2 this question. Are there analogues here?

3           MR. McCLOUD: Justice Kagan, I think  
4 the most analogous proceeding is a resentencing  
5 on a limited remand. That's where the court of  
6 appeals identifies one problem with the  
7 sentence and says correct that problem.

8           The way that court of appeals have  
9 treated those sentencings is that they do not  
10 bar courts from considering changes in fact or  
11 changes in law, and, in fact, courts can  
12 reconsider even issues that were already  
13 decided if they can get around the law of the  
14 case or waiver or forfeiture.

15           JUSTICE KAGAN: The -- the way you  
16 just answered the question suggested the "may"  
17 answer rather than the "must" answer. Is that  
18 right? On -- on those sorts of -- of  
19 resentencings, is -- is there -- is there a  
20 view that really we have to cover the field  
21 now, or is there a view of we can cover the  
22 field?

23           MR. McCLOUD: So, Your Honor, I think  
24 it is actually a -- a "must" answer because,  
25 under this Court's decision in Pepper, the

1 Court said that factual developments are  
2 relevant. Courts don't have discretion to  
3 ignore relevant developments.

4 With respect to legal developments,  
5 it's been an established principle in this  
6 Court's case law going back to the Schooner  
7 Peggy that a court does not have discretion to  
8 ignore changes in the law simply because they  
9 happen after an initial sentence.

10 And so, in those limited remands, if  
11 this Court, for example, were to issue a new  
12 opinion that bears on some issue in the case,  
13 the Court could not ignore that. It would have  
14 to apply that law.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Gorsuch?

17 JUSTICE GORSUCH: I -- I would like to  
18 follow up on that just briefly. I apologize to  
19 my colleagues for extending the proceedings.

20 But Pepper, I thought, said that after  
21 a successful appeal on resentencing in the  
22 district court, the court may consider evidence  
23 of rehabilitation during that period.

24 What do we do with that?

25 MR. McCLOUD: Your Honor, I think that

1 what Pepper stands for is the proposition that  
2 post-sentencing information can be relevant.  
3 So, if the post-sentencing information is  
4 relevant, I would think that established  
5 principles of decision-making suggest the court  
6 has to consider it. It doesn't have to affect  
7 the overall decision on the sentence, but it at  
8 least has to be considered.

9 JUSTICE GORSUCH: So you do read  
10 Pepper as -- as a "must consider"?

11 MR. McCLOUD: I do read Pepper as  
12 "must consider," Your Honor.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

15 JUSTICE KAVANAUGH: I do have a couple  
16 questions.

17 First, in response to Justice  
18 Sotomayor's questions, she's quite right about  
19 the discretion that district judges have, and  
20 disagreement with the guidelines, I think you  
21 agreed, was a permissible basis for a district  
22 judge to rely on when sentencing.

23 So, if the -- on resentencing here,  
24 whatever the proceeding is, if the district  
25 court judge says I actually don't think someone

1 should get the benefit of the career offender  
2 guideline, and, therefore, I'm not going to  
3 take that into account, the change, is that an  
4 abuse of discretion?

5 MR. McCLOUD: No, that would not be an  
6 abuse of discretion. The only abuse of  
7 discretion along those lines I can think of is  
8 the one I was discussing with the Chief Justice  
9 earlier where a court has a categorical rule  
10 that they won't reduce sentence.

11 JUSTICE KAVANAUGH: Second and  
12 relatedly, you know, my experience is in the  
13 D.C. courthouse with district judges who  
14 spanned the spectrum of sentencing  
15 philosophies, and you're going to get some who  
16 do the career offender thing and really lower  
17 the sentence. You're going to get others who  
18 really don't. You know, it's going to -- it's  
19 going to split, and that's going to be true  
20 probably in every courthouse.

21 And is that -- you know, should we be  
22 concerned about that? I guess your answer is,  
23 no, that's just the way sentencing works, which  
24 I -- I agree with. I've spent enough time  
25 reviewing it. But -- but that seems a -- a



1 mild concern here.

2 MR. McCLOUD: That is my answer,  
3 Justice Kavanaugh. Our sentencing system isn't  
4 perfect and it relies on imperfect human beings  
5 to make these decisions about other imperfect  
6 human beings standing before them.

7 And so there will be some variation in  
8 -- in the decisions that get made. I think  
9 that's true under any possible rule in this  
10 case, though.

11 JUSTICE KAVANAUGH: I think that's  
12 probably right.

13 So, last question, does the district  
14 judge in the new proceeding have to calculate  
15 the new guidelines range based on today and, if  
16 they err in that, is that reversible error on  
17 appeal?

18 MR. McCLOUD: Under a "must consider"  
19 rule, the district court would have to consider  
20 the new applicable guidelines, and an error in  
21 that calculation would be reversible.

22 JUSTICE KAVANAUGH: How about on a  
23 "may consider"?

24 MR. McCLOUD: I think not on a "may  
25 consider." Well, a legal error in the

1 guidelines would be reversible. So, if the  
2 district court went to the trouble of  
3 calculating the guidelines and got it wrong --

4 JUSTICE KAVANAUGH: Yeah.

5 MR. McCLOUD: -- that would be  
6 reversible.

7 JUSTICE KAVANAUGH: But they don't  
8 have to do it?

9 MR. McCLOUD: But they don't have to  
10 do it.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 Thank you, counsel.

15 MR. McCLOUD: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Guarnieri.

17 ORAL ARGUMENT OF MATTHEW GUARNIERI

18 ON BEHALF OF THE RESPONDENT

19 MR. GUARNIERI: Mr. Chief Justice, and  
20 may it please the Court:

21 Section 404 of the First Step Act  
22 authorizes a limited sentence reduction  
23 proceeding, not a plenary resentencing.

24 By its plain terms, Section 404 only  
25 requires a district court to take account of

1 one new development, namely, the changes to  
2 crack cocaine sentencing made by Sections 2 and  
3 3 of the Fair Sentencing Act.

4 Section 404 does not entitle a  
5 defendant to insist that the court consider  
6 other unrelated factual and legal developments  
7 since the original sentencing, including the  
8 more than 75 non-retroactive amendments to the  
9 Sentencing Guidelines that the Commission has  
10 adopted since 2010.

11 Reading Section 404 to create such an  
12 entitlement would result in a significant and  
13 unjustified windfall for a select subset of  
14 crack cocaine offenders who were sentenced  
15 before the effective date of the Fair  
16 Sentencing Act.

17 Petitioner's principal argument, as  
18 you've heard this morning, in favor of such an  
19 entitlement rests on the term "impose" in  
20 Section 404, which Petitioner would read to  
21 incorporate a requirement to redo the  
22 Section 3553(a) analysis that a court does in  
23 imposing an initial sentence.

24 That argument is inconsistent with the  
25 text of Section 404 as a whole, in particular,

1 with the text of Section 404(c), as well as  
2 with the undisputedly limited scope and nature  
3 of sentence reduction proceedings.

4 As the statutory text reflects, the  
5 lodestar of any proceeding under Section 404 is  
6 the defendant's existing lawful sentence.

7 At every single proceeding under  
8 Section 404, the district court has already  
9 fully considered the Section 3553(a) factors at  
10 the original sentencing, and the only question  
11 before the court is whether to reduce that  
12 current sentence.

13 In that context, we think that  
14 Congress chose to require district courts to  
15 consider only the changes made by Sections 2  
16 and 3 of the Fair Sentencing Act, and it  
17 sensibly left the consideration of other  
18 developments to the Court's discretion.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Counsel, you seem  
21 fairly certain that there is no -- that  
22 Petitioner's argument is foreclosed by the  
23 language of the statute.

24 Could you spend a minute on precisely  
25 what words you're relying on for this -- for

1 your limitations?

2 MR. GUARNIERI: Sure. So we do think  
3 that there are important limitations in the  
4 text of Section 404(b) itself. In particular,  
5 Section 404(b) requires the district court to  
6 engage in this counterfactual inquiry and to  
7 determine the statutory and guidelines range  
8 that would have applied to the offender at the  
9 time of the original sentencing, had Sections 2  
10 and 3 of the Fair Sentencing Act been in effect  
11 at that time.

12 Now, in light of the fact that the  
13 statute specifies that the Court must engage in  
14 that counterfactual inquiry, we think there's  
15 just no plausible textual basis to read into  
16 the statute a requirement to consider other  
17 unrelated changes.

18 JUSTICE THOMAS: So you think this  
19 language by -- there's sort of a negative  
20 implication that nothing -- because it mentions  
21 this provision, no other considerations can be  
22 taken into account?

23 MR. GUARNIERI: Well, I -- Justice  
24 Thomas, I wouldn't say that no other  
25 considerations can be taken into account. I --

1 I would say that the statute does not require  
2 the district court to take into account  
3 anything else. And that discretionary reading  
4 is backstopped by Section 404(c), which says  
5 expressly that a sentence reduction is never  
6 required in any of these proceedings.

7 So the -- the watchword here is  
8 discretion. This is a -- entirely  
9 discretionary sentence reduction. There --  
10 there is a mandatory decision-making process in  
11 the sense that the district court, for a  
12 covered eligible offender, must engage in this  
13 counterfactual inquiry, but once the court has  
14 done so and figured out this counterfactual  
15 penalty range, the choice of a point within  
16 that range is left to the court's discretion.

17 JUSTICE THOMAS: But I don't see the  
18 difference. Petitioner seemed quite willing to  
19 accept that also. So I don't see what the  
20 daylight is between you and -- I see the  
21 daylight between the -- the "mandatory"  
22 argument, but if Petitioner's argument is  
23 willing to accept the discretionary approach,  
24 as you seem to be willing to accept, what's the  
25 daylight between you and Petitioner with

1 respect to that approach?

2 MR. GUARNIERI: Well, I'm not sure  
3 there is any daylight, Justice Thomas. In  
4 seeking this Court's review, Petitioner argued  
5 in favor of a mandatory approach in which  
6 district courts would be required to consider  
7 these unrelated developments.

8 In his merits brief in this Court,  
9 Petitioner has adopted as his notional fallback  
10 position the government's long-standing  
11 approach to Section 404 under which the  
12 consideration of other factors is discretionary  
13 or other -- other factual and legal  
14 developments is discretionary.

15 So I think, at least with respect to  
16 Petitioner's fallback argument, there really is  
17 -- is not daylight between the parties at this  
18 point.

19 JUSTICE KAVANAUGH: You're not -- keep  
20 going. Keep going.

21 MR. GUARNIERI: Well, I -- I -- there  
22 is a significant difference between that  
23 approach and the mandatory approach that  
24 Petitioner has principally advocated for. And  
25 under Petitioner's mandatory approach in a case

1 like this one, the district court would be  
2 required to redo the 3553(a) analysis from  
3 scratch. The court would be required to  
4 recalculate the offender's advisory guidelines  
5 range in light of numerous amendments that the  
6 Commission itself declined to make retroactive  
7 to a defendant in Petitioner's circumstances.

8 And we just don't think there's a  
9 basis to read into the statute that kind of  
10 burdensome requirement.

11 JUSTICE GORSUCH: Counsel, I'm -- I --  
12 I understand that everybody seems happy to lose  
13 and take the "may," but it's interesting that  
14 the government has chosen not to defend the  
15 "must not" position that the Ninth Circuit,  
16 among others, articulated pretty thoughtfully.  
17 And you -- you -- you've mentioned it, alluded  
18 to it in your opening remarks, the "as if"  
19 language suggests that you're just doing a  
20 counterfactual hypothetical changing one thing,  
21 and one thing only. And that's the -- the --  
22 Sections 2 and 3 of the Fair Sentencing Act.

23 I can understand -- I'm -- I -- I'm  
24 kind of where the Chief Justice was at the  
25 beginning of this argument. I can understand



1 that argument. And then I can also understand  
2 the -- the "may impose" suggests -- if you're  
3 going to impose a sentence, you do it like we  
4 have always done it, and that's 3553.

5 I have a very hard time getting my  
6 head around that there's some universe in which  
7 you may impose a lower sentence but it's  
8 unconstrained by 3553 or anything the  
9 Sentencing Commission has said. That's a  
10 world, I guess, after Rita and Gall I just  
11 don't recognize.

12 So can you help me first with why the  
13 government abandoned the position in the Ninth  
14 Circuit, which I could understand, and, two,  
15 help me understand that -- that which I'm  
16 struggling to understand?

17 MR. GUARNIERI: Sure, Justice Gorsuch.  
18 A couple of points. One, as detailed in our  
19 brief in opposition, I'm not sure it's clear  
20 that any court, including the Ninth Circuit,  
21 has embraced the kind of --

22 JUSTICE GORSUCH: Well, assume they  
23 did, okay?

24 MR. GUARNIERI: Sure. Sure. You --  
25 principally -- I mean, we start actually from a

1 quite similar position to one that Mr. McCloud  
2 alluded to in the top half of his argument,  
3 which is it would really be extraordinary in  
4 this context for Congress to have forbidden  
5 district courts from taking into account  
6 post-sentencing criminality by -- by the  
7 Section 404 movement.

8           So if you had a case in which the  
9 defendant had committed a serious -- had, for  
10 example, continued to deal drugs --

11           JUSTICE GORSUCH: I don't --

12           MR. GUARNIERI: -- while in prison --

13           JUSTICE GORSUCH: -- understand that  
14 argument because -- because surely a district  
15 court can consider criminality post-sentencing  
16 as a basis for exercising its discretion not to  
17 reduce the sentence. That would be one of the  
18 3553(a) factors, right? Your -- your  
19 character, your -- and your activities. That's  
20 -- that's part of what a judge would do.

21           And, surely, Congress didn't say you  
22 can increase the sentence on the basis of such  
23 conduct, because a trial would be required. If  
24 you're going to increase punishment, you'd need  
25 a jury to do that. So there's obvious reasons

1 why that's not the case.

2 So that doesn't work for me. So let's  
3 try again.

4 MR. GUARNIERI: Well, I take the  
5 point, Justice Gorsuch, but if you were to  
6 really adopt what I'll -- I'll characterize as  
7 a hard-line view in which all that the district  
8 court is required to take into account in these  
9 proceedings --

10 JUSTICE GORSUCH: I'm asking you to  
11 first address the question of why is the  
12 government not pursuing the "as if" position,  
13 which I attribute at least to the Ninth Circuit  
14 and which does strike me a plausible reading.  
15 That's my first question, all right?

16 MR. GUARNIERI: Sure.

17 JUSTICE GORSUCH: Let's start there.

18 MR. GUARNIERI: Justice Gorsuch,  
19 perhaps I'm not understanding what it is that  
20 -- that you are conceptualizing as -- as that  
21 approach, but as I understand it --

22 JUSTICE GORSUCH: That you must not  
23 consider anything other than the Fair  
24 Sentencing Act change, and it's a  
25 counterfactual hypothetical.

1 MR. GUARNIERI: Sure.

2 JUSTICE GORSUCH: The government's  
3 saying that's off the table, we're not pursuing  
4 that argument, and I'm just asking why?

5 MR. GUARNIERI: Well, again, we don't  
6 think that that is a plausible reading of the  
7 text here, in significant part because if you  
8 were to adopt that reading, the implication  
9 would be that the sentencing court cannot  
10 consider post-sentencing misconduct by --

11 JUSTICE GORSUCH: That -- that is a  
12 rational policy too. As -- as Justice Alito  
13 explained, on a presumption of finality in our  
14 criminal justice system, we're not going to  
15 reopen the books for any reason.

16 MR. GUARNIERI: Well --

17 JUSTICE GORSUCH: For any reason.

18 MR. GUARNIERI: Sure. It --

19 JUSTICE GORSUCH: Except -- except --

20 MR. GUARNIERI: It would be very  
21 strange to impute to Congress the -- the -- a  
22 directive to district courts to consider  
23 whether to impose a reduced sentence in light  
24 of the changes made to -- by the Fair  
25 Sentencing Act but to ignore the fact that the

1 defendant, during the intervening period, has  
2 continued to engage in serious criminal  
3 conduct, including potentially drug dealing --

4 JUSTICE BARRETT: But why would --

5 MR. GUARNIERI: -- while in prison.

6 JUSTICE BARRETT: -- that be strange?

7 MR. GUARNIERI: And if you accept  
8 that, if you accept the district court was --  
9 that Congress was unlikely to have required  
10 district courts to blind themselves in that  
11 way, then I think it follows naturally that  
12 district courts could also take a -- at least  
13 entertain argument --

14 JUSTICE BARRETT: But, counsel, I  
15 don't understand why that would be strange.  
16 Justice Kavanaugh pointed out that there are  
17 horizontal equity arguments because others  
18 can't take advantage of, say, the changes in  
19 the career offender guidelines. Why is that so  
20 outlandish?

21 MR. GUARNIERI: Well, I -- I take the  
22 point, and -- and, indeed, we make those kinds  
23 of horizontal equity arguments in many cases.  
24 We think that is a strong reason to reject  
25 Petitioner's mandatory approach.

1           But my point is just a more modest  
2 one, which is that I don't -- you know, we  
3 certainly think that, for example, district  
4 courts -- it's a perfectly permissible exercise  
5 of a district court's discretion to decline to  
6 take into account post-Sentencing Guidelines  
7 amendments that the Commission made not  
8 retroactive, but it would be strange to take  
9 off the table any consideration of  
10 post-sentencing misconduct by the defendant --

11           CHIEF JUSTICE ROBERTS: I -- I just --

12           MR. GUARNIERI: -- including, as in  
13 this case, the seven disciplinary infractions  
14 that Petitioner committed while incarcerated.

15           CHIEF JUSTICE ROBERTS: Well, I have  
16 the same reaction as Justice Barrett. I don't  
17 know if -- think it would be a reasonable  
18 thing -- I think it would be the most rational  
19 thing. Congress is saying there is a  
20 particular problem that we think is really  
21 outrageous, that we think ought to be fixed,  
22 and it's this, you know, crack/powder  
23 disparity. And we want you to go fix it.

24           Well, you know, are you worried about  
25 this problem? You know, are you worried about

1 this one? Saying no, no. You know, district  
2 judges are busy, so are people in Congress. I  
3 don't want to deal with the whole universe of  
4 things that a judge might want to look at.  
5 I've got one problem and I'm going to deal with  
6 that. And then to say back when it gets back  
7 to the district judge, well, we're going to do  
8 a whole bunch of other things.

9 I don't know Congress would have  
10 wanted that. And you could pick particularly  
11 egregious examples. There are particularly  
12 egregious examples with respect to other people  
13 who are not seeking relief under the Fair  
14 Sentencing Act, and they don't get a restart.  
15 I can see Congress saying we're only dealing  
16 with one thing and that's it.

17 MR. GUARNIERI: Well, Mr. Chief  
18 Justice --

19 CHIEF JUSTICE ROBERTS: And that's  
20 certainly what the record looks like. I don't  
21 see anything in the record saying and it's a  
22 good opportunity for us to fix all these other  
23 errors that might be out there.

24 MR. GUARNIERI: Sure. Mr. Chief  
25 Justice, let me -- let me take -- let me make

1 a couple of additional points against that  
2 position. First, it would be contrary to this  
3 Court's decision in *Pepper*, which recognized  
4 that -- and *Pepper*, to be clear, was a case  
5 involving a plenary resentencing after a  
6 sentence was vacated on direct appeal. But the  
7 Court in *Pepper* was discussing general  
8 principles and made clear that, ordinarily, a  
9 district court is entitled to take into account  
10 or has the discretion to take into account  
11 post-sentencing conduct in fashioning a  
12 sentence in --

13 CHIEF JUSTICE ROBERTS: Well, but --

14 MR. GUARNIERI: -- those  
15 circumstances.

16 CHIEF JUSTICE ROBERTS: -- I mean,  
17 that kind of begs the whole question here.  
18 Here we have something which is not a plenary  
19 review. It's a focused review on the Fair  
20 Sentencing Act issue.

21 MR. GUARNIERI: Well, what --

22 CHIEF JUSTICE ROBERTS: So I would put  
23 *Pepper* to one side.

24 MR. GUARNIERI: That's entirely true.

25 The second point I would make, again,



1 we -- we draw a great deal of our argument from  
2 the expressly discretionary language of the  
3 statute that is 404(b)'s use of the term "may"  
4 and 404(c)'s clear rule that nothing in the  
5 statute requires a sentence reduction in any  
6 particular case. So you have that  
7 discretionary language.

8           The third point I would make,  
9 Section 404 motions, and this is in 404(b), can  
10 be brought by the director of the Bureau of  
11 Prisons. There's really no obvious reason why  
12 Congress would have authorized the Bureau of  
13 Prisons to move under Section 404 for a  
14 sentence reduction, unless it is to bring to  
15 the district court's attention post-sentencing  
16 conduct because that's really institutionally  
17 the only thing that BOP would be positioned to  
18 speak to.

19           So, again, that's -- I mean, it's not  
20 -- it's not prohibitive --

21           JUSTICE BREYER: Why?

22           MR. GUARNIERI: -- but it's another  
23 sort of textual hint that Congress didn't mean  
24 to take off the table any consideration of  
25 post-offense conduct.

1 JUSTICE BREYER: Fine. Okay. Why  
2 have you said nothing about the Commission? Is  
3 the Department disowning the Commission, or am  
4 I making a big mistake?

5 (Laughter.)

6 JUSTICE BREYER: And please tell me or  
7 try to tell me if I'm making a big mistake.

8 MR. GUARNIERI: I --

9 JUSTICE BREYER: I thought, when the  
10 guidelines were originally drawn up and for a  
11 long time, what the Fair Sentencing Act is  
12 about and what the First Step is about are  
13 mandatory minimums, okay, five grams and 50  
14 grams of crack.

15 There also are approximately 48  
16 numbers in between those. And, indeed, someone  
17 can be convicted of four grams of crack, all  
18 right? So what the Commission did was write  
19 some guidelines that were keyed to what was  
20 then the 100-to-1 ratio.

21 When Congress changed it, Congress --  
22 the Commission rewrote those guidelines, again,  
23 with a key. So, if we limit this just to the  
24 mandatory minimums, what are we going to find?  
25 We're going to find that where you're talking

1 about 4, 3, 2, and 1, for example, and where  
2 the Commission both rechanged it and made them  
3 retroactive to a considerable degree, we will  
4 have a big discrepancy because we will only be  
5 looking at the change from 100 to 1 to 28 to 1.  
6 And so that -- Congress is most unlikely to  
7 have wanted that.

8           So I would think that sometimes at  
9 least a district court should look at other  
10 things, such as what the Commission did with  
11 four grams or six grams or 10 grams. So I  
12 would think that was pretty relevant.

13           Now there may be other things which  
14 they shouldn't look at, which have been  
15 mentioned. We know the Department is a member  
16 of the Commission or at least they have a  
17 person there, and they can say: Let's write  
18 our guidelines which are followed by  
19 approximately 60 to 80 percent of the judges,  
20 though they're absolutely discretionary, to say  
21 let's not.

22           What the -- what the Education Office  
23 has so far said is it said: What you should  
24 do, courts should consider the guidelines and  
25 policy statements along with other 3553(a)

1 factors during the resentencing. That's what  
2 their staff said.

3 So why is -- where I'm puzzled is, why  
4 is nobody thinking that any of that is  
5 relevant?

6 MR. GUARNIERI: Well, Justice Breyer,  
7 let me just make a couple of quick points about  
8 the Commission's role in these proceedings.

9 First, the United States does not  
10 oppose consideration of the revised drug  
11 quantity table in the Section 404 proceedings.  
12 So, in that sense, the district courts are --  
13 are permitted to and, indeed, are taking  
14 account of the Commission's handiwork here.

15 The principal locus of a lot of the  
16 litigation about these proceedings is the  
17 career offender enhancement, which I think, as  
18 Justice Kavanaugh's questions demonstrated  
19 earlier, has nothing at all to do with the  
20 crack-to-powder disparity that Congress was  
21 addressing in the Fair Sentencing Act and in  
22 the First Step Act.

23 The second point I'd like to make  
24 about the Commission's role here, Section 404  
25 proceedings unfold under the aegis of 18 U.S.C.

1 3582(c)(1)(A). 3582(c) is the provision that  
2 generally forbids district courts from  
3 modifying terms of imprisonment once they have  
4 been imposed, and then the statute has a couple  
5 of exceptions to that broad rule.

6 (c)(1)(A) is the exception for  
7 compassionate release. (c)(2) is the exception  
8 for retroactive guidelines amendments. And  
9 (c)(1)(B), the provision implicated here, is  
10 for modifications permitted by statute or by  
11 Rule 35.

12 Now, for (c)(1)(A) and (c)(2),  
13 Congress has expressly incorporated a  
14 requirement to consider the 3553(a) factors to  
15 the extent applicable. In (c)(1)(A) and  
16 (c)(2), both of those provisions direct the  
17 sentencing court to consider applicable  
18 Commission policy statements. (c)(1)(B), the  
19 provision at issue here, contains none of that  
20 express language.

21 So there is nothing in 3582(c)(1)(B)  
22 that requires a district court to consider any  
23 applicable Commission policy statement or to  
24 otherwise redo the 3553(a) analysis.

25 JUSTICE KAVANAUGH: Could I ask --

1           MR. GUARNIERI: And, of course,  
2 there's nothing in Section 404 either. So we  
3 -- I mean, there's just -- there's no clear  
4 statutory directive requiring that.

5           Now, again, we think that a district  
6 court may do so in respect --

7           JUSTICE KAVANAUGH: That's what I --  
8 can I interrupt there?

9           MR. GUARNIERI: Certainly.

10          JUSTICE KAVANAUGH: Just to be clear  
11 about your position, you're saying that the  
12 district court, with respect to changes in the  
13 law, is not required to consider the changes in  
14 the law but may, is that correct?

15          MR. GUARNIERI: That's generally  
16 correct, Justice Kavanaugh.

17          JUSTICE KAVANAUGH: That -- I mean,  
18 that's got to be a yes or no, I think.

19          MR. GUARNIERI: Well, I just -- I want  
20 to make sure that I'm crystal-clear about the  
21 way that we think this works. The district  
22 court under 404(b) has to figure out the  
23 counterfactual penalty range that would have  
24 applied at the time of the initial sentencing  
25 if the Fair Sentencing Act had been in effect.

1           The result of that inquiry may well be  
2           that the defendant is still subject to  
3           mandatory minimum sentences. And a district  
4           court -- when we say the district court can  
5           consider other changes in the law, what we mean  
6           is the district court is entitled to say:  
7           Well, in light of some other changes that  
8           reflect, you know, different views, different  
9           social views about the severity of the offense,  
10          whatnot, I'm going to select a point within  
11          that range, but the district court can't go  
12          below any applicable mandatory minimums.

13                 JUSTICE KAVANAUGH: And this is a very  
14                 important question to me. Okay. In figuring  
15                 out the new range, you figure out the new range  
16                 that here is 188 to 235, is that the correct  
17                 new range, or is the correct new range 57 to  
18                 71, which, as the numbers reveal, is a huge  
19                 difference? Which of those two is the correct  
20                 new range here, or does the district court have  
21                 discretion which of those two to say he or she  
22                 is following?

23                 MR. GUARNIERI: The correct new one is  
24                 the first one. The -- the -- the "as if"  
25                 clause --

1 JUSTICE KAVANAUGH: Okay.

2 MR. GUARNIERI: -- we understand to  
3 require the district court to -- to correctly  
4 calculate that range --

5 JUSTICE KAVANAUGH: So --

6 MR. GUARNIERI: -- as it would have  
7 applied at the original sentencing.

8 JUSTICE KAVANAUGH: Got it. So that  
9 -- and then the district court in your view has  
10 discretion, though -- just correct me if I'm  
11 wrong -- to say but I know there's this career  
12 offender thing out there that's changed too.  
13 And that would be 57 to 71. And that  
14 influences me a lot, so I'm going to really  
15 drop the sentence quite a bit.

16 Your position is that's okay?

17 MR. GUARNIERI: That's correct.

18 JUSTICE KAVANAUGH: Okay.

19 MR. GUARNIERI: Now, in this Court, we  
20 -- in this case, we also --

21 JUSTICE GORSUCH: I want to follow up  
22 on that. In what world does it make sense that  
23 some district courts will be -- take cognizance  
24 of -- of changes in the law like that and  
25 others will not, and the results will be, as --



1 as Justice Kavanaugh points out, dramatically  
2 different for different individuals?

3 I thought the point of imposing a  
4 sentence was that you looked the defendant in  
5 the eyes on the day he stands before you and  
6 take the measure of that person as a whole.  
7 And to be willfully blind to math wouldn't  
8 normally be part of the equation. That would  
9 normally be an abuse of discretion.

10 MR. GUARNIERI: Well, as I alluded to  
11 in my opening, at every single one of these  
12 404(b) proceedings, the district court has  
13 already done precisely what -- what Your Honor  
14 is suggesting. The district court has  
15 conducted the full -- the full 3553(a) analysis  
16 that applies at the initial sentencing. And  
17 the court is not imposing a new sentence.

18 JUSTICE GORSUCH: No, we're positing,  
19 though --

20 MR. GUARNIERI: It is figuring whether  
21 to do so.

22 JUSTICE GORSUCH: -- two district  
23 courts, one of whom who says looking at the  
24 person before me and deciding how many years  
25 this person must spend in federal prison, I

1 take cognizance of the fact that sentencing  
2 guidelines have changed and here is the  
3 Commission's current recommendation.

4 And the other one says: I choose not  
5 to do so, for no reason, for no reason. Now,  
6 if he had a bad behavior in prison, that might  
7 be a reason, okay, not -- not to -- not to  
8 impose a lower sentence. I get that.

9 But just to say "I choose not to"  
10 traditionally has never been a good enough  
11 reason under this Court's precedents to ignore  
12 the changes in Commission guidance, intervening  
13 law, intervening facts, in looking at an  
14 individual in the eye at the time he stands  
15 before the court.

16 But your submission, I understand it,  
17 is different. And I'm just -- I just don't  
18 know another area in which we give lower courts  
19 that kind of latitude. Are you aware of any?

20 MR. GUARNIERI: Well, I think the most  
21 obvious example would be a Rule 35 sentence  
22 reduction proceeding, which gives --

23 JUSTICE KAVANAUGH: What about the  
24 original sentencing too? Can't the -- at the  
25 -- sorry to interrupt.

1           MR. GUARNIERI: That -- that's  
2 perfectly --

3           JUSTICE KAVANAUGH: But, at the  
4 original sentencing, the district court can  
5 say: You know what? I don't agree with this  
6 guideline. I'm not following it. That, in  
7 fact, a significant percentage of district  
8 judges do that now.

9           MR. GUARNIERI: That's absolutely  
10 true.

11          JUSTICE GORSUCH: Well, if we're going  
12 to get into a discussion here, I'd say that  
13 they -- that they at least have to take  
14 cognizance of it and explain themselves, and it  
15 can't be "I prefer not to."

16          And so that's my question to you, just  
17 to -- just -- and I appreciate the friendly  
18 amendment, I'll take it as that, to my  
19 question -- it isn't about whether I disagree  
20 with the guidelines. Rita and Gall, of course,  
21 leave room for that, but it has to be a  
22 reasoned explanation.

23          Here, you're positing something  
24 different and that I'm unfamiliar with, so help  
25 me out.

1           MR. GUARNIERI: Well, as I began to  
2 say, this is no different in kind from Rule 35  
3 proceedings under which there is no mandate to  
4 redo the 3553(a) analysis. It's -- it's not  
5 substantially different than a sentence  
6 reduction proceeding under (c)(2), as this  
7 Court considered in Dillon. There, again, the  
8 district court is not required to redo all of  
9 the analysis that it did at the initial 3553(a)  
10 factors.

11           And -- and, more broadly, I mean, it  
12 makes sense that Congress would have left  
13 this to the district court's discretion because  
14 in many cases, these are the same district  
15 court judges who imposed the original sentence.  
16 They are the ones best positioned to know the  
17 factors that they found particularly important  
18 in their original 3553(a) calculus, the things  
19 that they -- that are likely to influence them  
20 in making a judgment now, ten or more years  
21 after the fact, of whether a reduction is  
22 warranted in light of the water under the  
23 bridge in those intervening years.

24           And so Congress left it to their  
25 discretion.

1 JUSTICE KAVANAUGH: One more  
2 friendly --

3 JUSTICE BREYER: I thought Congress  
4 solved this. I thought they solved it, because  
5 the arguments that you are making, I've heard  
6 for decades. Okay? In lots of contexts.

7 And the way I thought they solved it  
8 was they created a Sentencing Commission, and  
9 now, as discretionary, they said to the lower  
10 -- the district judge: Judge, you don't have  
11 to apply these rules. And if you don't, give  
12 us your reason.

13 And then you can appeal, I thought,  
14 your sentence to the courts of appeals, who  
15 will decide whether your decision on these  
16 matters is reasonable.

17 Now, I mean, that's been going on  
18 since 1986. And I don't think it's worked  
19 perfectly, but I don't think it's been a  
20 disaster. And all I can't understand is why  
21 this isn't the same kind of problem?

22 So that we don't have to answer this  
23 now. We -- all we have to say is treat it the  
24 same as you treat lots of other things in  
25 sentencing. And if the Commission wants to

1 write a guideline to unify things, it can. And  
2 if district courts want to decide different  
3 ways -- and believe me, if a district court  
4 decides something important and doesn't give  
5 any reason except, oh, that's what I like,  
6 which I don't think I've seen, but I feel there  
7 are courts of appeals that would sort of take  
8 offense at that and they might say at least  
9 explain.

10 But, I -- I mean, I spell this out,  
11 because I don't really see why this is a  
12 different problem in the courts.

13 MR. GUARNIERI: Well, I think that's  
14 absolutely correct, Justice Breyer. And, you  
15 know, there is -- an important backstop here is  
16 the availability of review on appeal for abuse  
17 of discretion.

18 You know, this -- the rule we are  
19 defending here has been the rule, the operative  
20 rule, in numerous courts of appeals for the  
21 past several years. We haven't seen a spate of  
22 reversals. And to the extent we have, they are  
23 cases in which the court --

24 JUSTICE ALITO: Let me make --

25 MR. GUARNIERI: -- doesn't --

1 JUSTICE ALITO: -- sure I understand --

2 MR. GUARNIERI: -- any -- any  
3 explanation.

4 JUSTICE ALITO: -- let me make sure I  
5 understand your -- your argument. Suppose  
6 we're dealing with a guide -- a new guideline  
7 issued by the Sentencing Commission that the  
8 Sentencing Commission says is not retroactive,  
9 okay?

10 Could a district judge say, although  
11 the Sentencing Commission has said this is not  
12 retroactive, I think it reflects a policy that  
13 is appropriate and I am going to apply it?  
14 Could another district judge say the Sentencing  
15 Commission has said this is not retroactive,  
16 and I don't think that there should be should  
17 be a retroactive change as to this defendant's  
18 sentence.

19 Are those both permissible, in your  
20 view?

21 MR. GUARNIERI: Yes, they are. And as  
22 I hope I clarified in my answer to Justice  
23 Kavanaugh earlier, we do think there is a  
24 predicate step where the district court has to  
25 correctly calculate what the guidelines range

1 would have been at the time of the original  
2 offense, but having done that, it is left to  
3 the court's discretion whether to take into  
4 account these other non-retroactive guidelines.

5 JUSTICE ALITO: And -- and would  
6 the --

7 MR. GUARNIERI: At the end of the day,  
8 these are all advisory.

9 JUSTICE ALITO: Would the -- would the  
10 -- the judge who takes the second view, that  
11 they said it was not retroactive, I don't think  
12 there should be a retroactive change, would the  
13 judge be required to say anything more than  
14 that?

15 MR. GUARNIERI: No.

16 JUSTICE ALITO: And the same issue as  
17 to new factual developments. One judge says I  
18 think we should take these into account because  
19 I'm resentencing this person, I want to make  
20 sure it's appropriate for this human being  
21 who's standing before me.

22 Another judge says, no, this person  
23 was sentenced before. I think that the -- the  
24 person should get the sentence that this person  
25 merited on the day when that person was



1 sentenced. That would be permissible as well?

2 MR. GUARNIERI: Yes.

3 JUSTICE ALITO: So why -- and so I --  
4 I come back to a question Justice Gorsuch  
5 provided to you. Why in the world is that --  
6 would Congress want that?

7 I know district judges have some  
8 discretion, but the Sentencing Reform Act was  
9 intended to eliminate the enormous disparities  
10 that existed before then, and our decisions  
11 have reduced the strength of that -- that -- to  
12 which the Sentencing Reform Act achieves it.

13 But your argument introduces an  
14 enormous amount of discretion. It's hard to  
15 understand why Congress would have wanted that,  
16 and if they did, why would they have -- how can  
17 you find that in -- in this language?

18 MR. GUARNIERI: Well, we think these  
19 are just two -- these are flip sides of the  
20 same coin. Congress did not require district  
21 courts to take account of unrelated legal and  
22 factual developments beyond the Fair Sentencing  
23 Act itself, but so too it didn't prohibit  
24 courts from doing so.

25 The -- the statute is essentially

1 agnostic on that issue. And so we think it  
2 leaves to the district court some discretion to  
3 do that.

4 JUSTICE KAGAN: You suggested that  
5 there was a backstop of appellate review. But  
6 how is appellate review supposed to operate as  
7 against such a system? What -- what are they  
8 reviewing for? What's -- what counts as an  
9 abuse of discretion?

10 MR. GUARNIERI: Well, it's -- I mean,  
11 abuse of discretion is a familiar appellate  
12 standard of appellate review. It's been the  
13 standard of review for sentencing decisions --

14 JUSTICE KAGAN: Yes, I know --

15 MR. GUARNIERI: -- this Court said in  
16 Gall --

17 JUSTICE KAGAN: -- but you're sort of  
18 positing a world in which anybody gets to do  
19 anything. So what -- what -- what counts as  
20 going -- what counts as an abuse?

21 MR. GUARNIERI: Well, I -- the  
22 district court could decline to -- for  
23 impermissible reasons, such as animus, I think,  
24 would be an impermissible reason. You -- you  
25 could imagine the district court fails to

1       conduct the "as if" inquiry correctly. That  
2       would be an abuse of discretion. If the  
3       district court is trying to recalculate the  
4       guidelines range that would have applied at the  
5       original sentencing and makes a mistake, that  
6       could be a reason for --

7                 JUSTICE KAGAN: No, no, no.

8                 MR. GUARNIERI: -- that -- that --

9                 JUSTICE KAGAN: But beyond the "as if"  
10       inquiry. In the world of discretion that  
11       you're positing and that people, you know, from  
12       different, maybe, points are saying, huh, why  
13       does that middle position make sense, is there  
14       any -- are there -- are there any bounds to  
15       that discretion that you're positing?

16                MR. GUARNIERI: Well, look, I think  
17       frankly the result here is going to be  
18       substantial discretion for the district courts.  
19       Again, these are proceedings that are limited  
20       in scope. This is a sentence reduction  
21       proceeding.

22                There's already a lawful sentence that  
23       was itself the product of the 3553(a) factors.  
24       We're talking here about whether to reduce that  
25       sentence in light of a -- essentially

1 congressional largesse. Congress has created  
2 this limited and -- and, frankly, quite  
3 extraordinary opportunity for defendants who  
4 were lawfully sentenced at the time, to benefit  
5 retroactively from Congress's reconsideration  
6 to correct the powder ratio. And in that very  
7 narrow context, we're saying the district  
8 courts have discretion about whether or to what  
9 extent they want to take into account  
10 developments --

11 JUSTICE SOTOMAYOR: Counsel --

12 MR. GUARNIERI: -- other than Fair  
13 Sentencing Act.

14 JUSTICE SOTOMAYOR: Counsel, much of  
15 the questions that I'm hearing are discomfort  
16 that some of my colleagues are expressing with  
17 the -- the discretion that district courts  
18 have. Regrettably, that's what led to the  
19 Sentencing Guidelines and to the original  
20 mandatory nature.

21 Once we overturned that and returned  
22 discretion, the fact that judges have different  
23 views about factors and how to weigh them is  
24 inherent in the sentencing process.

25 Do you agree with that?

1           MR. GUARNIERI: I do, Justice  
2 Sotomayor. And this is not categorically  
3 different from that. I mean, just as a judge  
4 might give different weight to the 3553(a)  
5 factors, so too, in this context, a judge might  
6 choose to give different weight to  
7 post-sentencing conduct --

8           JUSTICE SOTOMAYOR: I -- I mean, there  
9 are some judges, and I've known them, who  
10 always believe the maximum guideline sentence  
11 was the appropriate sentence for any serious  
12 crime, and they define "serious" more broadly  
13 than most others.

14           Similarly, some people might view a  
15 clean disciplinary record as being zero  
16 infractions, and other judges may say if  
17 there's one infraction, that's enough for me to  
18 say no.

19           That is always inherent in sentencing,  
20 and we can rail against it, but I think your  
21 point is -- and you can correct me, is if  
22 Congress wanted to take that discretion away,  
23 it would have -- it would have, as it has done  
24 on many other occasions, have said that  
25 explicitly, correct?

1           MR. GUARNIERI: That -- that's  
2 absolutely correct. And -- and then on the  
3 other side, we don't think there's any sound  
4 basis to constrain the district courts'  
5 discretions in these proceedings by weighting  
6 down the proceedings with a requirement to redo  
7 the 3553(a) factors or to take account of any  
8 intervening legal or factual developments that  
9 the -- the defendant claims --

10           JUSTICE SOTOMAYOR: Or -- or --

11           MR. GUARNIERI: -- is eligible.

12           JUSTICE SOTOMAYOR: -- frankly, to  
13 weigh it down by saying the only thing the  
14 district court can do is look at the original  
15 factors, because that then introduces -- have  
16 they actually calculated it right becomes more  
17 important, correct?

18           MR. GUARNIERI: That's right.

19           CHIEF JUSTICE ROBERTS: Justice  
20 Thomas, anything further?

21           Justice Breyer? Okay.

22           Justice Alito?

23           JUSTICE ALITO: Your argument is that  
24 the -- a district court can disregard the 3553  
25 factors, isn't -- if it chooses to, right? It

1 has discretion to do that?

2 MR. GUARNIERI: It has discretion not  
3 to reconsider those factors, although, in many  
4 cases, we do urge the courts to use them.  
5 They're a sensible and familiar framework, but  
6 -- but it --

7 JUSTICE ALITO: Yeah. So maybe the --  
8 the -- the scope of the discretion that you  
9 seem to suggest in responding to Justice  
10 Sotomayor with respect to the post-sentencing  
11 guideline, post-Booker world was a bit  
12 exaggerated there. There still is discretion,  
13 but it's still limit to -- limited to a  
14 substantial degree. Isn't that true?

15 MR. GUARNIERI: At -- at an original  
16 sentencing, sure, we -- we don't think at -- in  
17 -- in these sentence reduction proceedings that  
18 3553(a) operates the same way. And -- and --  
19 and that's consistent with 3553(a) itself.

20 The prime directive in 3553(a) is to  
21 impose a sentence that is sufficient but not  
22 greater than necessary. And at a sentence  
23 reduction proceeding, the district court can  
24 only go down, it can't go up, even if its  
25 judgment is that a greater sentence is

1 necessary to effectuate the purposes of federal  
2 sentencing.

3           So this is just a different  
4 proceeding. It's more limited in scope, and we  
5 don't think 3553(a) automatically applies here.

6           JUSTICE ALITO: What should I do if I  
7 think that you are -- the government is  
8 effectively trying to drive down the -- the  
9 middle -- on -- on the dividing line of a  
10 two-lane highway, and, really, the only choice  
11 is to go in one direction or the other  
12 direction.

13           So you had to choose between either --  
14 either Petitioner's position or the position  
15 that you just have to have the -- you have to  
16 have a resentencing while ruling -- while  
17 taking -- correcting only the specific error  
18 mentioned in the -- in this provision? Which  
19 would you choose?

20           MR. GUARNIERI: We -- we would prefer  
21 to live in a world in which the district court  
22 would have to take into account post-sentencing  
23 developments, and that's principally because,  
24 in many, many of these cases, we do rely on  
25 arguments about post-sentencing misconduct by



1 the defendant, and we would not want to take  
2 those off the table.

3 JUSTICE ALITO: And -- and where would  
4 you find that in the statutory language?

5 MR. GUARNIERI: Well, I -- for all the  
6 reasons set forth in our brief, we don't think  
7 that's the correct understanding of the  
8 statute. But I -- I took Your Honor's question  
9 to be, if those arguments are rejected, which  
10 -- which is the lesser evil from our  
11 perspective, and -- and that -- that would be  
12 our answer.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Sotomayor, anything further?

15 JUSTICE SOTOMAYOR: No. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: I'd like to ask a  
18 similar question of you that I asked to Mr.  
19 McCloud. I mean, I find the text here not very  
20 useful either way, so that makes me think that  
21 we should try to figure out what the most  
22 analogous situations are and how courts operate  
23 in those situations. I think, for the reasons  
24 Justice Alito gave, I don't think sentencing  
25 generally is analogous. I -- I think you have

1 to look to some, you know, resentencings that  
2 occur for particular reasons.

3 So, in that, tell me what you think  
4 the analogues are in resentencings and what the  
5 rules are, you know, how much discretion, of  
6 what kind, or, you know, what are the -- what  
7 -- what are the rules that operate in what you  
8 think of as the best analogues?

9 MR. GUARNIERI: Sure. So I think the  
10 best analogue here is a -- a sentence reduction  
11 proceeding in light of a retroactive guidelines  
12 amendment which unfolds under 3582(c)(2). And  
13 that's the best analogue because that is the  
14 other circumstance in which a district court  
15 has discretion to reduce the sentence in light  
16 of retroactive legal changes.

17 Now there, obviously, it's a change  
18 that the Commission has made retroactive.  
19 Here, it's Congress has created this limited  
20 retroactivity provision. But 3582(c)(2) is  
21 probably the best -- the closest sibling to  
22 these proceedings.

23 And in that context, it -- the  
24 district court, it is not a de novo  
25 resentencing. The court is not redoing the

1 3553(a) factors from scratch. It is a  
2 proceeding that is limited in scope for all the  
3 reasons this Court discussed in Dillon.

4 And the Court can permissibly decline  
5 to take into account other unrelated changes.  
6 And -- and, indeed, the guidelines require the  
7 district court not to take into account other  
8 unrelated changes to the guidelines themselves.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: A couple quick  
13 questions, I hope.

14 First, Justice Gorsuch was talking  
15 about the defendant appearing at the new  
16 proceeding in -- if I followed his questions.  
17 I want to make sure. Does that always happen,  
18 or is this sometimes done on the paper?

19 MR. GUARNIERI: That rarely happens,  
20 and, indeed, I believe the courts of appeals --

21 JUSTICE KAVANAUGH: What -- what  
22 rarely happens? Appearing?

23 MR. GUARNIERI: The -- the -- yes. It  
24 -- it is -- these proceedings are principally  
25 done on the papers. And the courts of appeals

1 have been unanimous so far in concluding that  
2 the defendant has no right to an in-person  
3 hearing for a Section 404 motion.

4 JUSTICE KAVANAUGH: Okay. Second:  
5 Factual changes, in other words, things you've  
6 done in prison while you're there. I thought  
7 the good time credit system was designed to  
8 deal with that. Am I wrong about that?

9 MR. GUARNIERI: The good time credit  
10 system, as -- as modified by the First Step Act  
11 itself, certainly is -- is one means that  
12 Congress has created to give defendants the  
13 benefit of good conduct in prison.

14 JUSTICE KAVANAUGH: Okay. Third,  
15 you've said discretion is your number one  
16 choice here, your only argument really.

17 That means appellate review should be  
18 very deferential, correct?

19 MR. GUARNIERI: Yes.

20 JUSTICE KAVANAUGH: Okay. And, last,  
21 I think your strongest argument in terms of the  
22 big picture is this is the way it's been going  
23 in the district courts and courts of appeals in  
24 a lot of regions around the country.

25 And I just want to get the

1 government's perspective on, have there been  
2 problems in these proceedings from the  
3 government's perspective or not?

4 MR. GUARNIERI: No, Justice Kavanaugh.  
5 The rule we're advocating here, as -- as  
6 detailed in our brief in opposition in this  
7 case, has been the majority rule in the courts  
8 of appeals, and it's been perfectly  
9 administrable in the district courts, and we  
10 haven't seen any kind of practical problems  
11 with -- with this approach.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 Thank -- thank you, counsel.

16 MR. GUARNIERI: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. McCloud, I  
18 guess I'll call it rebuttal.

19 REBUTTAL ARGUMENT OF CHARLES L. McCLOUD

20 ON BEHALF OF THE PETITIONER

21 MR. McCLOUD: Thank you, Mr. Chief  
22 Justice.

23 Justice Kavanaugh, you asked about  
24 good time credits. We agree those are  
25 important, and the First Step Act made changes

1 to the way that those are calculated, but they  
2 don't take into account some important  
3 developments, for example, Mr. Concepcion's  
4 religious conversion in prison. A number of  
5 prisoners bring that sort of evidence to their  
6 First Step Act proceedings, and it's not always  
7 accounted for in the good time credits.

8 Justice Kagan, you asked a question of  
9 Mr. Guarnieri about the analogous proceeding.  
10 He gave a different answer. He referenced  
11 3582(c)(2). I think, at the end of the day, it  
12 doesn't matter which proceeding you think is  
13 most analogous.

14 In fact, I think 3582(c)(2) helps us  
15 because the reason this Court in Dillon did not  
16 allow the defendant to make an argument based  
17 on current law is because there was explicit  
18 text in the policy statement that was at issue  
19 there that said you can't raise those sorts of  
20 arguments.

21 The First Step Act doesn't have that  
22 sort of limitation, and so we don't see any  
23 reason for courts not to be able to consider  
24 current law and current facts in First Step Act  
25 proceedings.

1           Mr. Chief Justice, you asked a  
2 question about why we shouldn't just fix the  
3 one problem and leave it at that, and -- and  
4 the problem with that approach is that this is  
5 not a mechanical adjustment. So, in Mr.  
6 Concepcion's case, if you make the change from  
7 the Fair Sentencing Act, you still have a range  
8 of four years of possible sentences that could  
9 be given.

10           And looking at Mr. Concepcion as he  
11 exists today and taking account of the good and  
12 the bad and relevant legal developments is  
13 critical in deciding where in that range he  
14 should fall.

15           Thank you.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel. The case is submitted.

18           (Whereupon, at 12:47 p.m., the case  
19 was submitted.)

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