

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS CONCEPCION,)
)
 Petitioner,)
)
 v.) No. 20-1650
)
 UNITED STATES,)
)
 Respondent.)

Pages: 1 through 86
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CARLOS CONCEPCION,)

Petitioner,)

v.) No. 20-1650

UNITED STATES,)

Respondent.)

- - - - -

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,
24 yeah, 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, and they say
3 here's what you do, Judge, at the moment. What
4 you do is you look to 3553. I think that's
5 what the Office of Education says. So this
6 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 KAVANAUGH: What --

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

14 JUSTICE BREYER: It's the statute.

15 JUSTICE KAVANAUGH: How about the --

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

18 JUSTICE KAGAN: It's the statute --

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

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

24 JUSTICE BREYER: Fair.

25 JUSTICE KAGAN: The statute says "may

1 impose a reduced sentence."

2 JUSTICE BREYER: Yes.

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

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

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

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

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

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

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

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

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

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

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

1 a constitutional problem with that?

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

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

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

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

24 MR. McCLOUD: Yes, Justice Alito, I
25 agree with you that if there were a situation

1 where a court was increasing the sentence that
2 was given to the defendant based solely on
3 conduct in prison, that could raise
4 constitutional questions.

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

10 JUSTICE KAVANAUGH: Mr. McCloud --

11 JUSTICE ALITO: So --

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

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

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

1 So Congress was not wiping the slate
2 clean. It was giving district courts the
3 option to make an exception to finality and to
4 give the defendant a new sentence that's lower
5 relative to their prior sentence.

6 JUSTICE KAVANAUGH: Mr. McCloud --

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

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

18 And my real question -- I shouldn't
19 have sounded so definite and so -- so forth,
20 and I'm sorry about that -- but -- but -- but,
21 look, what I don't see is why we wouldn't treat
22 this the same way. And, of course, sometimes
23 they could abuse their discretion. Sometimes
24 they couldn't. So why -- there must be a
25 reason that you can answer me on that because

1 nobody's really been arguing that.

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

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

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

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

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

1 And, in our view, the First Circuit
2 misread that language as a limitation on
3 district courts' authority. It is not a
4 limitation.

5 JUSTICE GORSUCH: But --

6 MR. McCLOUD: It actually --

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

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

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

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

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

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

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

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

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

25 MR. McCLOUD: So, Justice Kavanaugh,

1 let me start with the "as if" language, and
2 then I'll turn to the question about disparity.

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

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

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

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

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

24 On the question about disparity, I
25 recognize there may be some difference in

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

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

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

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

1 change, you get to 57 to 71. That's enormous,
2 but that's because of the career offender
3 change, not because of the crack powder.
4 Correct me if I'm wrong on that.

5 MR. McCLOUD: No, that's -- that's
6 correct, Justice Kavanaugh. Two things on that
7 point.

8 The first is we have to remember this
9 is still a discretionary system, and so, if the
10 district court finds that reducing Mr.
11 Concepcion's sentence based on the changes in
12 his career offender status is unwarranted, it
13 can do that.

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

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

1 understand that argument.

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

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

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

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

25 And however the Court comes out on the

1 question presented today, these motions are
2 still procedurally available to defendants, and
3 so courts will have to do some amount of work
4 at the end of the day to resolve the motions.

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

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

20 MR. McCLOUD: That's correct.

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

1 MR. McCLOUD: That's correct, Justice
2 Sotomayor. An example is 3742(g), which limits
3 district courts' ability to consider current
4 guidelines on resentencing.

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

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

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

23 MR. McCLOUD: Your Honor, I understand
24 the government's position to be that there are
25 some legal changes that courts could take

1 account of. There are some courts -- the Ninth
2 Circuit in the Kelley case is an example --
3 that have held that courts can consider factual
4 changes but not legal changes.

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

13 And someone with a very long
14 disciplinary record in prison or someone, as
15 Justice Alito mentioned, who has killed
16 somebody, that a district court wouldn't say to
17 itself, well, I can't raise his sentence, but I
18 certainly don't think that I should reduce it.

19 And once I accept that that kind of
20 changed circumstance from the original
21 sentencing might influence my decision, that
22 changes in law and there's a lot of other
23 variety of arguments that could be made that
24 would enter into my consideration, correct?

25 MR. McCLOUD: That's right, Justice

1 Sotomayor. And I would note that changes in
2 law can be just as relevant as changes in fact.
3 Changes in law go to the nature and
4 characteristics of the defendant.

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

13 JUSTICE SOTOMAYOR: I think --

14 CHIEF JUSTICE ROBERTS: Counsel, I --

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

25 MR. McCLOUD: That's right, Your

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

10 JUSTICE SOTOMAYOR: Thank you,
11 counsel.

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

20 I don't see anything in this statute
21 that says because of that fortuity, that you
22 benefit or may benefit from that, all bets are
23 off and we're back to the beginning and I could
24 look at anything I want. That seems to me to
25 be a pretty -- you're putting an awful lot of

1 weight on the "as if" when I think the
2 structure of the statute really doesn't show
3 any objective other than to correct a
4 particularly egregious problem.

5 MR. McCLOUD: May I respond, Your
6 Honor?

7 CHIEF JUSTICE ROBERTS: Sure.

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

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

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

22 Justice Breyer?

23 Justice Alito?

24 JUSTICE ALITO: Justice Sotomayor
25 correctly said that district judges generally

1 have a lot of discretion in deciding what
2 sentence to impose at least while they have it
3 insofar as it's allowed under the Sentencing
4 Reform Act and our Court's decisions, but isn't
5 it true that the backdrop here is that there
6 has been a sentence and there would be no
7 ground for reconsidering the sentence were it
8 not for this one provision?

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

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

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

1 in the law, regardless of whether your conduct
2 in the intervening years might justify a
3 different sentence?

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

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

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: No. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAGAN: You know, I guess, in
21 thinking about the challenge that Justice Alito
22 has posed to you, I would think it's -- it's
23 relevant to ask whether there are analogous
24 kinds of resentencings. In other words, are
25 there resentencings that have been prompted for

1 one -- because of one particular thing but that
2 enable or require a judge to take into account
3 the world more broadly?

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

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

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

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

1 MR. McCLOUD: So, Your Honor, I think
2 it is actually a -- a "must" answer because,
3 under this Court's decision in Pepper, the
4 Court said that factual developments are
5 relevant. Courts don't have discretion to
6 ignore relevant developments.

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: I -- I would like to
21 follow up on that just briefly. I apologize to
22 my colleagues for extending the proceedings.

23 But Pepper, I thought, said that after
24 a successful appeal on resentencing in the
25 district court, the court may consider evidence

1 of rehabilitation during that period.

2 What do we do with that?

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

12 JUSTICE GORSUCH: So you do read
13 Pepper as -- as a "must consider"?

14 MR. McCLOUD: I do read Pepper as
15 "must consider," Your Honor.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 JUSTICE KAVANAUGH: I do have a couple
19 questions.

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

1 So, if the -- on resentencing here,
2 whatever the proceeding is, if the district
3 court judge says I actually don't think someone
4 should get the benefit of the career offender
5 guideline, and, therefore, I'm not going to
6 take that into account, the change, is that an
7 abuse of discretion?

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

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

24 And is that -- you know, should we be
25 concerned about that? I guess your answer is,

1 no, that's just the way sentencing works, which
2 I -- I agree with. I've spent enough time
3 reviewing it. But -- but that seems a -- a
4 mild concern here.

5 MR. McCLOUD: That is my answer,
6 Justice Kavanaugh. Our sentencing system isn't
7 perfect and it relies on imperfect human beings
8 to make these decisions about other imperfect
9 human beings standing before them. And so
10 there will be some variation in -- in the
11 decisions that get made. I think that's true
12 under any possible rule in this case, though.

13 JUSTICE KAVANAUGH: I think that's
14 probably right.

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

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

24 JUSTICE KAVANAUGH: How about on a
25 "may consider"?

1 MR. McCLOUD: I think not on a "may
2 consider." Well, a legal error in the
3 guidelines would be reversible. So, if the
4 district court went to the trouble of
5 calculating the guidelines and got it wrong --

6 JUSTICE KAVANAUGH: Yeah.

7 MR. McCLOUD: -- that would be
8 reversible.

9 JUSTICE KAVANAUGH: But they don't
10 have to do it?

11 MR. McCLOUD: But they don't have to
12 do it.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Thank you, counsel.

17 MR. McCLOUD: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Guarnieri.

19 ORAL ARGUMENT OF MATTHEW GUARNIERI

20 ON BEHALF OF THE RESPONDENT

21 MR. GUARNIERI: Mr. Chief Justice, and
22 may it please the Court:

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

1 By its plain terms, Section 404 only
2 requires a district court to take account of
3 one new development, namely, the changes to
4 crack cocaine sentencing made by Sections 2 and
5 3 of the Fair Sentencing Act.

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

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

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

1 That argument is inconsistent with the
2 text of Section 404 as a whole, in particular,
3 with the text of Section 404(c), as well as
4 with the undisputedly limited scope and nature
5 of sentence reduction proceedings.

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

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

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

21 I welcome the Court's questions.

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

1 Could you spend a minute on precisely
2 what words you're relying on for this -- for
3 your limitations?

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

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

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

25 MR. GUARNIERI: Well, I -- Justice

1 Thomas, I wouldn't say that no other
2 considerations can be taken into account. I --
3 I would say that the statute does not require
4 the district court to take into account
5 anything else. And that discretionary reading
6 is backstopped by Section 404(c), which says
7 expressly that a sentence reduction is never
8 required in any of these proceedings.

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

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

1 as you seem to be willing to accept, what's the
2 daylight between you and Petitioner with
3 respect to that approach?

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

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

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

21 JUSTICE KAVANAUGH: You're not -- keep
22 going. Keep going.

23 MR. GUARNIERI: Well, I -- I -- there
24 is a significant difference between that
25 approach and the mandatory approach that

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

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

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

25 I can understand -- I -- I -- I'm kind

1 of where the Chief Justice was at the beginning
2 of this argument. I can understand that
3 argument. And then I can also understand the
4 -- the "may impose" suggests -- if you're going
5 to impose a sentence, you do it like we have
6 always done it, and that's 3553.

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

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

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

24 JUSTICE GORSUCH: Well, assume they
25 did, okay?

1 MR. GUARNIERI: Sure. Sure. You --
2 principally -- I mean, we start actually from a
3 quite similar position to one that Mr. McCloud
4 alluded to in the top half of his argument,
5 which is it would really be extraordinary in
6 this context for Congress to have forbidden
7 district courts from taking into account
8 post-sentencing criminality by -- by the
9 Section 404 movement.

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

13 JUSTICE GORSUCH: I don't --

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

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

23 And, surely, Congress didn't say you
24 can increase the sentence on the basis of such
25 conduct because a trial would be required. If

1 you're going to increase punishment, you'd need
2 a jury to do that. So there's obvious reasons
3 why that's not the case.

4 So that doesn't work for me, so let's
5 try again.

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

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

18 MR. GUARNIERI: Sure.

19 JUSTICE GORSUCH: Let's start there.

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

24 JUSTICE GORSUCH: That you must not
25 consider anything other than the Fair

1 Sentencing Act change, and it's a
2 counterfactual hypothetical.

3 MR. GUARNIERI: Sure.

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

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

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

18 MR. GUARNIERI: Well, it --

19 JUSTICE GORSUCH: For any reason.

20 MR. GUARNIERI: Sure. It --

21 JUSTICE GORSUCH: Except -- except --

22 MR. GUARNIERI: -- it would be very
23 strange to impute to Congress the -- the -- a
24 directive to district courts to consider
25 whether to impose a reduced sentence in light

1 of the changes made by the Fair Sentencing Act
2 but to ignore the fact that the defendant,
3 during the intervening period, has continued to
4 engage in serious criminal conduct, including
5 potentially drug dealing --

6 JUSTICE BARRETT: But why would --

7 MR. GUARNIERI: -- while in prison.

8 JUSTICE BARRETT: -- that be strange?

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

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

23 MR. GUARNIERI: Well, I -- I take the
24 point, and -- and, indeed, we make those kinds
25 of horizontal equity arguments in many cases.

1 We think that is a strong reason to reject
2 Petitioner's mandatory approach.

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

13 CHIEF JUSTICE ROBERTS: I -- I just --

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

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

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

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

19 MR. GUARNIERI: Well, Mr. Chief
20 Justice --

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

1 MR. GUARNIERI: Sure. Mr. Chief
2 Justice, let me -- let me take -- let me make
3 a couple of additional points against that
4 position.

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

16 CHIEF JUSTICE ROBERTS: Well, but --

17 MR. GUARNIERI: -- those
18 circumstances.

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

24 MR. GUARNIERI: Well, what --

25 CHIEF JUSTICE ROBERTS: So I would put

1 Pepper to one side.

2 MR. GUARNIERI: That -- that's
3 entirely true.

4 The second point I would make, again,
5 we -- we draw a great deal of our argument from
6 the expressly discretionary language of the
7 statute that is 404(b)'s use of the term "may"
8 and 404(c)'s clear rule that nothing in the
9 statute requires a sentence reduction in any
10 particular case. So you have that
11 discretionary language.

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

23 So, again, that's -- I mean, it's not
24 -- it's not prohibitive --

25 JUSTICE BREYER: Why?

1 MR. GUARNIERI: -- but it's another
2 sort of textual hint that Congress didn't mean
3 to take off the table any consideration of
4 post-offense conduct.

5 JUSTICE BREYER: Fine. Okay. Why
6 have you said nothing about the Commission? Is
7 the Department disowning the Commission, or am
8 I making a big mistake?

9 (Laughter.)

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

12 MR. GUARNIERI: I --

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

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

25 When Congress changed it, Congress --

1 the Commission rewrote those guidelines, again,
2 with a key. So, if we limit this just to the
3 mandatory minimums, what are we going to find?
4 We're going to find that where you're talking
5 about 4, 3, 2, and 1, for example, and where
6 the Commission both rechanged it and made them
7 retroactive to a considerable degree, we will
8 have a big discrepancy because we will only be
9 looking at the change from 100 to 1 to 28 to 1.
10 And so that -- Congress is most unlikely to
11 have wanted that.

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

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

1 What the -- what the Education Office
2 has so far said is it said: What you should
3 do, courts should consider the guidelines and
4 policy statements along with other 3553(a)
5 factors during the resentencing. That's what
6 their staff said.

7 So why is -- where I'm puzzled is, why
8 is nobody thinking that any of that is
9 relevant?

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

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

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

1 the First Step Act.

2 The second point I'd like to make
3 about the Commission's role here, Section 404
4 proceedings unfold under the aegis of 18 U.S.C.
5 3582(c)(1)(A). 3582(c) is the provision that
6 generally forbids district courts from
7 modifying terms of imprisonment once they have
8 been imposed, and then the statute has a couple
9 of exceptions to that broad rule.

10 (c)(1)(A) is the exception for
11 compassionate release. (c)(2) is the exception
12 for retroactive guidelines amendments. And
13 (c)(1)(B), the provision implicated here, is
14 for modifications permitted by statute or by
15 Rule 35.

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

25 So there is nothing in 3582(c)(1)(B)

1 that requires a district court to consider any
2 applicable Commission policy statement or to
3 otherwise redo the 3553(a) analysis.

4 JUSTICE KAVANAUGH: Could I ask --

5 MR. GUARNIERI: And, of course,
6 there's nothing in Section 404 either. So we
7 -- I mean, there's just -- there's no clear
8 statutory directive requiring that.

9 Now, again, we think that a district
10 court may do so in respect --

11 JUSTICE KAVANAUGH: That's what I --
12 can I interrupt there?

13 MR. GUARNIERI: Certainly.

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

19 MR. GUARNIERI: That's generally
20 correct, Justice Kavanaugh.

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

23 MR. GUARNIERI: Well, I just -- I want
24 to make sure that I'm crystal-clear about the
25 way that we think this works. The district

1 court under 404(b) has to figure out the
2 counterfactual penalty range that would have
3 applied at the time of the initial sentencing
4 if the Fair Sentencing Act had been in effect.

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

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

1 is following?

2 MR. GUARNIERI: The correct new one is
3 the first one. The -- the -- the "as if"
4 clause --

5 JUSTICE KAVANAUGH: Okay.

6 MR. GUARNIERI: -- we understand to
7 require the district court to -- to correctly
8 calculate that range --

9 JUSTICE KAVANAUGH: So --

10 MR. GUARNIERI: -- as it would have
11 applied at the original sentencing.

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

20 Your position is that's okay?

21 MR. GUARNIERI: That's correct.

22 JUSTICE KAVANAUGH: Okay.

23 MR. GUARNIERI: Now, in this Court, we
24 -- in this case, we also --

25 JUSTICE GORSUCH: I want to follow up

1 on that. In what world does it make sense that
2 some district courts will be -- take cognizance
3 of -- of changes in the law like that and
4 others will not, and the results will be, as --
5 as Justice Kavanaugh points out, dramatically
6 different for different individuals?

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

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

22 JUSTICE GORSUCH: No, we're positing,
23 though --

24 MR. GUARNIERI: It is figuring whether
25 to do so.

1 JUSTICE GORSUCH: -- two district
2 courts, one of whom who says looking at the
3 person before me and deciding how many years
4 this person must spend in federal prison, I
5 take cognizance of the fact that sentencing
6 guidelines have changed and here is the
7 Commission's current recommendation.

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

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

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

24 MR. GUARNIERI: Well, I think the most
25 obvious example would be a Rule 35 sentence

1 reduction proceeding, which gives --

2 JUSTICE KAVANAUGH: What about the
3 original sentencing too? Can't the -- at the
4 -- sorry to interrupt.

5 MR. GUARNIERI: That -- that's
6 perfectly --

7 JUSTICE KAVANAUGH: At the original
8 sentencing, the district court can say: You
9 know what? I don't agree with this guideline.
10 I'm not following it. That, in fact, a
11 significant percentage of district judges do
12 that now.

13 MR. GUARNIERI: That's absolutely
14 true.

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

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

1 reasoned explanation.

2 Here, you're positing something
3 different and that I'm unfamiliar with, so help
4 me out.

5 MR. GUARNIERI: That's right. Well,
6 as I began to say, this is no different in kind
7 from Rule 35 proceedings under which there is
8 no mandate to redo the 3553(a) analysis. It's
9 -- it's not substantially different than a
10 sentence reduction proceeding under (c)(2), as
11 this Court considered in Dillon. There, again,
12 the district court is not required to redo all
13 of the analysis that it did of the initial
14 3553(a) factors.

15 And -- and, more broadly, I mean, it
16 makes sense that Congress would have left
17 this to the district courts' discretion
18 because, in many cases, these are the same
19 district court judges who imposed the original
20 sentence. They are the ones best positioned to
21 know the factors that they found particularly
22 important in their original 3553(a) calculus,
23 the things that they -- that are likely to
24 influence them in making a judgment now, 10 or
25 more years after the fact, of whether a

1 reduction is warranted in light of the water
2 under the bridge in those intervening years.

3 And so Congress left it to their
4 discretion.

5 JUSTICE KAVANAUGH: One more
6 friendly --

7 JUSTICE BREYER: I thought Congress
8 solved this. I thought they solved it because
9 the arguments that you are making I've heard
10 for decades, okay, in lots of contexts.

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

17 And then you can appeal, I thought,
18 your sentence to the courts of appeals, who
19 will decide whether your decision on these
20 matters is reasonable.

21 Now, I mean, that's been going on
22 since 1986, and I don't think it's worked
23 perfectly, but I don't think it's been a
24 disaster. And all I can't understand is why
25 this isn't the same kind of problem so that we

1 don't have to answer this now. We -- all we
2 have to say is treat it the same as you treat
3 lots of other things in sentencing. And if the
4 Commission wants to write a guideline to unify
5 things, it can. And if district courts want to
6 decide different ways -- and believe me, if a
7 district court decides something important and
8 doesn't give any reason except, oh, that's what
9 I like, which I don't think I've seen, but I
10 feel there are courts of appeals that would
11 sort of take offense at that and they might say
12 at least explain.

13 But, I -- I mean, I spelled this out
14 because I don't really see why this is a
15 different problem.

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

21 You know, this -- the rule we are
22 defending here has been the rule, the operative
23 rule, in numerous courts of appeals for the
24 past several years. We haven't seen a spate of
25 reversals, and to the extent we have, they're

1 cases in which the court --

2 JUSTICE ALITO: Let me make --

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

4 JUSTICE ALITO: -- sure I understand --

5 MR. GUARNIERI: -- put any -- any
6 explanation.

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

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

22 Are those both permissible in your
23 view?

24 MR. GUARNIERI: Yes, they are. And as
25 I hope I clarified in my answer to Justice

1 Kavanaugh earlier, we do think there is a
2 predicate step where the district court has to
3 correctly calculate what the guidelines range
4 would have been at the time of the original
5 offense, but having done that, it is left to
6 the court's discretion whether to take into
7 account these other non-retroactive guidelines.

8 JUSTICE ALITO: And would the --

9 MR. GUARNIERI: And, at the end of the
10 day, these are all advisory.

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

17 MR. GUARNIERI: No.

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

24 Another judge says, no, this person
25 was sentenced before. I think that the -- the

1 person should get the sentence that this person
2 merited on the day when that person was
3 sentenced. That would be permissible as well?

4 MR. GUARNIERI: Yes.

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

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

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

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

1 courts from doing so.

2 The -- the statute is essentially
3 agnostic on that issue, and so we think that it
4 leaves to the district courts some discretion
5 to do that.

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

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

16 JUSTICE KAGAN: Yes, I know --

17 MR. GUARNIERI: -- as this Court's
18 decision in Gall --

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

23 MR. GUARNIERI: Well, I -- the
24 district court could decline to -- for
25 impermissible reasons, such as animus, I think,

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

9 JUSTICE KAGAN: No, no, no.

10 MR. GUARNIERI: -- that -- that --

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

18 MR. GUARNIERI: Well, look, I think,
19 frankly, the result here is going to be
20 substantial discretion for the district courts.
21 Again, these are proceedings that are limited
22 in scope. This is a sentence reduction
23 proceeding. There's already a lawful sentence
24 that was itself the product of the 3553(a)
25 factors. We're talking here about whether to

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

12 JUSTICE SOTOMAYOR: Counsel --

13 MR. GUARNIERI: -- other than the Fair
14 Sentencing Act.

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

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

1 Do you agree with that?

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

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

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

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

1 explicitly, correct?

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

11 JUSTICE SOTOMAYOR: Or -- or --

12 MR. GUARNIERI: -- is eligible.

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

19 MR. GUARNIERI: That's right.

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

22 Justice Breyer? Okay.

23 Justice Alito?

24 JUSTICE ALITO: Your argument is that
25 the -- a district court can disregard the 3553

1 factors, isn't -- if it chooses to, right? It
2 has discretion to do that?

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

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

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

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

1 judgment is that a greater sentence is
2 necessary to effectuate the purposes of federal
3 sentencing.

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

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

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

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

1 arguments about post-sentencing misconduct by
2 the defendant, and we would not want to take
3 those off the table.

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

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

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

16 JUSTICE SOTOMAYOR: No. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

1 generally is analogous. I -- I think you have
2 to look to some, you know, resentencings that
3 occur for particular reasons.

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

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

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

24 And in that context, it -- the
25 district court, it is not a de novo

1 resentencing. The court is not redoing the
2 3553(a) factors from scratch. It is a
3 proceeding that is limited in scope for all the
4 reasons this Court discussed in Dillon.

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 Justice Kavanaugh?

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

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

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

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

24 MR. GUARNIERI: The -- the -- yes. It
25 -- it is -- these proceedings are principally

1 done on the papers. And the courts of appeals
2 have been unanimous so far in concluding that
3 the defendant has no right to an in-person
4 hearing for a Section 404 motion.

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

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

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

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

20 MR. GUARNIERI: Yes.

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

1 And I just want to get the
2 government's perspective on, have there been
3 problems in these proceedings from the
4 government's perspective or not?

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

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Thank -- thank you, counsel.

17 MR. GUARNIERI: Thank you.

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

20 REBUTTAL ARGUMENT OF CHARLES L. McCLOUD
21 ON BEHALF OF THE PETITIONER

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

24 Justice Kavanaugh, you asked about
25 good time credits. We agree those are

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

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

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

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

1 proceedings.

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

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

16 Thank you.

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

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

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