No.

In the Supreme Court of the United States

LAZELLE MAXWELL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, 21 U.S.C. § 841 note, a district court must or may consider intervening legal and factual developments.

PARTIES TO THE PROCEEDING

Petitioner, Lazelle Maxwell was the defendant-appellant below.

Respondent, United States of America was the plaintiff-appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States of America v. Lazelle Maxwell*, No. 20-5755, 6th Cir. (Mar. 19, 2021) (affirming denial of motion for imposition of a reduced sentence under the First Step Act); and
- *United States of America v. Lazelle Maxwell*, No. 2:09-cr-00033-2, E.D. Ky. (June 25, 2020) (denying motion for imposition of a reduced sentence under the First Step Act).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Petitioner Lazelle Maxwell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-15a) is reported and available at 991 F.3d 685. The opinion of the United States District Court for the Eastern District of Kentucky (Pet.App.16a-24a) is unreported and available at 2020 WL 3472913.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2021. Pet.App.1a-15a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, codified at 21 U.S.C. § 841 note, provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

STATEMENT

This petition is being filed contemporaneously with the petition in *United States v. Concepcion*, No. 19-2025 (1st Cir. Mar. 15, 2021). These cases are ideal vehicles for resolving a deep and acknowledged circuit conflict over the scope of district courts' authority when resentencing defendants under the First Step Act of 2018. The First Step Act remedies the legacy of racially discriminatory drug laws that imposed significantly greater punishment for crack cocaine offenses than for powder cocaine offenses. The First Step Act permits district courts to impose a reduced sentence on defendants previously convicted of certain covered offenses "as if" the revised penalties for crack cocaine contained in section 2 of the Fair Sentencing Act of 2010, Pub. L. 111-220, were "in effect at the time the covered offense was committed."

Courts of appeals are sharply divided over the extent of district courts' authority when conducting resentencing proceedings under the First Step Act. This circuit conflict has left thousands of individuals, like petitioners Lazelle Maxwell and Carlos Concepcion, with different rights depending on where their resentencing proceeding occurs.

Within the Third, Fourth, Tenth, and D.C. Circuits, district courts are *required* to consider intervening legal or factual developments—and not just the changes to the crack-cocaine statutory penalties—when conducting First Step Act resentencings. Thus, in those circuits, Messrs. Maxwell and Concepcion—who are currently serving sentences of thirty years and nineteen years, respectively—would either have had their Sentencing Guidelines ranges recalculated to reflect the fact that they were no longer career offenders or would have had their sentences reconsidered based on post-sentencing rehabilitation—or would have been entitled to both considerations.

By contrast, within the Sixth Circuit, where Mr. Maxwell was sentenced district courts may, but need not, consider changes in the law or updated Guidelines and facts. Within the First Circuit, where Mr. Concepcion was sentenced, the district court may consider intervening legal and factual developments only after deciding that a sentence reduction is appropriate in light of the First Step Act changes. The Sixth Circuit and First Circuit therefore held in petitioners' cases that the district courts were not required to consider any changes other than the revised statutory maximum and minimum sentences for crack cocaine imposed by the Fair Sentencing Act. The Second, Seventh, and Eighth Circuits adhere to the same rule.

Finally, three other circuits go even further. In the Fifth, Ninth, and Eleventh Circuits, district courts are *prohibited* from considering any intervening case law or updated Guidelines and are not required to consider updated facts. Defendants in those circuits must therefore suffer under the weight of legally inaccurate Guidelines calculations and outdated section 3553(a) factors that do not account for post-sentencing conduct.

The question presented calls out for this Court's immediate review. The conflict between the circuits is deep, widely acknowledged by the courts of appeals, and entrenched. The split was outcome determinative in these cases. Both Mr. Maxwell and Mr. Concepcion presented evidence that their Guidelines range would be lower based on current, accurate law, but the district courts in their cases refused to consider this information. Only this Court can act to restore uniformity and ensure that all defendants eligible for resentencing under the First Step Act are considered on an equal basis, regardless of the court in which they happen to find themselves.

The Court should act now, because the conflict is too important to ignore. The First Step Act offers relief from a draconian sentencing regime to thousands of incarcerated individuals like Mr. Maxwell and Mr. Concepcion. But because of the divergence between the circuits, individuals within some circuits have found success in obtaining new, legally accurate sentences that factor in post-sentencing facts, while others have had their requests for resentencing denied despite existing sentences that are manifestly incorrect under current law and consideration of mitigating post-sentencing facts.

In sum, these cases present an ideal opportunity to resolve an intractable circuit conflict on a critical and recurring question of federal sentencing law. Only this Court's intervention can resolve the split and ensure that a historic criminal justice reform offers relief equally to all individuals.

A. Statutory Background

For more than three decades, federal drug laws treated one gram of crack cocaine as the equivalent of 100 grams of powder cocaine for purposes of setting the statutory minimum and maximum sentence. *See* The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1, 100 Stat. 3207. Recognizing the "unjustified race-based differences" in sentences for crack and powder cocaine offenses, Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, 2372, "[t]o restore fairness to Federal cocaine sentencing," *Dorsey v. United States*, 567 U.S. 260, 268 (2012); *see also* U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, 19 Fed. Sent. R. 297, 298 (2007). Section 2 of the Fair Sentencing Act substantially increased the quantity of crack cocaine needed to trigger the mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), (B). Pub. L. No. 111-220, § 2(a)(1), (2), 124 Stat. 2372, 2372

(amending 21 U.S.C. § 841(b)(1)(A)(iii) and B(iii)).[1] As directed by the Fair Sentencing Act, the United States Sentencing Commission conformed the drug guideline penalty structure for crack cocaine offenses to the amended statutory guidelines. *See* United States Sentencing Guidelines, App. C, amend. 750 (effective Nov. 1, 2011).

The First Step Act of 2018 makes the Fair Sentencing Act's reforms retroactive. Pub. L. No. 115-391, Title IV, 132 Stat. 5194, 5220-22. As relevant here, section 404(b) of the First Step Act allows a person convicted of crack-cocaine offenses and sentenced before August 3, 2010, to receive a reduced sentence "as if" section 2 of the Fair Sentencing Act were "in effect at the time the covered offense was committed."[2] Congress' intent was clear: "[T]o give retroactive effect to the Fair Sentencing Act's reforms and correct the effects of an unjust sentencing regime." *United States v. Collington*, 995 F.3d 347, 354 (4th Cir. 2021).[3]

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[1] The mandatory-minimum triggering quantities of crack cocaine were increased from 50 grams to 280 grams and from 5 grams to 28 grams.

[2] A "covered offense" is defined in section 404(a) as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . that was committed before August 3, 2010." The government concedes that the crack-cocaine offenses of which Mr. Maxwell and Mr. Concepcion were convicted are "covered offense[s]" and that they are thus eligible for relief under the First Step Act. *See* Maxwell Gov't C.A. Br. 5-6; Concepcion Gov't C.A. Br. 16. Therefore, the Court's resolution of the question presented in *Terry v. United States*, No. 20-5904 (argued May 4, 2021), has no bearing on these petitions.

[3] The Act restricts district courts' resentencing power to prevent defendants from (1) receiving multiple sentence reductions due to the First Step Act or (2) filing successive motions for a sentence reduction if a previous such motion was denied "after a complete review of the

B. Procedural History

Petitioner Lazelle Maxwell was sentenced to thirty years' imprisonment for federal drug offenses on January 11, 2010—about six months before the Fair Sentencing Act of 2010 became law. Pet.App.17a.

1. In 2009, a Kentucky jury convicted Mr. Maxwell of one count of conspiracy to distribute crack cocaine, and another count of conspiracy to distribute heroin. 21 U.S.C. §§ 841(a), 846; Pet.App.16a-17a. The district court sentenced Mr. Maxwell to twenty years' imprisonment for the crack-cocaine conspiracy count and ten years' imprisonment for the heroin conspiracy count, to be served consecutively. Pet.App.17a.

At sentencing, the district court applied the 2009 edition of the federal Sentencing Guidelines to calculate the sentencing range. Pet.App.18a. The district court made two calculations under the 2009 Guidelines to determine which sentencing range would govern: one based on the drug quantities under U.S.S.G. § 2D1.1(c), and the other using the career-offender provisions of U.S.S.G. § 4B1.1. Pet.App.18a; *see* U.S.S.G. § 4B1.1(b) (requiring that the offense level for a career offender govern if it is greater than the otherwise applicable offense level).

The district court treated Mr. Maxwell as a "career offender" under U.S.S.G. § 4B1.1(a). The court reasoned that Mr. Maxwell met the three requirements of that section because (1) he was over eighteen years old when the offenses occurred, (2) a felony conviction for drug conspiracy constituted "a controlled substance offense," and (3) he had pleaded guilty to two prior felony convictions that

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motion on the merits." Pub. L. No. 115-391, § 404(c), Title IV, 132 Stat. 5194, 5220-22. Neither limitation applies in this case.

were considered "crime of violence" predicates. Tr. of Jan. 11, 2010 Sentencing, Dkt. No. 226 at 15.[4]

The drug-quantity Guidelines determined the base offense level,[5] but the career-offender provisions increased Mr. Maxwell's criminal history category to VI. *See* U.S.S.G. § 4B1.1(b) (2009). The base offense level and criminal history category produced a Guidelines range of 360 months to life. The district court sentenced Mr. Maxwell to thirty years' imprisonment. Pet.App.17a.

Mr. Maxwell filed several appeals challenging his conviction and sentence. *See* Pet'r's Br. 6-9; *United States v. Shields*, 415 F. App'x 692, 705 (6th Cir. 2011); *United States v. Maxwell*, 617 F. App'x 470, 480 (6th Cir. 2015); *United States v. Maxwell*, 678 F. App'x 395, 395 (6th Cir. 2017). On Mr. Maxwell's motion for collateral relief pursuant to 28 U.S.C. § 2255, the government conceded that Mr. Maxwell's trial counsel was constitutionally ineffective in failing to challenge his multiplicitous conspiracy convictions, and the Sixth Circuit remanded with instructions to vacate one of the two convictions. 617 F. App'x at 471. The district court then vacated the heroin conspiracy conviction, but sentenced Mr. Maxwell to thirty years' imprisonment for the crack-cocaine conviction alone. Pet.App.3a.

2. After the First Step Act became law, Mr. Maxwell timely sought relief under section 404(b) of the Act. In February 2019, Mr. Maxwell wrote a *pro se* letter to the

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[4] In 1993, Mr. Maxwell pled guilty to one count of bank robbery; in 1999, he pled guilty to fleeing from a police officer in violation of Michigan law. Pet.'s Br. 4-5.

[5] The drug quantities used to calculate the Guidelines range were the quantities attributed to the entire conspiracy: 420 grams of crack-cocaine and 560 grams of heroin.

district court to "request appointment of counsel to have [his] case considered" under the First Step Act. Pet'r's Ltr., Dkt. No. 354. The district court treated the letter as a substantive motion for resentencing and denied relief. Pet.App.4a.

The Sixth Circuit reversed because Mr. Maxwell's letter "sought only one form of relief: appointment of counsel." *United States v. Maxwell*, 800 F. App'x 373, 376 (6th Cir. 2020). However, the Sixth Circuit rejected Mr. Maxwell's argument that the district judge had "prejudged" his case, and declined to assign a different judge to hear his forthcoming motion for a sentence reduction under the First Step Act. *Id.* at 377-78. The Sixth Circuit "trust[ed] that the district court [would] heed its duty to consider both the factors in [18 U.S.C.] § 3553, along with Congress's significant decision to allow prisoners to retroactively benefit from the Fair Sentencing Act." *Id.* at 378.

Upon remand, and with the assistance of new pro bono counsel, Mr. Maxwell moved for relief under the First Step Act. He sought a reduced sentence of 188 months on three principal grounds.

First, Mr. Maxwell noted that section 2 of the Fair Sentencing Act reduced the statutory minimum sentence for his offense, conspiracy to distribute 50 grams or more of crack-cocaine, from twenty years to ten years. *See* Pub. L. No. 111-220, § 2(a)(1), 124 Stat. 2372, 2372 (amending 21 U.S.C. § 841(b)(1)(A)(iii)). *Compare* 21 U.S.C. § 841(b)(1) (2009), *with* 21 U.S.C. § 841(b)(1) (2018). Mr. Maxwell argued that a lower sentence would not diminish the severity of the crime, but would rather fall in line with Congress' determination, expressed through the Fair Sentencing Act and the First Step Act, that punishment for crack-cocaine offenses had previously been too severe and deserved correction, even retroactively. Mot. to Reduce, Dkt. No. 373 at 9.

Second, Mr. Maxwell argued that for two independent reasons, he was no longer a career offender under the 2018 Guidelines. Mot. to Reduce, Dkt. No. 373 at 10-14; *see* U.S.S.G. §§ 4B1.1(a), 4B1.2(b). To start, intervening case law had clarified that his drug conspiracy conviction was not a "controlled substance offense." *See United States v. Havis*, 927 F.3d 382, 385 (6th Cir.), *reconsideration denied,* 929 F.3d 317 (6th Cir. 2019); *United States v. Minter*, No. 19-5307, 2020 U.S. App. LEXIS 6127, at *1 (6th Cir. Feb. 27, 2020). Additionally, he did not have the two requisite predicate offenses because his prior conviction for fleeing from a police officer was no longer considered a "crime of violence" in light of the removal of the "residual clause" from the Guidelines. *See* U.S.S.G. Suppl. to App. C, amend. 798 (2016); *see also Johnson v. United States,* 576 U.S. 591, 606 (2015) (invalidating as unconstitutionally vague and violative of due process an identical residual clause relating to the statutory definition of "violent felony" in the Armed Career Criminal Act). Consequently, under then-current law, Mr. Maxwell argued his Guidelines range was 188 to 235 months. Mot. to Reduce, Dkt. No. 373 at 13-14.

Third, Mr. Maxwell invoked the factors to be considered in imposing a sentence under 18 U.S.C. § 3553(a). In particular, Mr. Maxwell argued that he should be sentenced to the low end of the resulting non-career offender range: 188 months. Mot. to Reduce, Dkt. No. 373 at 14-19. He urged the district court to consider his post-offense rehabilitation and contended that after more than a decade in prison, and now in his late 40s, he had demonstrated consistently good conduct and significant rehabilitation, and he was unlikely to recidivate. During his imprisonment, he had pursued education and job training, and maintained close contact with his family. And despite struggling with prostate cancer himself, he was "carefully

selected and trained" by the BOP to care for other sick inmates. Pet'r's Br. 13-14.

In June 2020, the district court denied relief. The court rejected the argument that it was required to recalculate Mr. Maxwell's Guideline range, concluding that "[t]here is nothing in the text of the [First Step Act] suggesting that district courts must reevaluate" determinations like career-offender status. Pet.App.21a. The court also expressed concern that considering intervening legal developments in a First Step Act resentencing proceeding would place crack-cocaine offenders in a better position than defendants convicted of other drug offenses. Pet.App.21a-22a. The district court therefore declined to reduce Mr. Maxwell's sentence based on changes to the Guidelines and refused to update its "previous analysis" of the section 3553(a) factors. Pet.App.23a.

3. On appeal, Mr. Maxwell argued that the district court erred doubly—first by refusing to calculate Mr. Maxwell's range under the 2018 Guidelines, and opting instead to refer back to the "erroneous and expired" 2009 Guidelines, and second by resurrecting its original section 3553(a) analysis based on those stale and incorrect Guidelines. Pet's Br. 22. Mr. Maxwell contended that it is impossible to complete a section 3553(a) analysis—chiefly the need to avoid unwarranted sentencing disparities as required by section 3553(a)(6)—without determining the range he would face were he convicted and sentenced today. Pet'r's Br. 17.

The government agreed, for the first time on appeal, that Mr. Maxwell's offense of conspiring to distribute crack cocaine no longer qualifies him as a career offender and that Mr. Maxwell's calculation of the amended Guidelines range—188 to 235 months—is correct. U.S. CA6 Br. 12-13. What is more, the government conceded that the

district court "may have fallen short" by failing to "explicitly adopt 188 to 235 months as the applicable range." *Id.* at 13-14. Nevertheless, the government argued that any error was harmless because the district court "thought the sentence it chose was appropriate irrespective of the Guidelines range." *Id.* at 14 (quotation omitted).

The Sixth Circuit affirmed. Pet.App.1a-15a. The court relied on the reasoning of certain other circuit courts that the First Step Act requires the resentencing court to change "just one variable" from the original sentencing—the change to the statutory penalties under the Fair Sentencing Act—and does not require the resentencing court to consider other intervening legal or factual developments. Pet.App.6a-7a.[6] The Sixth Circuit went on to conclude that "a district court could reasonably reject reliance on later legal changes unrelated to the First Step Act out of concern regarding disparities with other similarly situated defendants." Pet.App.14a (quotation omitted). The Sixth Circuit recognized that its ruling split with the Fourth Circuit's decision in *United States v. Chambers*, 956 F.3d 667, 675 (4th Cir. 2020) (ordering district court to recalculate Guidelines range to account for legal development rendering career-offender enhancement inapplicable to defendant).

REASONS FOR GRANTING THE PETITION

This petition, and the petition in *United States v. Concepcion*, present an acknowledged conflict in the courts of appeals on an important question affecting thousands of individuals who are eligible for resentencing under the

[6] The Sixth Circuit cited *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020), pet. for cert. filed Mar. 15, 2021; *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019); and *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) all of which refused to account for changes in career-offender precedents.

First Step Act. All twelve geographic circuits have now addressed the scope of a district court's authority during a First Step Act resentencing. All agree that district courts must consider the changes to the applicable statutory penalties effected by the Fair Sentencing Act. But the circuits disagree sharply over what, if any, additional information district courts may or must consider when conducting resentencing proceedings.

Four circuits require a district court to consider intervening case law, updated sentencing Guidelines, or intervening factual developments when resentencing. Five circuits allow district courts to ignore those issues. And three circuits bar consideration of intervening law or updated Guidelines entirely. This deep and entrenched split prevents uniform application of an important law designed to alleviate the sentencing effects of a misguided policy penalizing crack-cocaine offenses one-hundredfold over powder-cocaine offenses. Only this Court can resolve this division. And these cases, for which the question presented is squarely raised and outcome-determinative, are optimal vehicles in which to address it.

I. The Decision Below Deepens a Clear Circuit Split Over the Scope of Resentencing Under the First Step Act

1. If Mr. Maxwell were sentenced in the Third, Fourth, Tenth, or D.C. Circuits, the district court would have either reconsidered his career offender status or recalculated his Guidelines range based on current law and facts. The decision below permitted the district court to ignore both those changes.

The Fourth Circuit has held that intervening legal changes affecting career-offender designations must be considered when imposing a reduced sentence under section 404. In *United States v. Chambers*, the Fourth Circuit vacated the district court's resentencing for failing to

correct an erroneous career-offender designation as established by intervening circuit precedent. 956 F.3d 667, 668 (2020). The court first held that the text of section 404(b) instructs courts to "impose a reduced sentence," and "when 'imposing' a new sentence, a court . . . must recalculate the Guidelines range." *Id.* at 672. When considering that new range, a court "must" examine all sentencing factors, *id.* at 674, which includes updated facts about the "history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). *See United States v. McDonald*, 986 F.3d 402, 412 (4th Cir. 2021) (remanding for failure to consider post-sentencing conduct in First Step Act resentencing).

Second, the Fourth Circuit held that nothing in section 404 "preclude[s] the court from applying intervening case law." *Chambers*, 956 F.3d at 672. Therefore, the court explained that it would "pervert Congress's intent to maintain a career offender designation that is as wrong today as it was" when the defendant was originally sentenced, especially when the defendant was resentenced under a Guidelines range four times higher than the correct range. *Id.* at 673. Comparing errors in an original sentencing based on intervening case law to a "typo," the court held that "self-circumscrib[ing] a sentencing court's authority under the First Step Act would not only subvert Congress's will but also undermine judicial integrity." *Id.* at 674.

The Third Circuit has similarly held that the First Step Act requires a district court to calculate the current Guidelines range at the time of resentencing—incorporating any legal changes to the Guidelines since the original sentencing—and resentence based on renewed consideration of the sentencing factors, which includes updated facts. *See United States v. Easter*, 975 F.3d 318, 325-26

(3d Cir. 2020). The court stated that resentencing under section 404 must "include[ ] an accurate calculation of the *amended* guidelines range at the *time of resentencing* and thorough *renewed* consideration" of the sentencing factors. *Id.* (emphasis added) (citation omitted). Because the district court failed to consider updated facts about the defendant, the court remanded. *Id.* at 322, 327. In adopting this rule, the Third Circuit specifically cited and endorsed the rationale of the Fourth Circuit in *Chambers*. *Id.* at 325-26.

The Tenth Circuit also agrees with the Fourth Circuit that intervening case law must be considered when resentencing under the First Step Act. In *United States v. Brown*, the court emphasized the "importance of calculating the Guideline range correctly" prior to any sentencing. 974 F.3d 1137, 1144 (10th Cir. 2020). Any error in that range is "implicitly adopt[ed]" as a legal conclusion by a district court. *Id.* at 1145. Therefore, as "a clarification of what the law always was," intervening case law demonstrates that a prior sentence was premised on error—and a court "is not obligated to err again." *Id.* When the district court refused to consider how intervening circuit precedent impacted the defendant's career-offender designation, the Tenth Circuit remanded with instructions that the district court "*shall* consider [defendant's] challenge to his career offender status." *Id.* at 1146 (emphasis added). However, unlike the Fourth and Third Circuits, the Tenth Circuit does not permit use of updated Guidelines. *Id.* at 1144 ("[T]he First Step Act also does not empower the sentencing court to rely on revised Guidelines instead of the Guidelines used at the original sentencing.").

And the D.C. Circuit agrees that district courts must take into account all of § 3553(a) factors as they exist at

the time of the First Step Act proceeding. In *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020), the D.C. Circuit made clear that "[t]hose factors include consideration of the defendant's postsentencing behavior." Furthermore, the D.C. Circuit added, "the resentencing decision must be procedurally reasonable and supported by a sufficiently compelling justification." *Id.* at 91 (internal quotation marks omitted). "Nothing less is sufficient to meet the goals of the Fair Sentencing Act and the First Step Act to provide a remedy for defendants who bore the brunt of a racially disparate sentencing scheme." *Id.* Because the district court in *White* had "ma[de] no reference to the extensive mitigating evidence" that the defendants had offered, the D.C. Circuit remanded for the district court to consider that evidence. *See id.* at 93.

2. By contrast, five circuits, including the Sixth Circuit in the decision below, hold that district courts need not consider intervening legal developments or updated Guidelines and facts when resentencing under the First Step Act.

In *Concepcion*, the First Circuit held that district courts are not required to consider any changes other than those "specifically authorized by sections 2 and 3 of the Fair Sentencing Act." 991 F.3d at 289. It asserted that if the Fair Sentencing Act changed the applicable Sentencing Guidelines range "a district court may, in its discretion, consider other factors relevant to fashioning a new sentence." *Id.* at 289-90. Those other factors can include intervening facts and current Guidelines. *Id.* at 290. In taking a more restrictive course, the First Circuit explicitly acknowledged the "divided authority" on this issue, and it rejected the approach taken by the Fourth Circuit and Third Circuit. *See id.* at 286-87.

The Sixth Circuit below as well as the Second, Seventh, and Eighth Circuits have reached a similar result. *See, e.g.*, *United States v. Moore*, 975 F.3d 84, 90, 91 n.36 (2d Cir. 2020) (holding "*only* that the First Step Act does not *obligate* a district court to consider post-sentencing developments (emphasis added)); *United States v. Shaw*, 957 F.3d 734, 741-42 (7th Cir. 2020) (permitting, but not requiring, courts to look at sentencing factors "anew"); *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020), *cert. denied*, No. 20-6870, 2021 WL 666739 (U.S. Feb. 22, 2021) ("First Step Act sentencing *may* include consideration of the defendant's advisory range under the current guidelines." (emphasis added)).

3. At the other end of the spectrum and taking the most extreme approach, the Fifth, Ninth and Eleventh Circuits completely *forbid* district courts from considering any intervening case law or updated Guidelines and do not require district courts to consider updated facts.

In *United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 285 (2019), the defendant was designated a career offender during his original sentencing. By the time of his First Step Act motion, intervening circuit precedent established that the defendant's predicate offenses should not have qualified him for the career-offender enhancement. The Fifth Circuit rejected the defendant's arguments that he should receive a renewed, legally accurate Guidelines calculation along with a reapplication of the sentencing factors without inclusion of his erroneous career-offender status. *See id.* at 417-18. The court reasoned that the "as if" clause of section 404 meant that nothing but changes in the Fair Sentencing Act could be considered. *Id.* at 418. It described the First Step Act procedure as requiring a district court

to "plac[e] itself in the time frame of the original sentencing, altering the relevant legal landscape *only* by the changes mandated by the 2010 Fair Sentencing Act." *Id.* at 418-19 (emphasis added). Thus, the court affirmed the district court's refusal to consider the career-offender status issue. The result was application of a Guidelines range of 151-188 months as opposed to the correct range of 77-96 months. *See id.* at 416. Additionally, the court did not require consideration of updated facts. *See id.* at 418. The Fourth Circuit explicitly rejected the Fifth Circuit's conclusion in *Hegwood* as "not persuasive." *Chambers*, 956 F.3d at 676.

The Ninth and Eleventh Circuits both take the same approach as the Fifth Circuit. In *United States v. Kelley*, the Ninth Circuit acknowledged it was adopting the Fifth Circuit's reasoning and thereby "deepen[ing] a circuit split." 962 F.3d 470, 475-76 (9th Cir. 2020), pet. for cert. filed Mar. 15, 2021. In so doing, the court rejected the Fourth Circuit's approach in two ways. First, it permitted—but did not require—consideration of sentencing factors, including updated facts. *Id.* at 474, 479. Second, it agreed with the Fifth Circuit that the "as if" clause of section 404 strictly limits the scope of what a district court can consider—reasoning that a court has "no authority" to consider any "changes in law other than sections 2 and 3 of the Fair Sentencing Act." *Id.* at 476. Like the court in *Hegwood*, the Ninth Circuit in *Kelley* affirmed a district court's refusal to correct the defendant's career-offender status that had been established as erroneous by intervening circuit precedent. *See id.* at 474.

In *United States v. Denson*, the Eleventh Circuit followed the same approach on intervening law, prohibiting the district court from considering any legal changes

other than changes to sections 2 and 3 of the Fair Sentencing Act, and requiring application of the "original guidelines calculations." 963 F.3d 1080, 1089 (11th Cir. 2020) (citing *Hegwood*, 934 F.3d at 418).

4. The deep circuit divide over this question is obvious. Almost every court to address this issue, including the Sixth Circuit below and the First Circuit in *Concepcion*, has acknowledged the division in the law. Pet.App.6a-8a; *cf. Concepcion*, 991 F.3d at 285-86 (laying out a split of five circuits on one side and four on the other); *Moore*, 975 F.3d at 90 n.30 ("We recognize that other Circuits have split on this issue."); *Kelley*, 962 F.3d at 475 ("[W]e deepen a circuit split."). This division has not gone unnoticed. Indeed, the split is so clear that it is referenced in the relevant American Law Report on sentencing under the First Step Act. *See* George L. Blum, Annotation, *Reduction of Sentence Under First Step Act, 18 U.S.C.A. §§ 3631 et seq.—Federal Appellate Cases*, 54 A.L.R. Fed. 3d Art. 2, §§ 31-32 (2020); *see also* Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 Loy. U. Chi. L.J. 67, 103-04 (2020) (noting that the circuits "disagree" on the scope of resentencing under the First Step Act). The government, too, has acknowledged the "conflict" in the circuits in a brief opposing certiorari on a similar question. Br. for the United States in Opp. at 18, *Bates v. United States*, No. 20-535 (U.S. Jan. 22, 2021).[7]

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[7] In *Bates*, the United States opposed the petition because "it [was] not clear that the court of appeals resolved the question that [Bates] seeks to present." In the government's view, the Tenth Circuit's decision in *Bates* did not categorically address a defendants' entitlement to be sentenced according to a legally correct Guidelines range. Here, by contrast, there can be no question that the decision below squarely addressed the question presented and resolved it against petitioner.

In sum, the division in the courts of appeals over what courts must consider during First Step Act resentencing is deep, acknowledged, and entrenched. The different sides of the split interpret the same statute in ways that can result in vast differences in Guidelines ranges. The applied Guidelines are critical indicators of the length of the sentence imposed. Thus, similarly situated offenders can end up serving sentences varying by *decades*—with geographic happenstance as the only variable. Only this Court can bridge the chasm between the circuits to ensure equal treatment across the country.

II. The Question Presented is Important and Squarely Presented

1. The question presented affects thousands of people who are eligible for resentencing under the First Step Act, and the impact could be years of unjust imprisonment for those resentenced under an improper interpretation of the law. According to the U.S. Sentencing Commission, district courts have granted 3,363 motions for resentencing under the First Step Act as of October 2020. U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Rep.* at 4 (Oct. 2020).[8] That data does not even account for the many motions, like Mr. Maxwell's, that were or will be denied without consideration of intervening or updated law. Unsurprisingly, district courts within the Fourth Circuit, which must consider updated law, have granted 1,031 First Step Act mo-

[8] In 2018, the U.S. Sentencing Commission estimated that a total of 2,660 offenders were *eligible* for resentencing under section 404. *See* U.S. Sent'g Comm'n, *Sentence and Prison Impact Estimate Summary S. 756, The First Step Act of 2018* (Dec. 2018), https://tinyurl.com/3nx9h43y. Given that 3,363 motions have already been *granted*, that estimate was woefully under-inclusive.

tions, almost *double* the number of the next highest circuit. *Id.* at 6. Yet within the Ninth Circuit, with its more restrictive approach, district courts have granted only 162 motions—demonstrating the impact of the circuit split. *Id.*

Whether a district court must consider an accurate Guidelines range that accounts for intervening changes in the law has immense effect on people's lives. Incarcerated individuals with successful First Step Act motions see their sentences reduced by an average of almost six years. *Id.* at 9. Additionally, requiring courts to consider how changes in legal precedent, changes to the Guidelines, or updates in facts affect offenders' sentencing ranges will have enormous impact on any reductions. The Guidelines are the "lodestar" of sentencing. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). This Court has acknowledged that the Guidelines "influenc[e] the sentences imposed by judges," and that "data indicate that when a Guidelines range moves up or down, offenders' sentences move with it." *Peugh v. United States*, 569 U.S. 530, 543-44 (2013). Years, or even decades, of imprisonment are at stake depending on the Guidelines range used by a sentencing judge.

2. For the thousands of defendants affected by the First Step Act, there is no time to lose in resolving the deep circuit split, and this case and the *Concepcion* case are optimal vehicles for doing so. All courts of appeals have already taken positions, leaving this Court as the only option for resolving the split. Many cases continue to proceed through the district courts and those courts are applying interpretations of the First Step Act that will result in radically different Guidelines ranges for some offenders compared to others with the same underlying offenses. Indeed, as Judge Wilkinson recently wrote: "The

issue is an altogether serious one in sentencing, and I respectfully suggest that the sooner the Supreme Court resolves the fractured views concerning it, the better off we all will be." *United States v. Lancaster*, ___ F.3d ___, 2021 WL 1823287, at *5 (4th Cir. May 7, 2021) (concurring in the judgment).

This case, along with the petition in *Concepcion*, presents a clean opportunity for the Court to swiftly resolve this entrenched conflict. The question presented is outcome determinative, and it is broad enough to encompass the disagreement among all courts of appeals regarding the scope of resentencing as to both legal and factual developments. The Sixth Circuit's decision permitted the district court to refuse to consider changes in the Mr. Maxwell's career-offender status, the amended Guidelines drug equivalency tables, and Mr. Maxwell's exemplary record of conduct while incarcerated. Pet.App.6a. Had he been sentenced in the Third, Fourth, Tenth, or D.C. Circuits, Mr. Maxwell would have been entitled to an appropriate resentencing under the First Step Act. Instead, the district judge applied the same Guidelines range used in his original resentencing—360 months to life—and denied Mr. Maxwell's First Step Act motion. Mr. Maxwell's sentence remained 360 months. Had the judge removed Mr. Maxwell's career-offender status, as dictated by intervening circuit law and the removal of the Guidelines' residual clause, his Guidelines range would have been 235 to 293. Further, had the judge considered the updated Guidelines drug tables for cocaine, his range would have been *188 to 235 months*. Mr. Maxwell deserved a review of his sentence based on these updates in the law. Additionally, he deserved consideration of his model post-sentencing behavior. The Court should intervene to ensure fair and uniform consideration of his, and thousands of other individuals', First Step Act motions.

3. Undersigned counsel is also filing contemporaneously with this petition a petition for a writ of certiorari in *United States v. Concepcion*. Like the decision in Mr. Maxwell's case, the First Circuit's decision in *Concepcion* widens the circuit conflict and has significant consequences for affected individuals and for the uniformity of federal sentencing law. Both petitions squarely present the same underlying question regarding the scope of district courts' resentencing authority under the First Step Act, but they do so on different factual records and seek review of courts of appeals decisions that applied somewhat different reasoning. The Court should accordingly grant both petitions to ensure that the Court has the full range of options for timely resolving the question presented.

This Court has before it two petitions from the Ninth Circuit raising similar issues under the First Step Act: *Kelley v. United States* (No. 20-7474) and *Houston v. United States* (No. 20-1479). This Court may wish to consider the differences between those petitions and the petitions filed by Messrs. Maxwell and Concepcion. The petitioner in *Kelley* has been released from prison. *See Kelley*, 962 F.3d at 474 n.5. *Kelley* also addresses only the applicability of intervening case law interpreting the Sentencing Guidelines, leaving the applicability of updated versions of the Guidelines or of intervening factual developments unresolved. *See* Pet. at 11, *Kelley v. United States*, No. 20-7474 (Mar. 15, 2021). *Houston*, meanwhile, addresses only the application of intervening factual developments. *See* Pet., *Houston v. United States*, No. 20-1479 (filed Apr. 19, 2021). As the petitioner in *Houston* explains, the Second, Fifth, Seventh, and Eleventh Circuits have not taken a position on that issue. *Id.* at 14 n.1. As chronicled above, however, those Circuits have weighed in on the broader question presented by Messrs. Maxwell and Concepcion.

III. The Decision Below Is Wrong

The Sixth Circuit's decision misconstrues and hobbles the First Step Act, which Congress passed to allow a fresh review of the sentences of individuals subjected to disproportionate rules applied to crack-cocaine offenses. In permitting district courts to ignore present-day legal and factual circumstances when they conduct First Step Act resentencings, the Sixth Circuit imposed a cramped and inconsistent reading of the text of the First Step Act that would perversely exacerbate, rather than rectify, sentencing disparities for First Step Act defendants.

1. The First Step Act authorizes district courts to "*impose* a reduced sentence." First Step Act § 404(b), Pub. L. No. 115-391, 132 Stat. 5194 (emphasis added). As other federal sentencing statutes make clear, the term "impose" capaciously allows a court to consider any thing relevant to what is an appropriate sentence. For example, section 3553(a) states that "in determining the particular sentence to be imposed," district courts "shall consider" various factors, including "the history and characteristics of the defendant" and "the sentencing range established" under the Sentencing Guidelines. 18 U.S.C. § 3553(a); *see also* 18 U.S.C. § 3582(a) (directing consideration of the § 3553(a) factors when a district court "determin[es] whether to impose a term of imprisonment, and, if a term of imprisonment is imposed, in determining the length of the term"); 18 U.S.C. § 3661 (prohibiting any "limitation" on what information about a defendant's circumstances a district court may consider "for the purpose of imposing an appropriate sentence").

District courts "impos[ing] a reduced sentence" under the First Step Act should follow the same process of considering all information bearing on a sentence that is just at the time of sentencing. This Court presumes that

Congress "uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972); *see id.* ("The rule of *in pari materia* . . . assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject."). Congress' use of "impose" in the First Step Act should be interpreted accordingly. *See Easter*, 975 F.3d at 325; *Chambers*, 956 F.3d at 671-72.

When a district court imposes a reduced sentence under the First Step Act, it must calculate "the sentencing range established" under the Sentencing Guidelines as it exists at the time of the motion's adjudication. 18 U.S.C. § 3553(a)(4), (5). Indeed, as this Court made clear in *Gall v. United States*, "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range." 552 U.S. 38, 49 (2007) (emphasis added). Thus, a First Step Act resentencing, "at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing." *Easter*, 975 F.3d at 325-26; *see also Brown*, 974 F.3d at 1145 ("A correct Guideline range calculation is paramount, and the district court can use all the resources available to it to make that calculation."); *Chambers*, 956 F.3d at 674 (rejecting argument that "a court must perpetuate a Guidelines calculation error that was an error even at the time of initial sentencing"). To determine the accurate Guidelines range, district courts must consider intervening legal developments at the time of resentencing.

The district court also must consider all § 3553(a) factors, including factual ones such as "the history and characteristics of the defendant," 18 U.S.C. § 3553(a). And, as this Court held in *Pepper v. United States*, a district court cannot artificially limit itself to a defendant's past history and circumstances while ignoring more recent develop-

ments. 562 U.S. 476, 488-89 (2011). In *Pepper*, in the context of a resentencing upon remand, the Court held that "[p]ostsentencing rehabilitation may also critically inform a sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary,' to comply with the sentencing purposes set forth in § 3553(a)(2)." *Id.* at 491. So too for defendants seeking the imposition of a reduced sentence under the First Step Act, whose years or decades of post-sentencing conduct may also be "highly relevant." *Chambers*, 956 F.3d at 675 (quoting *Pepper*, 562 U.S. at 491); *see also Easter*, 975 F.3d at 325-26 (First Step Act resentencing requires "thorough renewed consideration of the § 3553(a) factors" (citation omitted)).

Application of the above principles to First Step Act resentencings is also consistent with Congress' purpose. "The First Step Act provides a vehicle for defendants sentenced under a starkly disparate regime to seek relief that has already been available to later-sentenced defendants for nearly a decade." *United States v. Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019); *cf. United States v. Concepcion*, 991 F.3d 279, 313 (1st Cir. 2021) (Barron, J., dissenting) (The First Step Act should not be "construe[d] . . . in a way that would attribute to Congress an intent to constrain district courts from exercising the remedial discretion that they are accustomed to exercising when revisiting a sentence that may have been too harsh when first imposed").

2. The Sixth Circuit wrongly carved out an exception to these rules for district courts that are imposing sentence under the First Step Act. It did so based on a cramped reading of the Act's provision of authority to "impose a reduced sentence *as if* section 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act § 404(b),

Pub. L. No. 115-391, 132 Stat. 5194 (emphasis added). The "as if" clause, the Sixth Circuit held, transforms a First Step Act resentencing into a thought experiment in which "the district court looks to the law as it existed at the time the defendant committed the offense, save for one change: the Fair Sentencing Act's amendments," Pet.App.7a, and need not "consider[] intervening legal and factual developments," Pet.App.9a.

In so doing, the Sixth Circuit both added to and deleted from the text of the Act. It excised the "impose" language reflecting Congress' clear command to follow the normal procedures for imposing a sentence. The Sixth Circuit also added the word "only" to the First Step Act, such that a district court may impose a reduced sentence *only* as if sections 2 and 3 of the Fair Sentencing Act were in effect when the offense was committed. But the Act includes no language suggesting that "only" the changes brought about by the Fair Sentencing Act can be considered. Rather, the "as if" clause is more appropriately read to "direct[] the sentencing court to apply section 2 or 3 of the Fair Sentencing Act, and not some other section, or some other statute. In effect, it makes those sections of the Fair Sentencing Act retroactive." *Chambers*, 956 F.3d at 672. Furthermore, interpreting the "as if" clause to mandate that a district court "imagine itself to be inhabiting an earlier point in time in all respects" makes no sense because:

> [T]he only time frame referenced in the "as if" clause is the time of the commission of the offense. . . . Congress could not have intended to direct a district court in a § 404(b) proceeding to imagine what sentence it would make sense to impose at a time when even the original sentencing proceeding had not yet occurred.

Concepcion, 991 F.3d at 302 n.9 (Barron, J., dissenting). Had Congress intended the "as if" language to serve the purpose the Sixth Circuit posited, it would have said that courts could resentence defendants "as if" the Fair Sentencing Act were in effect at the time the defendant *was sentenced* for the covered offense.

The Sixth Circuit's own analysis underscores the illogic of its approach. Far from dictating that First Step Act resentencings may proceed "only as if" the Fair Sentencing Act had been in effect when the offense was committed, the Sixth Circuit allowed district courts, in their discretion, to "consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much." Pet.App.10a. Such discretionary consideration of present-day law and facts could not be possible if the "as if" clause limited the First Step Act to a mechanical application of Fair Sentencing Act adjustments only.

The Sixth Circuit also created practical problems that Congress did not intend. The Sixth Circuit expressed the view that the First Step Act's purpose to "lessen[] undue disparities in criminal sentencing," Pet.App.13a, would be frustrated if district courts could resentence based on present-day law and facts that would not apply to defendants who are ineligible for First Step Act relief. That argument is wrong because Congress made clear that it *wanted* to single out those like Mr. Maxwell for retroactive relief based on their having been subjected to harsh crack-cocaine sentences.[9]

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[9] *See, e.g.*, 164 Cong. Rec. S7020-22 (daily ed. Nov. 15, 2018) (statement of Sen. Durbin) ("What we are going to set out to do with [the First Step Act] . . . is to give a chance to thousands of people who are still serving sentences for nonviolent offenses involving crack cocaine

In fact, it is the Sixth Circuit's decision that will create new sentencing disparities. It is difficult to imagine a more arbitrary disparity than ignoring present-day law and facts in a resentencing hearing for petitioner, while a similarly situated defendant in a courtroom down the hall is allowed to take advantage of twelve years of factual and legal developments. "Such a regime is antithetical to Congress' intent and the Guidelines' purpose." *Easter*, 975 F.3d at 325. That is particularly so where individuals, like Mr. Maxwell, have undisputed arguments that their sentences were illegal, which the government concedes would massively reduce their Guidelines range. This Court should "decline to read Congress's intent as directing a district court to impose a sentence possibly predicated on a legal error." *Brown*, 974 F.3d at 1146.

This arbitrariness also creates practical problems for the imposition and appellate review of sentences under the First Step Act. In circuits where district courts must consider present-day law and facts, the parties, district courts, and circuit courts all can apply familiar, predictable rules for arguing about and determining the appropriate sentence to be imposed. *See Easter*, 975 F.3d at 325 (requiring consideration of § 3553(a) factors "(1) makes sentencing proceedings under the First Step Act more predictable to the parties, (2) more straightforward for district courts, and (3) more consistently reviewable on appeal" (internal quotation marks omitted)); *United States v. McDonald*, 986 F.3d 402, 411-12 (4th Cir. 2021) (applying existing standards for review of district court's consideration of § 3553(a) factors and defendant's post-sentencing conduct).

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under the old 100-to-1 ruling to petition individually, not as a group, to the court for a reduction in the sentencing.").

Conversely, where district courts may ignore present-day law and facts, these familiar standards go out the window. In those circuits, parties have no idea whether their judge will even hear their arguments. District courts that choose to consider such arguments have no guidance as to what weight to give them. And appellate courts reviewing such sentences have no standards to say whether and when a district court can ever err in its consideration of arguments the district court is not obligated to consider in the first place.

3. Requiring district courts to consider present-day law and facts would not transform First Step Act proceedings into "a plenary resentencing hearing." Pet.App.6a. No Circuit has imposed such a requirement. *See Easter*, 975 F.3d at 326 (defendant entitled to present-day review of § 3553(a) factors "is not entitled to a plenary resentencing hearing at which he would be present"); *Brown*, 974 F.3d at 1139 (First Step Act "does not authorize plenary resentencing"); *Chambers*, 956 F.3d at 673 n.3 (no need for plenary resentencing "to correct [a] career-offender error").

For instance, a defendant who is able to make arguments based on present-day law and facts would not be entitled to be physically present at a resentencing, *see Easter*, 975 F.3d at 326, to relitigate old facts about his offense conduct, or to take a second bite at the apple regarding the application of Sentencing Guidelines enhancements for which the law has not changed, *see Lancaster*, 2021 WL 1823287, at *3 ("[T]he analysis is not intended to be a complete or new relitigation of Guidelines issues or the § 3553(a) factors. Rather, the scope of the analysis is defined by the gaps left from the original sentencing to enable the court to determine what sentence it would have imposed under the Fair Sentencing Act in light of intervening circumstances.").

Indeed, in most cases, the application of present-day law could be conducted with little more than the existing sentencing record. *See, e.g.*, *Chambers*, 956 F.3d at 673 n.3 (noting career-offender "error is evident from the face of [the defendant's] PSR and the 1996 and 1997 North Carolina judgments"). And, in the mine run of cases, relevant present-day factual information would be limited to a small supplemental record. *See, e.g.*, *McDonald*, 986 F.3d at 406-08 (evidence submitted by defendants included official prison records about discipline, payment of fines and restitution, and educational endeavors, as well as letters demonstrating a community support system for their reentry).

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The Court should grant certiorari to restore uniformity to this important criminal justice reform.

CONCLUSION

The petition for a writ of certiorari should be granted.

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