No. 20-1653

In the Supreme Court of the United States

LAZELLE MAXWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to consider all legal and factual developments since the defendant's original sentencing—whether or not related to the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372—in connection with his motion for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Ky.):

Maxwell v. *United States*, No. 12-cv-7223 (June 4, 2013)

Maxwell v. *United States*, No. 18-cv-0038 (Feb. 5, 2019)

United States Court of Appeals (6th Cir.):

United States v. *Maxwell*, No. 10-5030 (Mar. 18, 2011)

Maxwell v. *United States*, No. 13-5856 (July 1, 2015)

United States v. *Maxwell*, No. 15-6324 (Mar. 3, 2017)

Maxwell v. *United States*, No. 19-5158 (Apr. 11, 2019)

United States v. *Maxwell*, No. 19-5312 (Jan. 28, 2020)

Supreme Court of the United States:

Maxwell v. *United States*, No. 10-10639 (June 20, 2011)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 991 F.3d 685. The opinion of the district court (Pet. App. 16a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2021. The petition for a writ of certiorari was filed on May 24, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on one count of conspiring to distribute 50 grams or more of cocaine base (crack cocaine) and on one count of conspiring to distribute 100 grams of heroin, both in violation of 21 U.S.C. 841(a)(1) and 846.

1/14/10 Judgment 1. The district court sentenced petitioner to 360 of months imprisonment, to be followed by ten years of supervised release. *Id.* at 2-3. The court of appeals affirmed, 415 Fed. Appx. 692, and this Court denied a writ of certiorari, 564 U.S. 1029. On collateral review, the district court vacated petitioner's heroin conspiracy conviction and resentenced petitioner to 360 months of imprisonment, to be followed by ten years of supervised release, based on the crack-cocaine conspiracy conviction alone. 11/16/15 Judgment 2-3. The court of appeals affirmed. 678 Fed. Appx. 395. Following the enactment of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a sentence reduction under Section 404 of that Act. See Pet. App. 4a. The district court denied the motion, see *id.* at 16a-24a, and the court of appeals affirmed, *id.* at 1a-15a.

1. Beginning in January 2008, petitioner was the leader and primary supplier of a drug-dealing network in northern Kentucky, through which he distributed more than 420 grams of crack cocaine and 560 grams of heroin between January and May 2008. Presentence Investigation Report (PSR) ¶ 14. Agents with the Northern Kentucky Drug Strike Force began investigating the operation in May 2008. PSR ¶ 6. After a series of controlled purchases and electronic and physical surveillance, agents obtained search warrants for three residences. PSR ¶¶ 6-9. The resident of one of them, Kelly Henderson, and another person found at the home, told officers that a man they knew as "Stone," later identified as petitioner, used the residence to distribute heroin and crack cocaine. PSR ¶ 9, 11. Agents later identified "Stone" as petitioner and learned that he had traveled to Northern Kentucky to distribute the

drugs, recruited several others into the conspiracy, and used some of their homes to sell or process the drugs. PSR ¶ 11.

A federal grand jury in the Eastern District of Kentucky returned a superseding indictment charging petitioner and several co-conspirators with one count of conspiring to distribute and to possess with intent to distribute 50 grams or more of a mixture or substance containing a detectable amount of crack cocaine, and one count of conspiring to distribute and to possess with intent to distribute 100 grams or more of a mixture or substance containing a detectable amount of heroin, both in violation of 21 U.S.C. 841(a)(1) and 846. Superseding Indictment 1-2. The government subsequently filed an information pursuant to 21 U.S.C. 851, stating that petitioner had been previously convicted of a drug offense under Ohio law, and therefore was subject to enhanced penalties. D. Ct. Doc. 25 (May 13, 2009). Following a jury trial, petitioner was convicted on both counts. 1/14/10 Judgment 1.

2. Before sentencing, the Probation Office determined that petitioner was responsible for 420 grams of crack cocaine and 560 grams of heroin, resulting in a base-offense level of 34. PSR ¶ 22. Its presentence report also assigned petitioner a four-level enhancement for his role as an organizer or leader of the conspiracy, pursuant to Sentencing Guidelines § 3B1.1(a) (2009). PSR ¶ 25.

The Probation Office further determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1 (2009). PSR ¶ 29. Section 4B1.1(a) provided, and still provides, that a defendant is a "career offender," subject to an increased offense level, if

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Sentencing Guidelines § 4B1.1(a) (2009); see *id.* § 4B1.1(b) and (c) (2009); see also Sentencing Guidelines § 4B1.1. Section 4B1.2 of the 2009 Sentencing Guidelines defined a predicate "crime of violence" to include (*inter alia*) an "offense under * * * state law, punishable by imprisonment for a term exceeding one year, that * * * has as an element the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 4B1.2(a) (2009).

The Probation Office found that petitioner qualified as a career offender based on a previous federal conviction for bank robbery and a previous Michigan conviction for fleeing from a police officer. PSR ¶¶ 29, 35-36. The career-offender classification would have set petitioner's offense level at 37 pursuant to Sentencing Guidelines § 4B1.1(b) (2009), but petitioner's otherwise-applicable offense level was already calculated at the greater level of 38. PSR ¶ 29; see p. 3, *supra*. Finally, the Probation Office assigned petitioner nine criminal history points, but determined that petitioner's career-offender designation resulted in a criminal history category of VI. PSR ¶¶ 38-40.

The Probation Office accordingly calculated an advisory guidelines range of 360 months to life imprisonment. PSR ¶ 57. Based on the Section 851 information, the Office further found that petitioner's crack-cocaine

conspiracy offense was subject to a statutory-minimum term of 20 years of imprisonment and a maximum term of life imprisonment, and that petitioner's heroin conspiracy offense was subject to a statutory-minimum term of ten years of imprisonment and a maximum term of life imprisonment. PSR ¶ 56; see 21 U.S.C. 841(b)(1)(A) and (B) (2006).

At sentencing, the district court adopted the Probation Office's findings and calculations. Sent. Tr. 14-16, 19. The court sentenced petitioner to 360 months of imprisonment, to be followed by ten years of supervised release. *Id.* at 26. The judgment specified that petitioner's 360-month sentence was based on a 240-month sentence on the crack-cocaine conspiracy count and a consecutive 120-month sentence on the heroin conspiracy count. Judgment 2-3. The court of appeals affirmed in an unpublished opinion, 415 Fed. Appx. 692, and this Court denied a writ of certiorari, 564 U.S. 1029.

3. Petitioner subsequently filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255, contending, among other things, that his trial counsel was constitutionally deficient for failing to object to the conspiracy convictions as multiplicitous. D. Ct. Doc. 244 (June 18, 2012). The district court denied the motion, D. Ct. Doc. 269 (June 4, 2013), but the court of appeals reversed and directed the district court to vacate one of the two conspiracy convictions, 617 Fed. Appx. 470.

On remand, the government moved to dismiss the heroin conspiracy count, but recommended that the district court maintain petitioner's sentence of 360 months of imprisonment. D. Ct. Doc. 285, at 1 (Oct. 12, 2015). The government argued that even if the court were to apply the then-current Sentencing Guidelines and con-

clude that petitioner should not be classified as a career offender, the sentencing factors listed in 18 U.S.C. 3553(a) would still "support a sentence of 360 months imprisonment." D. Ct. Doc. 285, at 2.

Petitioner raised new and renewed objections to several calculations in the presentence report, including objections based on recent changes to the Sentencing Guidelines and intervening legal precedent. D. Ct. Doc. 289, at 1-5 (Oct. 30, 2015). Petitioner urged the district court to apply the 2015 edition of the Sentencing Guidelines. D. Ct. Doc. 291, at 1-3 (Nov. 6, 2015); see D. Ct. Doc. 289, at 4-5. Petitioner also sought to relitigate the application of the enhancement for his leadership role in the conspiracy. D. Ct. Doc. 289, at 2. Petitioner argued that if his objections were accepted, his advisory sentencing range under the 2015 edition of the Sentencing Guidelines would be 121 to 262 months—or 63 to 137 months if, as he argued, the court was required to rely only on the drug quantity listed in the indictment to calculate the guidelines range. D. Ct. Doc. 291, at 4-6.

At resentencing, the district court vacated petitioner's heroin conspiracy conviction and reimposed a sentence of 360 months of imprisonment on the crack-cocaine conspiracy conviction alone. 11/16/15 Judgment 2-3; 11/13/15 Tr. 28, 48. Using the 2009 edition of the Sentencing Guidelines, the district court again calculated petitioner's advisory sentencing range as 360 months to life imprisonment. D. Ct. Doc. 293, at 1 (Nov. 16, 2015). But the court also took account of the 324- to 405-month range that would have resulted under the 2009 edition if petitioner no longer qualified as a career offender. *Id.* at 3. And the court explained that "changes in the guidelines adopted through later versions of the United States Sentencing Guidelines were

included in the Court's subsequent analysis under 18 U.S.C. § 3553(a)." *Ibid.*

Those additional considerations, however, "did not alter" the district court's "determination that a sentence of 360 months imprisonment was necessary to meet all goals and objectives of sentencing." D. Ct. Doc. 293, at 1 (Nov. 16, 2015). The court determined that "neither post-sentencing rehabilitative conduct nor changes in the guidelines altered the Court's determination that a sentence of 360 months is sufficient, but not greater than necessary," and emphasized that "regardless of whether" petitioner was sentenced as a career offender, "the same term of imprisonment would be imposed by the Court." *Id.* at 4. The court of appeals affirmed. 678 Fed. Appx. 395.

4. In the Fair Sentencing Act of 2010 (Fair Sentencing Act), Pub. L. No. 111-220, 124 Stat. 2372, Congress altered the statutory penalties for certain crack-cocaine offenses. Before those amendments, a non-recidivist defendant convicted of trafficking (or conspiring to traffic) 50 grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, faced a minimum term of imprisonment of ten years, a maximum term of imprisonment of life, and a minimum supervised-release term of five years. 21 U.S.C. 841(b)(1)(A)(iii) (2006) and 21 U.S.C. 846. A non-recidivist defendant convicted of trafficking (or conspiring to traffic) five grams or more of crack cocaine, without an enhancement for a resulting death or serious bodily injury, faced a minimum term of imprisonment of five years, a maximum term of imprisonment of 40 years, and a minimum supervised-release term of four years. 21 U.S.C. 841(b)(1)(B)(iii) (2006) and 21 U.S.C. 846. For powder-cocaine offenses, Congress had set the

threshold amounts necessary to trigger the same penalties significantly higher. 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii) (2006) and 21 U.S.C. 846.

The Fair Sentencing Act reduced that disparity in the treatment of crack and powder cocaine by increasing the amount of crack cocaine necessary to trigger the penalties described above. Specifically, Section 2(a) of the Fair Sentencing Act increased the threshold quantities of crack cocaine necessary to trigger the statutory penalties set forth in 21 U.S.C. 841(b)(1)(A) from 50 grams to 280 grams, and in 21 U.S.C. 841(b)(1)(B) from five grams to 28 grams. 124 Stat. 2372. Those changes applied only to offenses for which a defendant was sentenced after the Fair Sentencing Act's effective date (August 3, 2010). See *Dorsey* v. *United States*, 567 U.S. 260, 273 (2012).

In 2018, Congress enacted Section 404 of the First Step Act, which allows a defendant sentenced for a "covered offense," 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," to seek a reduced sentence. 132 Stat. 5222. Under Section 404(b), a district court that "imposed a sentence for a covered offense may, on motion of the defendant, * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." 132 Stat. 5222. Section 404(c), in turn, provides that Section 404 "shall [not] be construed to require a court to reduce any sentence," and prohibits a court from reducing a sentence under Section 404 "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 * * * or if a previous motion made under [Section 404] to reduce the sentence was, after the date of enactment of [the First Step Act], denied after a complete review of the motion on the merits." *Ibid.*

5. In 2019, petitioner filed a motion *pro se* seeking the appointment of counsel to pursue relief under Section 404 of the First Step Act. D. Ct. Doc. 354 (Feb. 25, 2019). The district court construed the filing as a motion for relief under Section 404 and determined that a sentence reduction was not warranted. D. Ct. Doc. 355 (Mar. 22, 2019). The court of appeals vacated the district court's order, concluding that the district court had erroneously construed petitioner's request for counsel as a motion for substantive relief, and remanded the case for the district court to reconsider the request for counsel. 19-5312 C.A. Order (Jan. 28, 2020).

On remand, petitioner retained *pro bono* counsel, D. Ct. Doc. 370, 371 (Apr. 1, 2020), and moved for a reduction of sentence under Section 404 of the First Step Act, D. Ct. Doc. 373 (May 19, 2020). Petitioner contended that his conviction was for a "covered offense[]," and argued that a sentence reduction was warranted in light of "changes in the law regarding [his] career offender classification." D. Ct. Doc. 373, at 12. Specifically, petitioner contended that he would not be considered a career offender under the current Sentencing Guidelines and intervening legal precedent, because neither his felony drug conspiracy conviction nor his Michigan conviction for fleeing from a police officer continued to qualify as a crime of violence or a controlled substance offense under the 2020 version of Sentencing Guidelines § 4B1.1. D. Ct. Doc. 373, at 9-12. Petitioner also contended that his criminal history score

and criminal history category should be lowered based on intervening changes to Sentencing Guidelines § 4A1.1 (2020). D. Ct. Doc. 373, at 14 n.5. Applying these changes, petitioner argued that his recalculated advisory guidelines range would be 188 to 235 months, and petitioner urged the district court to impose a low-end, 188-month sentence, asserting (*inter alia*) substantial "rehabilitation since his prior sentencing." *Id.* at 19 (citation omitted); see *id.* at 13-19.

In response, the government contended that, assuming petitioner was eligible for a reduction, the district court should "exercise its discretion" to deny any reduction, based on the facts and circumstances of petitioner's offense, petitioner's demonstrated lack of respect for the law, the need for deterrence, and the interest in protecting the public. D. Ct. Doc. 380, at 1 (June 8, 2020). The government explained that petitioner's maximum sentence remained life imprisonment; that when the court resentenced petitioner in 2015, it had determined that the existing 360-month sentence remained warranted even if the then-current Sentencing Guidelines applied; and that the substance of petitioner's criminal history supported maintaining petitioner's current sentence. *Id.* at 2.

The district court denied petitioner's motion. Pet. App. 16a-24a. The court concluded that petitioner was eligible for relief under Section 404 of the First Step Act. *Id.* at 19a. But after considering "the factors outlined in 18 U.S.C. § 3553(a), including [petitioner's] amended sentencing guidelines range" and "post-sentencing conduct," the court determined that a sentence reduction "would not be appropriate in this case." *Ibid.*; see *id.* at 20a. The court explained that "this is not a case in which the [sentencing court] believed that a

lower sentence was appropriate but was unable to impose it because of the statutory mandatory minimum in effect at the time of sentencing." *Id.* at 20a. And it found that petitioner's "lengthy sentence was (and is) needed to reflect the seriousness of the crime and to provide just punishment for the offense, as well as to promote specific and general deterrence." *Id.* at 23a-24a.

The district court observed that, although petitioner had been charged with a conspiracy involving 50 grams or more of crack cocaine—"as that is what § 841(b)(1)(A) required at the time"—he was responsible for "nearly a kilogram of controlled substances, 560 grams of which were heroin." Pet. App. 20a. It emphasized petitioner's leadership role in the drug conspiracy and his "long pattern of criminal conduct," exhibiting a "danger to the public" and "lack of respect for the law." *Id.* at 23a. And while the Court "commend[ed] [petitioner's] steps toward rehabilitation" post-sentencing, it found that "th[o]se efforts do not warrant a sentence reduction when considered in conjunction with the other [sentencing] factors." *Id.* at 24a. The court accordingly determined that "a sentence of 360 months' imprisonment remains sufficient, but not greater than necessary, to meet all of the goals and objectives of 18 U.S.C. § 3553." *Ibid.*

The district court acknowledged petitioner's request to have his advisory guidelines range recalculated under current Guidelines and in light of intervening precedent that, in his view, would not classify him as a career offender. Pet. App. 20a. The court explained that, "[w]hile such legal changes may be considered as part of a § 3553(a) analysis, allowing cocaine-base offenders to benefit automatically from otherwise non-retroactive changes in the law may have unwarranted results" by placing crack-cocaine offenders in a better position than

other offenders who would be deprived of such benefits. *Id.* at 21a. The court also observed that, at the 2015 resentencing, it had determined that, "even if [petitioner] were not deemed a career offender," it would have imposed the same 360-month sentence. *Id.* at 20a. "Consistent with its prior decision," the court "decline[d] to reduce [petitioner's] sentence based on [any] changes in the Guidelines manual." *Id.* at 22a.

6. The court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals rejected petitioner's argument that, in determining whether to grant a motion for a sentence reduction under Section 404 of the First Step Act, "the district court must engage in a plenary resentencing * * * that recalculates the advisory guidelines range according to the law at the time of the request." Pet. App. 6a. The court explained that the First Step Act requires "the court to alter just one variable in the original sentence, not all variables." *Ibid.* Specifically, the court observed that it instructs the court to consider a request for a sentence reduction "'as if' the crack-cocaine sentencing range had been reduced under the Fair Sentencing Act of 2010, not as if other changes had been made to sentencing law in the intervening years." *Ibid.* And the court found in that directive "no requirement at the outset to account for intervening legal developments in recalculating the guidelines." *Id.* at 7a.

The court of appeals made clear, however, that "[t]o say that the First Step Act does not require plenary resentencing hearings is not to say that it prohibits trial judges from considering intervening legal and factual developments in handling First Step Act requests." Pet. App. 9a. The court observed that its decisions and those of "most of [its] sister circuits" permit (but do not require) a district court to consider "intervening devel-

opments, such as changes to the career-offender guidelines, * * * in balancing the § 3553(a) factors and in deciding whether to modify the original sentence." *Id.* at 12a. And the court of appeals determined that, "[g]auged by this measuring stick, the district court's decision should be affirmed." *Id.* at 13a.

The court of appeals observed that the district court had "acknowledged" petitioner's argument that his guidelines range would be lower if recalculated under the then-current Sentencing Guidelines and had "recognized its discretion to consider" petitioner's amended range "when it weighed the § 3553(a) factors." *Ibid.* And the court of appeals found that the district court "acted well within its discretion" when it nevertheless concluded that a 360-month sentence "remain[ed] sufficient, but not greater than necessary, to meet all of the goals and objectives of 18 U.S.C. § 3553." *Id.* at 15a (citation omitted).

ARGUMENT

Petitioner contends (Pet. 24-31) that the district court was required to consider all intervening legal or factual changes since his original sentencing in deciding whether to grant him a discretionary sentence reduction under the First Step Act. The court of appeals correctly rejected that contention; its decision does not conflict with any decisions of this Court; and although the circuits' approaches to intervening legal developments in Section 404 proceedings are not uniform, this Court's intervention is not warranted. This case, moreover, would be an unsuitable vehicle to consider the question. This Court has previously denied petitions for writs of certiorari presenting similar questions in *Hegwood* v. *United States*, 140 S. Ct. 285 (2019) (No. 19-5743), *Bates* v. *United States*, 141 S. Ct. 1462 (2021)

(No. 20-535), *Harris* v. *United States*, No. 20-6832 (June 14, 2021), *Deruise* v. *United States*, No. 20-6953 (June 21, 2021), and *Kelley* v. *United States*, No. 20-7474 (June 28, 2021). The Court should follow the same course here.[*]

1. The court of appeals correctly rejected petitioner's argument that the district court was required to consider "all changes in the law since his original sentence" when considering his Section 404 motion. Pet. App. 4a; see *id.* at 4a-9a.

"'A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon* v. *United States*, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. 3582(b)) (brackets omitted); see 18 U.S.C. 3582(c). Section 3582(c)(1)(B) creates an exception to that general rule of finality by authorizing a court to modify a previously imposed term of imprisonment "to the extent otherwise expressly permitted by statute." 18 U.S.C. 3582(c)(1)(B). Section 404 of the First Step Act, which expressly permits a court to reduce a previously imposed sentence for a "covered offense," § 404(a) and (b), 132 Stat. 5222, is such a statute. But its express authorization is narrowly drawn, permitting the district court only to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222. Section 404 does not expressly authorize other changes to a sentence for a covered offense, and Section 3582(c)(1)(B) states that a previously imposed term of imprisonment may

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[*] Counsel for petitioner has also submitted another petition for a writ of certiorari presenting the same question in *Concepcion* v. *United States*, No. 20-1650 (filed May 24, 2021).

be modified only "to the extent otherwise expressly permitted." 18 U.S.C. 3582(c)(1)(B). Accordingly, Section 404 does not permit a plenary resentencing.

This Court reached a similar conclusion in *Dillon* v. *United States*, *supra*, explaining that Section 3582(c)(2) —which permits a sentence reduction for a defendant "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2)— "authorize[s] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon*, 560 U.S. at 826. The Court stressed that Section 3582(c)(2) allows district courts only to "'reduce'" sentences for a "limited class of prisoners" under specified circumstances. *Id.* at 825-826 (citation omitted). And because the statute permits only "a sentence reduction within * * * narrow bounds," a district court "properly decline[s] to address" alleged errors in the original sentence unrelated to the narrow remedy authorized by statute. *Id.* at 831.

The same logic applies to Section 404. Analogously to *Dillon*, Section 404(b) permits a district court to impose a "reduced sentence," and only for a limited set of prisoners—namely, those serving a sentence for a "covered offense" who are not excluded by Section 404(c). First Step Act § 404(b), 132 Stat. 5222. Analogously to *Dillon*, the district court may exercise discretion to reduce a sentence "only at the second step of [a] circumscribed inquiry," 560 U.S. at 827, in which it first determines eligibility for a reduction and thereafter the extent (if any) of such a reduction, see First Step Act § 404(b) and (c), 132 Stat. 5222. And analogously to *Dillon*, Section 404(b) limits the scope of relief available, authorizing a reduction only "as if sections 2 and 3

of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222.

Accordingly, every court of appeals to consider the question has agreed that Section 404 does not create any entitlement to a plenary resentencing. See *United States* v. *Concepcion*, 991 F.3d 279, 289-290 (1st Cir. 2021), petition for cert. pending, No. 20-1650 (filed May 24, 2021); *United States* v. *Moore*, 975 F.3d 84, 90 (2d Cir. 2020); *United States* v. *Easter*, 975 F.3d 318, 326 (3d Cir. 2020); *United States* v. *Wirsing*, 943 F.3d 175, 181 & n.1 (4th Cir. 2019); *United States* v. *Hegwood*, 934 F.3d 414, 415 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019); *United States* v. *Smith*, 958 F.3d 494, 498 (6th Cir.), cert. denied, 141 S. Ct. 907 (2020); *United States* v. *Kelley*, 962 F.3d 470, 475-476 (9th Cir. 2020), cert. denied, No. 20-7474 (June 28, 2021); *United States* v. *Brown*, 974 F.3d 1137, 1144 (10th Cir. 2020); *United States* v. *Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020); see also *United States* v. *Brewer*, 836 Fed. Appx. 468, 468-469 (8th Cir. 2021) (per curiam).

As those courts have explained, "[b]y its express terms, [Section 404] does not require plenary resentencing or operate as a surrogate for collateral review, obliging a court to reconsider all aspects of an original sentencing." *Moore*, 975 F.3d at 90. It does not, in other words, entitle movants to relitigate each and every legal issue that may have affected their original statutory and guidelines ranges. Instead, "[t]hrough its 'as if' clause, all that § 404(b) instructs a district court to do is to determine the impact of Sections 2 and 3 of the Fair Sentencing Act." *Id.* at 91 (citation omitted). The "as if" clause requires the district court to place itself in a "counterfactual legal regime," assessing how "the addi-

tion of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape * * * would affect the defendant's sentence," before deciding whether to reduce the sentence to one "consistent with that change." *Kelley*, 962 F.3d at 475.

Petitioner is incorrect in asserting (Pet. 27) that the court of appeals implicitly "added the word 'only' to the First Step Act." As noted, it is not Section 404, but the "general rule of finality" that dictates that a defendant's sentence "may not be modified by a district court except in limited circumstances," *Dillon*, 560 U.S. at 824, and Section 3582(c)(1)(B) that authorizes a reduction in a term of imprisonment "to the extent expressly permitted by statute," 18 U.S.C. 3582(c)(1)(B). And Section 404 does not create an exception to the finality of a sentence for changes unrelated to the Fair Sentencing Act. See *United States* v. *Fowowe*, 1 F.4th 522, 532 (7th Cir. 2021) ("Backdating §§ 2 and 3 is the explicit basis for and therefore the only requirement Congress imposed on a district court exercising its discretion.").

2. Petitioner appears to acknowledge that Section 404 does not require a "plenary resentencing," but he fails to explain why his construction of the statute would not require such a result. Pet. 30 (citation omitted). Petitioner contends, for example, that a Section 404 proceeding must begin with an "accurate calculation of the amended guidelines range at the time of resentencing." Pet. 25 (citation omitted). And he suggests that a district court must not "perpetuate a Guidelines calculation that was an error even at the time of initial sentencing." *Ibid.* (citation omitted). "[F]astening such requirements on district courts" comes "very close to requiring a plenary resentencing." *United States* v. *Lancaster*, 997 F.3d 171, 178 (4th Cir. 2021) (Wilkinson, J.,

concurring in the judgment). It is therefore difficult to see petitioner's basis for a gerrymandered carve-out of "relitigat[ing] old facts about [a defendant's] offense conduct[]" or "tak[ing] a second bite at the apple regarding the application of Sentencing Guidelines enhancements for which the law has not changed," Pet. 30, from the scope of arguments that a district court would have to consider under his theory.

Petitioner errs (Pet. 24-26) in relying on the term "impose" as used in Section 404(b) as support for his approach. See First Step Act § 404(b), 132 Stat. 5222 (court "may * * * impose a reduced sentence"). A district court that grants a motion under Section 404 does not "impose a new sentence in the usual sense," but instead—because the "impos[ition]" is limited by the "as if" clause—effects "a limited adjustment to an otherwise final sentence." *Dillon*, 560 U.S. at 826-827 (discussing Section 3582(c)(2) sentence reductions); see *Moore*, 975 F.3d at 91 ("[T]he First Step Act does not simply authorize a district court to 'impose a sentence,' period."); *Kelley*, 962 F.3d at 477 (rejecting argument that the word "'impose'" in the "resentencing context" signals Congress's intent to "authorize a plenary resentencing"). In that context, Congress's use of the phrase "impose a reduced sentence," First Step Act § 404(b), 132 Stat. 5222, simply clarifies that the court is not limited to reducing "the sentence" for the covered offense, but may also correspondingly reduce the overall sentence to the extent it embodies an intertwined sentencing package. Cf. *Dean* v. *United States*, 137 S. Ct. 1170, 1178 (2017).

Contrary to petitioner's suggestion (Pet. 27-28), Section 404's requirement to consider a sentence reduction as if Sections 2 and 3 of the Fair Sentencing Act were in

effect "at the time the covered offense was committed," rather than at the time of the original sentencing, does not either explicitly or by necessary implication direct courts to consider unrelated post-sentencing changes. The statutory penalties for an offense are normally determined by the statutes in force at the time of commission, not the time of sentencing. See 1 U.S.C. 109; *Dorsey* v. *United States*, 567 U.S. 260, 272 (2012) (explaining that statutory "penalties are 'incurred' * * * when an offender becomes subject to them, *i.e.*, commits the underlying conduct that makes the offender liable"). Section 404's reference to the time of commission was therefore both the most natural and clearest way to describe the counterfactual circumstances that the court must evaluate. It does not indicate that a court is required to consider changes beyond Sections 2 and 3 of the Fair Sentencing Act.

Petitioner asserts that it would be "antithetical to Congress' intent and the Guidelines' purpose" and would create "practical problems" not to require district courts to consider all intervening changes of law and facts that have occurred since a defendant's original sentencing. Pet. 29 (citation omitted). But Section 3582 itself refutes the suggestion that Congress necessarily views reductions to otherwise-final sentences in such all-or-nothing terms. Section 3582(c)(2), while allowing reductions for retroactive Sentencing Guidelines amendments, treats the application of other changes in law or the correction of errors in the original sentence as "outside the scope of the proceeding." *Dillon*, 560 U.S. at 831. And petitioner provides no evidence that Congress's narrow and targeted approach to sentence reductions presents any insurmountable practicable problems for "arguing about and determining

the appropriate" sentence reduction, if any, "to be imposed." Pet. 29.

Finally, petitioner errs in asserting (Pet. 28) that the purpose of Section 404 was not to "single out" defendants who were "subjected to harsh crack-cocaine sentences" as special beneficiaries of all intervening sentence-related developments. To the contrary, the First Step Act makes clear that defendants need not be granted any relief at all. See § 404(c), 132 Stat. 5222 ("Nothing in this section shall be construed to require a court to reduce any sentence."). Instead, the manifest purpose of Section 404 was to finish the work of the Fair Sentencing Act, by eliminating the unwarranted sentencing disparities caused by the now-discredited 100-to-1 ratio in the treatment of powder and crack cocaine that led to those harsh sentences. Petitioner cannot dispute that interpreting Section 404(b) to require courts to reevaluate guidelines calculations under "case law unrelated to crack cocaine sentencing disparities would not create a level playing field but, rather, would put defendants convicted of crack cocaine offenses in a more advantageous position than defendants convicted of powdered cocaine offenses," *Concepcion*, 991 F.3d at 287, as well as defendants sentenced after the First Step Act's enactment, neither of whom is entitled to seek reductions on such grounds. Such favoritism makes little sense. See *Lancaster*, 997 F.3d at 180 (Wilkinson, J., concurring in the judgment) ("This is not criminal justice. It is arbitrary readjustment, a haphazard windfall for a limited number of crack cocaine offenders.").

3. Petitioner asserts (Pet. 13-20) that further review is warranted because the courts of appeals are divided on the scope of proceedings under Section 404 of the First Step Act. But petitioner overstates the extent and

practical effect of the disagreement. Petitioner posits three approaches prevailing in the courts of appeals as to whether and when a district court may consider intervening legal or factual developments in deciding to reduce a sentence under Section 404. He contends (*ibid.*) that three circuits (the Fifth, Ninth, and Eleventh Circuits) categorically forbid district courts from considering any legal developments; four circuits (the Third, Fourth, Tenth, and D.C. Circuits) mandate that district courts invariably consider all legal and factual developments; and five circuits (the First, Second, Sixth, Seventh, and Eighth Circuits) permit, but do not require, district courts to consider such developments in the exercise of their discretion. In fact, most circuits fall into the third category, and none of the decisions petitioner cites necessarily would preclude a district court from considering intervening changes in law and fact in exercising its discretion whether to reduce a sentence under Section 404.

a. As petitioner observes (Pet. 16-17), several circuits, including the court of appeals below, have expressly recognized a district court's ability to, in its discretion, consider intervening changes in law or fact in deciding a motion for a Section 404 sentence reduction. In *United States* v. *Concepcion*, *supra*, for example, the First Circuit explained that although a district court must determine whether relief is warranted "plac[ing] itself at the time of the original sentencing and keep the then-applicable legal landscape intact," the court "may take into consideration any relevant factors (other than those specifically proscribed), including current guidelines, when deciding to what extent a defendant should be granted relief." 991 F.3d at 289-290. In *United States* v. *Moore*, *supra*, the Second Circuit explained that

"[w]e hold only that the First Step Act does not obligate a district court to consider post-sentencing developments. We note, however, that a district court retains discretion to decide what factors are relevant as it determines whether and to what extent to reduce a sentence." 975 F.3d at 92 n.36. Similarly, in *United States* v. *Hudson*, 967 F.3d 605 (2020), the Seventh Circuit determined that "a district court may consider all relevant factors when determining whether an eligible defendant merits relief under the First Step Act," including "current Guidelines" or "post-sentencing conduct." *Id.* at 611-612; see *Fowowe*, 1 F.4th at 531-532 ("§ 404 of the First Step Act authorizes but does not require a district court to apply intervening judicial decisions."). And the Eighth Circuit is in accord. See *United States* v. *Harris*, 960 F.3d 1103, 1106 (2020) ("[T]he § 3553(a) factors in First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines."), cert. denied, 141 S. Ct. 1438 (2021).

Although petitioner asserts (Pet. 17-18) otherwise, the Fifth Circuit has also adopted a similar approach. In *United States* v. *Robinson*, 980 F.3d 454 (2020), the Fifth Circuit explained that its earlier decision in *United States* v. *Hegwood*, *supra*, on which petitioner relies (Pet. 17), holds only that a district court is not "*required* to consider [a] lower non-career offender guideline range that would apply" if the defendant were resentenced de novo. *Robinson*, 980 F.3d at 465. Like the circuits discussed above, the Fifth Circuit in *Robinson* made clear that "a district court, in exercising the sentencing discretion granted by the First Step Act, may consider, as a § 3553(a) sentencing factor, that a defendant originally sentenced as a career offender, for purposes of U.S.S.G. § 4B1.1, would not hold that status if

originally sentenced, for the same crime, today." *Ibid.* (emphasis omitted). And the Fifth Circuit has reached a similar conclusion about post-sentencing conduct—a district court is not "obliged" to consider it, but it may do so in its discretion. *United States* v. *Jackson*, 945 F.3d 315, 321-322 & n.7 (5th Cir. 2019), cert. denied, 140 S. Ct. 2699 (2020).

Petitioner does not identify any circuit that has categorically precluded district courts from considering intervening factual developments in Section 404 proceedings. See Pet. 17 (claiming only that some circuits "do not require" such consideration). And although the decisions that petitioner cites (Pet. 18-19) from the Ninth and Eleventh Circuits contain some language that could be read not to permit consideration of intervening legal developments, the question was not directly presented in those cases. See *Kelley*, 962 F.3d at 475 (explaining that the "only question on appeal" was "whether the First Step Act authorizes a plenary resentencing"); *Denson*, 963 F.3d at 1082 ("The issue on appeal is whether the district court is required to first hold a hearing at which [the defendant] was present" before resolving a Section 404 motion). As the Fifth Circuit's clarification of *Hegwood* in *Robinson* exemplifies, the courts' answers to the questions in those cases do not necessarily indicate that they would preclude all consideration of intervening legal developments in a case in which the issue is squarely presented. Indeed, petitioner himself states (Pet. 18) that the "Ninth Circuit acknowledged it was adopting the Fifth Circuit's" approach, and—as just explained—the Fifth Circuit has recognized that, in exercising its discretion under Section 404, a district court *may* consider intervening changes in law or fact. See pp. 22-23, *supra*; see also *United*

States v. *Sims*, 824 Fed. Appx. 739, 744 (11th Cir. 2020) (per curiam) (assuming without deciding that district courts "may consider the current guideline range when 'determining whether and how to exercise their discretion,'" under *Denson*) (brackets and citation omitted).

b. Petitioner asserts that the Third, Fourth, Tenth, and D.C. Circuits do not merely permit, but instead invariably require, district courts to consider intervening developments in law and fact. See Pet. 13-16. But petitioner overstates both the differences between the approaches and the practical effect of those differences.

In *United States* v. *Easter*, *supra*, the Third Circuit concluded that Section 404 requires district courts to consider the Section 3553(a) factors. 975 F.3d at 325-326. And the court has since concluded, in a divided decision, that such consideration "must include any new, relevant facts that did not exist, or could not reasonably have been known by the parties, at the time of the first sentencing" and "a fresh inquiry into whether the defendant qualifies as a career offender" in light of intervening case law. *United States* v. *Murphy*, 998 F.3d 549, 555, 560 (3d Cir. 2021); see *id.* at 560 (Bibas, J., dissenting). But at the same time, the court "emphasize[d] that nothing in [its] holding" would "constrain[] a district court's discretion to depart or vary from the Guidelines range as it sees fit," including by "consider[ing] a defendant's changed career-offender status and still retain[ing] his previously imposed sentence." *Id.* at 559 (majority opinion). Given that no court of appeals categorically precludes a district court from consulting intervening changes in law or fact, the practical effect of the Third Circuit's decision on offenders who might seek a Section 404 reduction at this point (two-and-a-

half years after such reductions became available) may be limited.

In *United States* v. *Chambers*, 956 F.3d 667 (2020), the Fourth Circuit concluded that a district court erred by declining to apply intervening case law, which had been declared retroactive, concerning the defendant's career-offender designation in considering a sentence reduction under Section 404. *Id.* at 668. And in *United States* v. *Lancaster*, *supra*, the court held that "[t]o determine the sentence that the court would have imposed under the Fair Sentencing Act," a district court "must engage in a brief analysis that involves the recalculation of the Sentencing Guidelines in light of [any] 'intervening case law,' and a brief reconsideration of the factors set forth in 18 U.S.C. § 3553(a)." 997 F.3d at 175 (citations omitted). Nevertheless, the Fourth Circuit stated only that the district court "can," not must, "take into account a defendant's conduct after initial sentencing." *Ibid.* It also emphasized that its interpretation of Section 404 "nonetheless leaves the court with much discretion," including the discretion to deny any relief if the court determines that the "sentence it would have imposed under the Fair Sentencing Act in light of intervening circumstances * * * would not be reduced." *Ibid.*

Recent Tenth and D.C. Circuit decisions have intermingled permissive and mandatory language in describing the way in which district courts should approach intervening developments. Compare, *e.g.*, *United States* v. *Brown*, 974 F.3d at 1139-1140 (stating that Section 404 "*allows* a district court to at least consider [the defendant's] claim that sentencing him as a career offender would be error given subsequent decisional law") (emphasis added), with *id.* at 1146 ("Upon remand, the district court *shall* consider [the defendant's] challenge

to his career offender status in accordance with this opinion.") (emphasis added); compare also, *e.g.*, *United States* v. *White*, 984 F.3d 76, 90 (D.C. Cir. 2020) (agreeing with the Seventh Circuit that a district court "*may* consider all relevant factors when determining whether an eligible defendant merits relief under the First Step Act") (emphasis added) (quoting *Hudson*, 967 F.3d at 611), with *id.* at 93 ("[T]he court *must* do this on remand.") (emphasis added); see *United States* v. *Crooks*, 997 F.3d 1273, 1278 (10th Cir. 2021) ("The district court should have recalculated the guidelines range."); see also *United States* v. *Lawrence*, 1 F.4th 40, 43-44 (D.C. Cir. 2021) ("[T]he district court must consider 'all relevant factors[,]' including * * * potentially * * * 'new statutory minimum or maximum penalties; current Guidelines; post-sentencing conduct; and other relevant information about a defendant's history and conduct.'") (citation omitted). Either circuit could follow the trend of tightening up, refining, or reconciling statements in prior opinions on those points. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). And, again, where no circuit categorically precludes consideration of all legal and factual developments, the significance of these circuits' decisions is also yet to be determined.

In sum, "[a]lthough the case law is still evolving, it appears that most circuits generally permit, but [do] not require," consideration of intervening legal and factual developments "in evaluating a First Step Act motion, insofar as the information relates to § 3553(a) factors." *Robinson*, 980 F.3d at 465 (emphases omitted); see *Fowowe*, 1 F.4th at 531 (noting the "growing consensus that a district court is not required to apply intervening

judicial decisions"). And because a Section 404 sentence reduction is discretionary, see First Step Act § 404(b)-(c), 132 Stat. 5222, different approaches may not have a substantial practical effect. Accordingly, this Court's intervention is unwarranted.

4. Finally, even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it.

Petitioner argues (Pet. 22) that his case is a superior vehicle to those in which the Court has previously declined further review, because the question presented in his petition "is broad enough to encompass the disagreement among all courts of appeals regarding the scope of resentencing as to both legal and factual developments." But while the court of appeals did directly consider whether the First Step Act requires a district court to consider intervening *legal* developments, it did not directly consider whether, as petitioner contends, district courts are required to consider intervening *factual* developments. See Pet. App. 4a (considering whether "the First Step Act demand[s] a plenary resentencing of a defendant that accounts for all changes in the law since his original sentence" and what it "permit[s] a district court in its discretion to consider").

In any event, the district court did in fact expressly consider intervening factual developments before denying Section 404 relief. See Pet. App. 24a ("While the Court commends [petitioner's] steps toward rehabilitation, these efforts do not warrant a sentence reduction when considered in conjunction with the other factors."); see also *id.* at 14a ("[T]he district court adequately considered [petitioner's] likelihood of recidivism, granted sufficient weight to his post-sentence rehabilitation, and did not need to explicitly address [his] arguments

that he would not be a danger to the community if released given his age and his health struggles."). And the court likewise indicated that intervening legal developments would not warrant a reduced sentence either.

Both during petitioner's resentencing in 2015 and when resolving petitioner's Section 404 motion in 2020, the district court acknowledged more recent changes in law that might have lowered petitioner's advisory guidelines range. See D. Ct. Doc. 293, at 3-4; Pet. App. 22a. Nevertheless, on each occasion the district court unequivocally explained that it would have found 360 months of imprisonment the appropriate sentence notwithstanding those changes to the Guidelines. See D. Ct. Doc. 293, at 4 (finding that "regardless of whether" petitioner was sentenced as a career offender, "the same term of imprisonment would be imposed by the [c]ourt"); Pet. App. 24a ("Consistent with the Court's previous decisions, a sentence of 360 months' imprisonment remains sufficient, but not greater than necessary, to meet all of the goals and objectives of 18 U.S.C. § 3553."). The First Step Act expressly provides that Section 404 "shall [not] be construed to require a court to reduce any sentence," § 404(c), 132 Stat. 5222, and nothing in the record suggests that the district court would reduce petitioner's sentence any further even if the question presented were decided in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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