No. 20-1650

# In the Supreme Court of the United States

CARLOS CONCEPCION,
*Petitioner*,

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF OF FAMM, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER


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## INTEREST OF THE *AMICI CURIAE*

*Amici curiae* are FAMM, the National Association of Criminal Defense Lawyers (NACDL), and the National Association of Federal Defenders (NAFD).[1]

FAMM (formerly Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization dedicated to promoting fair and proportionate sentencing policies and challenging inflexible and excessive penalties required by mandatory sentencing laws. For thirty years, FAMM has worked to restore discretion to judges to distinguish among individually situated defendants according to their role in the offense, the seriousness of the offense, their potential for rehabilitation, and other individual characteristics. Since its founding in 1991, FAMM has grown to include 75,000 supporters, including currently and formerly incarcerated people, family members, practitioners, and concerned citizens. FAMM's vision is a nation in which sentencing is individualized, humane, and sufficient to impose just punishment, secure public safety, and support successful rehabilitation. FAMM accomplishes its purposes through education of the general public, selected *amicus* filings in important cases, congressional testimony, and advocacy.

NACDL, founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented in writing to the filing of this brief.

has a membership of many thousands of direct members and approximately 40,000 affiliated members. NACDL files numerous *amicus* briefs each year, seeking to assist courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NAFD, formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, NAFD's members represent tens of thousands of indigent criminal defendants in federal court. Given the nature of litigation regarding retroactive sentencing relief under the First Step Act, federal and community defenders have handled the vast majority of the motions for relief in which movants have been represented by counsel. They therefore have both particular expertise and interest in the subject matter of this litigation.

*Amici* all are strongly committed to fair and appropriate sentencing in which district courts exercise discretion based on the facts of each individual's situation—so that the punishment imposed fits the offender as well as the crime. Because this approach favors sentencing policies that enable judges to exercise principled discretion based on the fullest information possible about the defendants before them, *amici* have a deep interest in ensuring that district courts adjudicating motions for a reduced sentence under Section 404(b) of the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (2018), codified at 21 U.S.C. § 841 note, consider facts regarding the defendant's conduct

after imposition of his or her original sentence and changes in law after the imposition of that sentence.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether a court considering a motion to impose a reduced sentence under the First Step Act's provision for retroactive application of new crack cocaine sentencing provisions is required to consider, in addition to the changes in crack cocaine penalties, other legal and factual developments since imposition of the original sentence.

The answer—based on statutory text and context, background principles of sentencing law, and practical considerations—is yes. The First Circuit's contrary conclusion forces a sentencing court to put on blinders and ignore intervening developments that this Court and Congress have determined are critical to imposition of rational sentences.

Congress in 1986 enacted a law "creat[ing] mandatory-minimum penalties for various drug offenses, and it set much lower trigger thresholds for crack [cocaine] offenses" than for offenses involving powder cocaine—adopting a 100-to-1 ratio. *Terry* v. *United States*, 141 S. Ct. 1858, 1860 (2021). The Sentencing Commission issued a report in 1995 stating that the combination of this law and the subsequently effective Sentencing Guidelines produced sentences for crack cocaine offenders that were unjustifiably harsh and warning that the public "had come to understand" that the differential treatment "reflect[ed] unjustified race-based differences." *Dorsey* v. *United States,* 567 U.S. 260, 268 (2012).

After leaving this unfair sentencing regime in effect for decades, Congress in 2010 addressed the disparity by enacting the Fair Sentencing Act, which "reduced the 100-to-1 ratio to about 18 to 1"—but "did not apply to those who had been sentenced before 2010." *Terry*, 141 S. Ct. at 1861. Although the Sentencing Commission made corresponding changes to the relevant Guidelines, and made those changes retroactive, "[c]ourts were still constrained * * * by the statutory minimums in place before 2010" and many individuals' sentences could not be reduced. *Ibid.*

Section 404 of the First Step Act addresses that unfair result by providing that a district court "may * * * impose a reduced sentence" upon an individual who received a sentence for a "covered offense," a category that includes federal criminal offenses for which the statutory penalties were modified by the Fair Sentencing Act. The text's use of the term "may" makes clear that the district court's decision on a Section 404 motion for a reduced sentence requires the exercise of discretion.

The question presented here is whether the district court—in determining whether to impose a reduced sentence and what sentence to impose—must take into account the movant's post-sentencing conduct and post-sentencing legal developments (some of which are not applicable retroactively either by their own terms or on collateral review) that demonstrate that the original sentence is unjustified and overly harsh. At this point, all of the individuals eligible to apply for Section 404 relief have been incarcerated for more than a decade—some for much more. They accordingly have had the opportunity to demonstrate rehabilitation, and there have also been a significant

number of changes in sentencing law during their time behind bars.

Many district courts have based their Section 404 decisions on these types of post-sentencing developments. They have found that some defendants' conduct while incarcerated established rehabilitation warranting significant sentence reductions. And they have concluded that post-sentencing legal developments necessitated reductions to avoid unfair and unjustified sentences.

This Court should hold that the Section 404 determination is governed by the standard that applies in other circumstances in which district courts are called upon to "impose" a sentence—consideration of all relevant circumstances. Congress's use of the term "impose" incorporates that approach, and nothing in the text of Section 404 suggests any intent to deviate from that tradition. Finally, the government's reliance on *Dillon* v. *United States*, 560 U.S. 817 (2010), to support its restrictive construction of Section 404 is misplaced because Section 404 lacks the limiting language contained in 18 U.S.C. § 3582(c)(2) that was the basis for the Court's decision in *Dillon*.

## ARGUMENT

### Trial Judges Must Consider A Defendant's Post-Sentencing Conduct And Intervening Legal Developments When Exercising Their Section 404 Authority To "Impose A Reduced Sentence."

Section 404(b) decisions in the three years since its enactment demonstrate that consideration of a defendant's post-sentencing conduct and post-sentenc-

ing changes in law has enabled district courts to impose fairer and more appropriate sentences. And Section 404(b)'s text and context make clear that courts are obligated to take account of those post-sentencing developments when exercising the discretion conferred by that statute.

### A. Evidence of post-sentencing conduct and intervening changes in law significantly affects district courts' exercise of Section 404 sentencing discretion—producing fairer and more appropriate sentences.

Many of the individuals eligible for First Step Act relief have been imprisoned for decades. At minimum, they have been incarcerated for the eleven years since the enactment of the Fair Sentencing Act in 2010.

Much has changed during that time. Individuals' records in prison can and do demonstrate substantial rehabilitation—or, alternatively, can reveal continued engagement in criminal behavior warranting adherence to their original sentences. Post-sentencing judicial decisions have established that a significant number of these individuals received substantial sentence enhancements under erroneous interpretations of career-offender provisions and other laws. And post-sentencing statutory changes and Guidelines amendments embody determinations that the prior provisions were unduly harsh.

A survey of lower court decisions applying the First Step Act demonstrates that fair and appropriate punishments result when courts are obligated to consider these intervening developments in exercising their discretion to determine whether and how much to reduce an individual's sentence.

*1. Post-sentencing conduct.*

Many of the individuals eligible for First Step Act relief have demonstrated substantial rehabilitation during their long periods of incarceration. And, importantly, an individual's behavior in prison also can demonstrate the absence of rehabilitation and therefore weigh against a reduced sentence. Ignoring that evidence where it exists, and instead deciding whether to impose a reduced sentence based on an evidentiary record that closed at least ten years ago, simply makes no sense.

Consider four cases in which courts properly took account of such evidence.

Anthony Olvis was sentenced in 1997 to 460 months' imprisonment for convictions that included distribution of crack cocaine. Def.'s Supp. Memo. in Support of Mot. to Reduce Sentence at 2-4, *United States* v. *Olvis*, No. 95-cr-0038 (E.D. Va. Mar. 12, 2021), ECF No. 342. In 2014, the court reduced his sentence to 404 months, based on a retroactive amendment to the Sentencing Guidelines. Order, *United States* v. *Olvis* (Dec. 9, 2014), ECF No. 297.

Shortly after enactment of the First Step Act, Mr. Olvis moved for a reduced sentence under Section 404, highlighting evidence of post-sentencing rehabilitation, but the district court "declined to exercise its discretion to grant a reduction because, in part, the Fair Sentencing Act of 2010 did not change the Sentencing Guidelines range applicable to the grouped crack offenses," which had been reduced in 2014. *United States* v. *Olvis*, 828 F. App'x 181, 181 (4th Cir. 2020). The Fourth Circuit vacated and remanded, explaining that under its recent decision in *United States* v.

*Chambers*, 956 F.3d 667 (4th Cir. 2020), the district court, when applying Section 404, had the authority to exercise "discretion to vary from the defendant's Guidelines range to reflect his post-sentencing conduct." *Olvis*, 828 F. App'x at 181-182.

On remand, Mr. Olvis submitted proof that he had not committed a single disciplinary infraction during more than two decades in custody, had earned his GED and completed further coursework, and had served as a tutor in prison programs. He also included letters of support from Bureau of Prisons staff, complimenting his work ethic and attitude. Def.'s Supp. Memo. In Support of Mot. to Reduce Sentence, *supra*, at 11-13. The government agreed that Mr. Olvis had "redeemed himself," had taken a "determined approach to post-conviction rehabilitation," had maintained a "spotless disciplinary record," and had a "thorough Re-entry Plan" in place. Gov't's Response to Def's Mot. for Modification at 2, *United States* v. *Olvis* (Mar. 24, 2021), ECF No. 343.

Based upon this information, the district court imposed a reduced sentence of 240 months—far less than the 325 months Mr. Olvis had already served—declaring his post-sentencing conduct to be "exemplary." Order at 8, *United States* v. *Olvis* (Apr. 23, 2021), ECF No. 344. Mr. Olvis was thus spared an additional six-and-one-half years in prison.

Tanesha Bannister was convicted in 2003 of conspiracy to distribute crack cocaine. Ms. Bannister did not have a major role in the conspiracy,[2] but under the

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[2] See *United States* v. *Davis*, 270 F. App'x. 236, 244 (4th Cir. 2008) (describing testimony that "Bannister's involvement" in the conspiracy was as an "intermediary").

then-mandatory Sentencing Guidelines regime, she was sentenced to life imprisonment. That sentence was reduced to 280 months following a remand based on *United States* v. *Booker*, 543 U.S. 220 (2005). See *United States* v. *Bannister*, 321 F. App'x 256, 257-258 (4th Cir. 2009).

Ms. Bannister's motion seeking relief under Section 404 highlighted her prison record, which included more than ten years without an infraction and deep involvement in educational, vocational, and mentorship programs. Order, *United States* v. *Bannister*, No. 02-cr-548-40 (D.S.C. May 1, 2019), ECF No. 4291.

The district court reduced Ms. Bannister's sentence by approximately four-and-one-half years. *Id*. at 1. The court cited letters of support from Bureau of Prisons officials that "reflect[ed] extraordinary post-sentencing mitigation." *Id.* at 2. Ms. Bannister served as a "mentor for the At Risk Program" and had "completed her GED, college courses, over 100 courses, and [had] become a certified cosmetologist." *Ibid*.[3] Further, the court observed that Ms. Bannister was now 44 years old and had a daughter, a granddaughter, and a paralyzed son who required full-time care. *Ibid*.

In 2011, Kenneth Townsend was sentenced to 370 months in prison for his role in a drug distribution

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[3] The prison's warden wrote a letter of recommendation for Ms. Bannister, describing her work as an instructor for prison programs, her "favorable written and oral communication skills," and that she "works well both independently and with others" and "demonstrates a willingness to volunteer her time on a daily basis as well as during special holidays and events." Letter of Support at 1, *United States* v. *Bannister* (Apr. 26, 2019), ECF No. 4287-3.

conspiracy. *United States* v. *Townsend*, 489 F. Supp. 3d 790, 791 (N.D. Ill. 2020). The sentence was reduced to 302 months in 2015 based on a change in the Guidelines range. *Ibid.*

Following enactment of the First Step Act, Mr. Townsend moved for a reduced sentence under Section 404(b). The district court granted the motion and sentenced him to time served which amounted to 132 months—a nearly 14-year reduction in his prison term. 489 F. Supp. 3d at 794.

The court based its decision on evidence that Mr. Townsend had received his GED, had completed approximately twenty educational courses, and was enrolled in college while working toward a vocational training in carpentry. The court stated that Mr. Townsend's "commitment to his education demonstrates that throughout his incarceration he has proactively taken steps to rehabilitate himself." *Ibid.* It concluded that "incarceration appear[ed] to have had the desired deterrent effect and Townsend will be law-abiding upon release." *Ibid.*

Roy Grace was convicted in 1997 of distributing crack cocaine and sentenced to concurrent life sentences, which was the statutory mandatory minimum applicable to the most serious count (distribution of at least 50 grams of crack cocaine). See *United States* v. *Grace*, 168 F.3d 502 (9th Cir. 1999) (table), 1999 WL 50895.

The Fair Sentencing Act reduced the applicable mandatory minimum from life imprisonment to ten years. Therefore, when Mr. Grace moved for imposition of a reduced sentence under Section 404, both

"parties agree[d] that Grace deserve[d] a sentence reduction"—but they disagreed regarding the appropriate reduction. *United States* v. *Grace*, 2020 WL 1044003, at *1 (D. Nev. Mar. 3, 2020). The district court credited Mr. Grace's "remarkable behavior while in custody for more than two decades" that "demonstrate[d] his commitment to following the law." *Id.* at *2. In addition, the court cited his age and the fact that he was now confined to a wheelchair. Based on these facts, the court found that there was "no evidence that Grace poses a threat to the community or that he is particularly prone to recidivate" and concluded that "a sentence of time served would be adequate to accomplish the purposes of sentencing." *Id.* at *1.

Numerous other courts have similarly based Section 404 reduced sentences on the defendant's post-sentencing rehabilitation. *E.g.*, Mem. Op. at 4, *United States* v. *Ross*, No. 09-cr-62 (E.D. Tenn. Oct. 7, 2021), ECF No. 131 (reducing 240-month sentence to 180 months, citing "Defendant's positive rehabilitative efforts while in custody"); Order at 1, *United States* v. *Davey*, No. 02-cr-201 (E.D.N.C. May 6, 2021), ECF No. 112 (reducing sentence from 360 to 280 months for "first-time drug offender who has positive post-sentencing conduct"); *United States* v. *Armstead*, 2021 WL 267825, at *2 (D.S.C. Jan. 27, 2021) (reducing 262-month sentence to time served, approximately 141 months, citing post-sentencing conduct); *United States* v. *Badger*, 2021 WL 248582, at *3 (D.S.C. Jan. 26, 2021) (reducing 360-month sentence to 300 months; citing defendant's "admirable steps to rehabilitate himself while incarcerated"); *United States* v. *Brown*, 2020 WL 6482397, at *3 (D.S.C. Nov. 4, 2020)

(reducing 262-month sentence to time served, resulting in release approximately seven months early, citing disparity and "Defendant's productive use of time while in custody without minimizing his disciplinary record"); *United States* v. *Roper*, 2020 WL 5200827, at *1-2 (N.D.W. Va. Aug. 31, 2020) (reducing 322-month sentence to time served in light of supervisors' description of Mr. Roper's conduct as "nothing short of extraordinary" and his "excellent disciplinary record" during 11 years of incarceration, and concluding that Mr. Roper's "efforts were the result of internalized change and a motivation to do better with the time he has left"); *United States* v. *Robinson*, 2020 WL 3958476, at *1-2 (N.D.W. Va. June 17, 2020) (reducing 262-month sentence to time served of 138 months citing "overwhelming evidence of rehabilitation" and a "nearly spotless" disciplinary record); *United States* v. *Sweets*, 2020 WL 3073318, at *2 (D. Md. June 10, 2020) (reducing sentence to time served, eliminating 15 years' imprisonment; "plac[ing] particular emphasis" on Mr. Sweet's participation "in extensive rehabilitative, education, and vocational programming," his Bureau of Prisons Progress Report, and his "minimal disciplinary record"); Order at 5, *United States* v. *Smith*, No. 98-cr-252 (D. Md. Feb. 14, 2020), ECF No. 92 (reducing 420-month sentence to 300 months, "[b]alancing [defendant's] conduct in this case and his criminal record with his progress since incarceration and family support, and in light of evolving perspectives on sentencing"); Order at 7, *United States* v. *Jones*, No. 6-96-cr-111-1 (W.D. Tex. Sept. 26, 2019), ECF No. 384 (reducing sentence from life imprisonment to time served, explaining that "the Court believes Jones has been rehabilitated"—citing testimony from defendant's caseworker describing him as a

"model inmate"); *United States* v. *Wright*, 2019 WL 3231383, at *4 (N.D. Ill. July 18, 2019) (reducing sentence of 292 months' imprisonment to time served of 194 months—citing evidence that Mr. Wright had spent his time in prison "productively, taking self-improvement classes" and working, and that Mr. Wright was "a changed man, ready and able to become a productive member of society").

Of course, evidence of a movant's post-sentencing conduct can also weigh against a reduced sentence. In *United States* v. *Muhammad*, 2021 WL 4228878, at *5 (W.D.N.C. Sept. 16, 2021), for example, the district court found that the defendant's Guidelines range had fallen from 188-235 months to just 77-96 months. But it declined to modify Mr. Muhammad's original sentence of 190 months based upon his high number of violent disciplinary infractions and his attempts to escape from supervised release. *Ibid*.

In sum, district courts' decisions applying the First Step Act clearly demonstrate that those courts are well equipped to make individualized determinations based on individuals' post-sentencing conduct, and that doing so results in fairer and more appropriate sentencing decisions.

*2. Post-sentencing legal developments.*

Many individuals eligible to seek relief under the First Step Act have been serving sentences that are far longer than those deemed appropriate for similarly-situated individuals today, not just because of the disparate powder and crack cocaine sentencing ranges addressed by the Fair Sentencing Act, but also because of other post-sentencing legal developments. In the decade or more since these individuals were

sentenced, there have been many such developments—including Guidelines amendments, judicial interpretations of existing laws, and legislative reforms—that have significantly ameliorated the impact of certain harsh Guidelines and sentencing laws.

Courts' Section 404 decisions show that taking account of these post-sentencing developments is necessary to produce the fairer and more appropriate sentencing decisions that Congress intended when it enacted the First Step Act.

For example, the Sentencing Guidelines assign "career offender" status to a defendant with two or more prior convictions for a "crime of violence" or "controlled substance offense." See U.S.S.G. § 4B1.1. Career offender status usually produces a significant increase in a defendant's base offense level— from 23 to 31 on average—and it elevates the criminal history category to VI (typically from IV). U.S. Sentencing Commission, *Quick Facts: Career Offenders* (May 2021), https://www.ussc.gov/research/quick-facts/career-offenders. For example, a guideline range of 70 to 87 months generally becomes—with the career offender enhancement—a range of 188 to 235 months, and always with criminal history category VI.

After a defendant's sentence has become final, a judicial decision in another case may hold that a prior conviction relied upon to impose career offender status did not qualify as a "crime of violence" under a proper application of the law. Courts adjudicating Section 404 motions have properly taken account of such legal developments.

Jessie Newton was initially convicted of conspiracy to possess with intent to distribute crack and sentenced to 360 months. His exceptionally long sentence resulted from a career offender finding (under then-mandatory Sentencing Guidelines) based on two prior Virginia burglary convictions. *United States* v. *Newton*, 2019 WL 1007100, at *1 (W.D. Va. Mar. 1, 2019).

Mr. Newton committed the burglary offenses when he was 16 and 17 years old. Initially charged as a juvenile, he was tried and convicted as an adult. *Ibid*. Subsequently, the Fourth Circuit held in another case that the Virginia burglary law does not fall within the federal definition of "generic burglary," which meant that Mr. Newton had been erroneously sentenced as a career offender. *Id*. at *2 (citing *United States* v. *Castendet-Lewis*, 855 F.3d 253 (4th Cir. 2017), and *United States* v. *Dooley*, 228 F. Supp. 3d 733 (W.D. Va. 2017)). Moreover, in 2016, the Sentencing Commission eliminated burglary as a career offender predicate based, in part, on better data about such offenses. U.S.S.G. App. C, Amend. 798 (Aug. 1, 2016).[4]

In seeking relief under Section 404(b), Mr. Newton successfully argued that the district court should

[4] See also U.S.S.G. App. C, Amend. 798, Reason for Amendment (Aug. 1, 2016) ("The amendment deletes 'burglary of a dwelling' from the list of enumerated offenses. In implementing this change, the Commission considered that (1) burglary offenses rarely result in physical violence, (2) 'burglary of a dwelling' is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for a burglary offense after release.")

consider this legal development. The court recalculated the guideline range without the inapplicable career offender enhancement (130 to 162 months) and reduced Mr. Newton's sentence from 360 months to "time served" (that is, 198 months). 2019 WL 1007100, at *5; see also *United States* v. *Brookins*, 2020 WL 5200828, at *2 (N.D.W. Va. Aug. 31, 2020) (reducing sentence by 70 months based on recognition that the defendant's career offender status was based on a residential burglary that no longer qualified as a career offender predicate).

Vernard Mitchell was convicted of possession with intent to distribute crack and sentenced to 262 months. His sentence was enhanced on the basis of prior convictions, under District of Columbia law, for attempted drug distribution and attempted robbery. *United States* v. *Mitchell*, 2019 WL 2647571, at *2 (D.D.C. June 27, 2019). After Mr. Mitchell's sentence became final, the D.C. Circuit held that neither of these statutes is a career offender predicate after all. See *United States* v. *Winstead,* 890 F.3d 1082, 1090-92 (D.C. Cir. 2018) (holding that attempted drug distribution does not qualify as a predicate offense for career-offender status); *United States* v. *Sheffield*, 832 F.3d 296, 315 (D.C. Cir. 2016) (holding that "D.C.'s attempted robbery statute simply does not qualify as a crime of violence as a categorical matter").

Reviewing Mr. Mitchell's Section 404 motion, the district court recognized that, if Mr. Mitchell were first sentenced at the time of the Section 404 proceeding, he would not qualify as a career offender. Based on that conclusion, along with Mr. Mitchell's record of

rehabilitation while in prison, imposed a reduced sentence of time served. *Mitchell*, 2019 WL 2647571, at *8.

Terry Johnson was sentenced in 2006 to 262 months under the career offender guideline, for possession of crack cocaine with intent to distribute and possession of a firearm. Subsequent judicial decisions established that one of Mr. Johnson's prior convictions could not support career-offender status because it subjected him to a maximum sentence of just ten months rather than the required one year. See Mot. for Reduced Sentence at 7-8, *United States* v. *Johnson*, No. 05-cr-00003 (W.D.N.C. Jan. 29, 2021), ECF No. 78 (relying upon *United States* v. *Simmons*, 649 F.3d 237, 241-43 (4th Cir. 2011), which held that under *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), some North Carolina drug offenses previously understood to be felonies were not, in fact, felonies, because the particular defendant (as opposed to a hypothetical defendant with the "worst possible criminal history") did not face a maximum sentence of more than one year).

Mr. Johnson sought the appointment of counsel to file a Section 404 motion, but the district court denied the motion based on the assumption that Mr. Johnson's Guideline range remained unchanged. Order at 1-2, *United States* v. *Johnson* (June 27, 2019), ECF No. 74.

Subsequently, counsel appeared for Mr. Johnson and asked the court to reconsider its ruling in light of the Fourth Circuit's decisions in *Simmons* (narrowing the scope of the prior-felony provision) and in *Chambers* (holding that courts must consider changes in law in exercising their Section 404 discretion). The government agreed that *Simmons* established that Mr.

Johnson was not a career offender and that the court should reduce his sentence to time served (212 months—far more than the correctly calculated Guidelines range of 57 to 71 months). United States' Response at 4-6, *United States* v. *Johnson* (Mar. 3, 2021), ECF No. 82.

The court granted the motion and sentenced Mr. Johnson to time served. Order, *United States* v. *Johnson* (Mar. 10, 2021), ECF No. 83. See also *United States* v. *Chambers*, No. 03-cr-00131 (W.D.N.C. July 17, 2020), ECF No. 80 (reducing defendant's sentence from 262 months to time served—197 months—after taking account of changes in law that would have precluded career offender status); *United States* v. *Gibbons*, No. 05-cr-00260 (W.D.N.C. Nov. 10, 2020), ECF No. 61 (same; reducing defendant's sentence from 322 months to time served—211 months).

James Murphy was convicted of conspiracy to distribute and possess with intent to distribute heroin and at least 50 grams of crack cocaine; the crack weight set the statutory sentencing range at 10 years' to life imprisonment. *United States* v. *Murphy*, 998 F.3d 549, 552 (3d Cir. 2021). At sentencing, Mr. Murphy was designated as a career offender based in part on a prior conviction for Maryland second-degree assault, which set his Guidelines range at 360 months to life imprisonment. *Ibid.*

Mr. Murphy sought relief under Section 404; in response, the government conceded that Mr. Murphy's prior assault conviction could no longer support a career offender designation. The district court nonetheless refused to recalculate Mr. Murphy's Guidelines range, although it imposed a reduced sentence that

varied downward from the lower limit of the career offender range—210 months. 998 F.3d at 553.

On appeal, the Third Circuit held that Section 404 requires district courts to take account of the effect of intervening case law on a defendant's career offender status, because calculating the correct Guidelines range is a prerequisite to imposing an "accurate" sentence that is not "greater than necessary." *Id.* at 556. The district court on remand imposed a sentence of time served, reducing Mr. Murphy's time in prison by approximately five years. Amended Judgment at 3, *United States* v. *Murphy*, No. 08-cr-00433 (M.D. Pa. July 26, 2021), ECF No. 298. See also Opinion and Order, *United States* v. *Crooks*, No. 00-cr-00439 (D. Colo. June 14, 2021), ECF No. 2018 (reducing defendant's sentence to time served based on determination that he would not qualify as a career offender based on post-sentencing change in law and consideration of other Section 3553(a) factors).

Cases such as these show that courts exercise their discretion differently when they consider legal developments that occurred after imposition of the original sentence—and do so in a manner that produces fair and appropriate sentences that accomplish the goals of the First Step Act.

### B. The text and statutory context of the First Step Act compel consideration of post-sentencing conduct and intervening legal developments.

The text and statutory context of the First Step Act make clear that courts must consider post-sentencing developments—including the defendant's conduct while in prison and legal developments that

would have affected the defendant's initial sentence—in making the Section 404(b) determinations whether to "impose a reduced sentence" and, if so, what new sentence should be imposed. By using that phrase, Congress made clear that a court's decision on a Section 404 motion is a type of sentencing decision that requires consideration of all of the information relevant to such decisions. District courts of course exercise broad discretion in making those determinations—the statute states that a court "may" impose a reduced sentence, and expressly affirms that it need not reduce any sentence. But they should exercise that discretion informed by all significant relevant information.[5]

*1. Requiring trial courts to consider a wide range of factors when exercising sentencing discretion is a long-established background principle of American law.*

The "'federal judicial tradition'" with respect to sentencing decisions rests on "the principle that 'the punishment should fit the offender and not merely the crime.'" *Pepper* v. *United States*, 562 U.S. 476, 487-488 (2011) (citations omitted). "'[T]he sentencing judge [should] consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" *Id.* at 487

[5] This case does not present the question, and *amici* express no view on, whether any or all of the *procedural protections* associated with a full sentencing hearing are implicated in "imposing" a reduced sentence under Section 404. Cf. *Dillon* v. *United States*, *supra*.

(quoting *Koon* v. *United States*, 518 U.S. 81, 113 (1996)).

That tradition is embodied in two essential aspects of the sentencing process. First, ensuring that judges are permitted to exercise discretion in making sentencing decisions. Second, and just as important, requiring those discretionary determinations to be based on consideration of all relevant information.

This Court has repeatedly stressed that the exercise of judicial discretion is critical to "consider[ing] every convicted person as an individual." *Koon*, 518 U.S. at 113; see also *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion) ("[T]he concept of individualized sentences in criminal cases generally, although not constitutionally required, has long been accepted in this country."). Indeed, Congress has repeatedly "[a]cknowledg[ed] the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances." *Koon*, 518 U.S. at 92.

To ensure that discretion is exercised appropriately, courts must consider all relevant information. As this Court has explained, "'[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.'" *Pepper*, 562 U.S. at 480 (quoting *Williams* v. *New York*, 337 U. S. 241, 246-47 (1949)). "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U.S. 51, 55 (1937).

Congress has codified this principle. The basic statutory provision governing the imposition of sentences—18 U.S.C. § 3553—specifies a wide variety of factors that a sentencing court "shall" consider "in determining the particular sentence to be imposed," including:

- the "nature and circumstances of the offense";
- the "history and characteristics of the defendant";
- the "need for the sentence imposed" to reflect the purposes of punishment, including the "seriousness of the offense," "just punishment," "adequate deterrence," and "protect[ion]" of the public;
- the "need to avoid unwarranted sentence disparities"; and
- the "kinds of sentences available" (*i.e.*, fines, probation, and other alternatives to imprisonment) and not just the applicable Guidelines "sentencing range."

See also 18 U.S.C. § 3582(a) ("The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, *shall consider the factors set forth in section 3553(a)* to the extent that they are applicable * * *.") (emphasis added); *id.* § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); 21 U.S.C. § 850

(same admonition as Section 3661, as applied to sentencing under the Controlled Substances Act).

As we next discuss, the statutory text and context of the First Step Act preserve, rather than override, these general principles with respect to courts' decisions under Section 404.

*2. The First Step Act's text incorporates background sentencing principles into Section 404 determinations.*

The plain language of Section 404(b)—authorizing courts to "impose a reduced sentence"—requires judges to take account of post-sentencing conduct and legal developments in adjudicating motions for a reduced sentence. Multiple aspects of the statutory text compel that conclusion.

*First*, the phrase "impose a reduced sentence" mirrors the text of Section 3553, which governs sentencing generally. Section 3553(a) states that "[t]he court shall *impose a sentence* sufficient, but not greater than necessary, to comply with the purposes set forth in * * * this subsection" and that "[t]he court, in determining the particular *sentence to be imposed*, shall consider" the factors specified in the text that follows. 18 U.S.C. § 3553(a) (emphasis added).

By employing that same phrase in Section 404(b), Congress made clear that it was incorporating the general background principles that apply when courts impose an initial sentence, as well as Section 3553(a)'s specific requirement that a court consider all of the specified factors when imposing a sentence. As just discussed, those principles direct district courts to ex-

ercise their discretion based on consideration of all information relevant to the individual and to the offense.

The Section 3553(a) factors clearly encompass both the defendant's post-sentencing conduct and post-sentencing legal developments. Section 3553(a)(1) requires judges to consider "the history and characteristics of the defendant." A defendant's conduct in prison, including whether or not they have shown evidence of rehabilitation, falls squarely within this factor.

Section 3553 requires that the court consider how the sentence imposed "provide[s] just punishment for the offense," *id.* § 3553(a)(2)(A), and take account of "the kinds of sentences available," *id.* § 3553(a)(3). Understanding whether the defendant's prior sentence was based on, for example, now-impermissible interpretations of statutes or Guidelines provisions is highly relevant to that determination.

*Second*, the discretionary nature of the district court's determination further supports interpreting Section 404(b) to require consideration of all factors relevant to imposition of a sentence. By stating that the court "*may* * * * impose a reduced sentence" (emphasis added), the statute requires the court to make an initial determination whether imposition of a reduced sentence is warranted. And that determination necessarily requires the court to canvass the factors that are relevant in "impos[ing]" a sentence—that is the only way the court can make that threshold decision whether a reduced sentence is justified.

*Third*, Section 404(b) uses essentially identical language to describe the original imposition of the

sentence and the decision whether to impose a reduced sentence—stating that "[a] court that imposed a sentence" may "impose a reduced sentence." By using the same term—"impose"—Congress confirmed that the district court's decision whether to exercise its discretion should be informed by the same broad range of information as the imposition of the initial sentence.

*Fourth*, when Congress wanted to differentiate the Section 404(b) decision from other situations in which a district court imposes a sentence, it included express language specifying a different approach. Thus, the provision makes clear that a district court adjudicating a Section 404 motion is not obligated to impose a new sentence—by stating in subsection (b) that the court "may" impose a reduced sentence. In addition, Section 404(c) includes the express statement that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section."

The absence of any text limiting the factors that the Section 404(b) court is obligated to assess in deciding whether to impose a reduced sentence further confirms that Congress intended that courts make that decision based on consideration of the factors specified in Section 3553(a).

Some lower courts have reached the contrary conclusion based on the portion of Section 404(b) stating that the district court may impose a reduced sentence "as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." They assert that this "as if" clause, by negative implication, prohibits a district court from considering any *other* post-sentencing factual or legal

developments. See, *e.g.*, *United States* v. *Kelley*, 962 F.3d 470, 475 (9th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021).

But that text has a different purpose: to enable courts to apply the Fair Sentencing Act retroactively. Without that mandatory language, that Act's changes in the amount of crack cocaine necessary to trigger the mandatory minimums might not even be applied by a court, undermining the entire reason for the enactment of Section 404. That language also ensures that retroactive application of the Fair Sentencing Act is not barred by 1 U.S.C. § 109, which requires Congress to act expressly when seeking to retroactively displace an imposed penalty. See *Dorsey* v. *United States*, 567 U.S. 260 (2012).

Indeed, the "as if" phrase's focus on "the time the covered offense *was committed*" (emphasis added) makes clear that this portion of the statute relates solely to the retroactive application of the Fair Sentencing Act and has nothing to do with the court's consideration of other facts relevant to sentencing, because those facts are *not* frozen at the time of the offense. To the contrary, courts routinely consider post-offense conduct in imposing an initial sentence and when resentencing. See, *e.g.*, *Pepper*, 562 U.S. at 493. And the relevant Sentencing Guidelines are those in effect on the date of sentencing (or resentencing), not on the date of the offense. 18 U.S.C. § 3553(a)(4)(A)(ii).[6] Interpreting Section 404(b) to

[6] That rule is, of course, subject to constitutional limitations, such as the Ex Post Facto Clause's prohibition on applying subsequent adverse changes in the Guidelines. See *Peugh* v. *United States*, 569 U.S. 530 (2013).

make the date of the offense the cut-off for consideration of relevant factual and legal developments would therefore require the court making the Section 404(b) determination to ignore even information that was permissibly considered by the initial sentencing court.

*3. The Act's statutory context confirms that courts should consider all factors relevant to imposition of a fair and appropriate sentence.*

The context in which Congress enacted Section 404 provides additional support for the conclusion that courts should consider all relevant post-sentencing facts in exercising their discretion.

To begin with, Section 404 does not stand alone. The First Step Act includes a number of different provisions designed to address and ameliorate unfairness in criminal sentencing. See Cong. Research Serv., *The First Step Act of 2018: An Overview* (2019), https://crsreports.congress.gov/product/pdf/R/R45558. It "is the product of a remarkable bipartisan effort to remedy past overzealous use of mandatory-minimum sentences and harsh sentences for drug-offenders, as well as to facilitate access to rehabilitation programs and compassionate release." *United States* v. *Henry*, 983 F.3d 214, 218 (6th Cir. 2020); accord *United States* v. *Venable*, 943 F.3d 187, 188 (4th Cir. 2019).

Moreover, Section 404 in particular is "'a remedial statute intended to correct earlier statutes' significant disparities in the treatment of cocaine base * * * as compared to powder cocaine.'" *United States* v. *White*, 984 F.3d 76, 89 (D.C. Cir. 2020) (citation omitted); see also *United States* v. *Boulding*, 960 F.3d 774, 782 (6th

Cir. 2020) ("Congress intended to rectify disproportionate and racially disparate penalties [with the First Step Act]."). That remedial goal supports interpreting the statute to preserve the traditional rule that district courts must consider all relevant facts when exercising their sentencing discretion.

The government asserts that permitting consideration of post-sentencing developments would confer a "windfall" on individuals eligible to invoke the First Step Act, because other federal defendants generally cannot benefit from post-sentencing developments. Br. in Opp. 18 (citation omitted). But there is no automatic entitlement to relief under the First Step Act—a district court is not obligated to impose any reduced sentence, even if the Fair Sentencing Act standards establish dramatically-reduced statutory and Guidelines ranges. Individuals sentenced after passage of the Fair Sentencing Act, by contrast, automatically receive the benefit of those new standards.

Moreover, Congress specifically recognized that individuals sentenced before the Fair Sentencing Act's enactment had been subjected to a highly inequitable sentencing regime, warranting courts' consideration of all relevant post-sentencing developments in deciding whether, and how, to exercise their discretion. And Congress would have recognized that consideration of post-sentencing facts and changes in law was particularly warranted for the class of individuals eligible to invoke Section 404, because so much time had elapsed since their initial sentencing—for all, at least eight years at the time Congress voted on the First Step Act; and for most, a decade or more.

Nor does petitioner's construction of Section 404 impose a burden on the district courts. The experience

of the Third, Fourth, and Tenth Circuits shows that courts are able to take account of post-sentencing developments in addressing Section 404 motions. The parties can and do bring the relevant information to the court's attention and the court is able to exercise its discretion efficiently and appropriately.

*4. The government's reliance on* Dillon *is wholly misplaced.*

The government argues (Br. in Opp. 12-15) that *Dillon* v. *United States*, 560 U.S. 817 (2010), supports its position that courts adjudicating Section 404(b) motions may consider only the change in the Guideline range resulting from the Fair Sentencing Act. That is wrong, for multiple reasons.

*Dillon* interpreted a different statutory provision with different text. The issue before the Court involved a motion under 18 U.S.C. § 3582(c)(2), which authorizes the court to reduce "the term of imprisonment" (a) if the defendant had been sentenced "to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission"; (b) "after considering the factors set forth in section 3553(a) to the extent that they are applicable"; and (c) "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

The Court concluded that a district court's authority to reduce a sentence under Section 3582(c)(2) was limited by the Sentencing Commission's policy statement governing that provision, which "instructs courts not to reduce a term of imprisonment below the minimum of an amended sentencing range except to

the extent the original term of imprisonment was below the range then applicable." 560 U.S. at 819.

Section 3582(c)(2) is irrelevant to the First Step Act. Section 404(b) grants courts authority to "impose a reduced sentence," and to the extent an exclusion from general finality rules is required it is supplied by Section 3582(c)(1)(B), which permits changes of an "imposed term of imprisonment to the extent otherwise expressly permitted by statute."

Moreover, the *Dillon* Court's reasoning has no application to Section 404.

The Court there relied on Section 3582(c)(2)'s reference to "modif[ication of] a term of imprisonment," stating that the provision "does not authorize a sentencing or resentencing proceeding." 560 U.S. at 825. But Section 404(b), by authorizing the court to "impose a reduced sentence" not only lacks what the Court held to be the limiting language of Section 3582(c)(2) but also incorporates the phrase—"impose a * * * sentence"—that requires the court to consider all relevant information when exercising its sentencing discretion. See pages 23-25, *supra*.

The Court next emphasized that Section 3582(c)(2) "authorizes a reduction [based on the Section 3553(a) factors] only 'if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'" 560 U.S. at 826. It concluded that "[t]he statute thus establishes a two-step inquiry. A court must first determine that a reduction is consistent with [the Commission's policy statement] before it may consider whether the authorized reduction is warranted, either in whole or in part, according to the factors set forth in §3553(a)." *Ibid*.

Critical to the Court's decision were the statute's express limit on judicial discretion and the restrictions in the Sentencing Commission's policy statement. Because Section 3582(c)(2) permits only "a reduction * * * consistent with [the Commission's] applicable policy statements," and 28 U.S.C. § 994(u) makes that particular policy statement obligatory and restrictive, the statutory text expressly "confine[d] the extent of the reduction authorized," 560 U.S. at 826-827—making the applicable "policy statement" binding.

The relevant Commission policy statement specified that courts adjudicating Section 3582(c)(2) motions "shall leave all other guideline application decisions unaffected." U.S.S.G. § 1B1.10. As a result, any change in other Guideline decisions would not be "consistent with" the Commission's policy statement—which, atypically, is binding—and, therefore, "outside the scope of the proceeding authorized by §3582(c)(2)." 560 U.S. at 831.

By contrast, Section 404(b) does not include, or incorporate by reference, any similar limitations on the court's sentencing discretion—either directly or through incorporation of Sentencing Commission restrictions.

Section 404(b) does require the court to consider one factor—the change made by the Fair Sentencing Act. But that clause does not supersede the traditional rule that a court "impos[ing]" sentence must consider all relevant information. See pages 23-27, *supra*. The government's contrary position requires the Court to imply significant limitations that are wholly absent from the statutory text.

If Congress wished to impose the limitations sought by the government, it easily could have drafted Section 404(b) to accomplish that goal. This Court's opinion in *Dillon* gave Congress a clear roadmap for achieving that result—simply include in Section 404(b) text limiting any reduced sentence to the minimum of the new guideline range resulting from application of the Fair Sentencing Act. But Congress included no such limitation.

Similarly, if Congress wanted to prevent consideration of other changes in law, it could have included a statement that the Section 404(b) court should leave all other guidelines (and statutory) applications unaffected. Again Congress adopted no such restriction.[7]

One lower court has stated that *Dillon* stands for the proposition that "congressional authorization to reduce a term of imprisonment does not necessarily carry with it authorization to correct any errors in the original sentencing proceeding." *Kelley*, 962 F.3d at 478. But, as discussed above, *Dillon* rests on the particular text of the relevant statutory provision, not some generally-applicable principle governing all sentence-reduction statutes regardless of the text enacted by Congress. Rather, the generally-applicable principle operates in the other direction: absent express prohibition, a provision conferring discretion to "impose"

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[7] The government argues (Br. in Opp. 16-17) that Section 404(b)'s text does not in express terms require courts to consider post-sentencing conduct and post-sentencing changes in law. But there was no need for Congress to include such a requirement in Section 404(b). Its use of the phrase "may * * * impose a reduced sentence," together with its emphasis on discretion in Section 404(c), triggers that obligation by incorporating traditional sentencing standards. See pages 23-25, *supra*.

a sentence requires the district court to take account of all relevant information and factors in deciding whether to impose a new sentence and what sentence to impose.

For these reasons, *Dillon* provides no support for the government's position and instead weighs in favor of construing Section 404(b) to require courts to consider post-sentencing developments.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2021