No. 22-1239

In the Supreme Court of the United States

MICHAEL JEROME FILES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked authority under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, to reduce petitioner's prior sentences for three drug-trafficking offenses involving only powder cocaine, rather than crack cocaine.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

Files v. *Warden, FCC Coleman – USP I*, No. 12-cv-323 (June 3, 2013)

United States Court of Appeals (11th Cir.):

United States v. *Files*, No. 98-6460 (Feb. 13, 2001)

United States v. *Allum*, No. 98-6803 (Dec. 28, 2001)

Files v. *United States*, No. 03-15995 (Mar. 26, 2004)

Files v. *United States*, No. 05-11266 (Apr. 15, 2005)

United States v. *Files*, No. 12-13070 (Oct. 16, 2012)

United States v. *Files*, No. 13-10121 (June 27, 2013)

Files v. *FCC Coleman – USP I Warden*, No. 13-13535 (Aug. 14, 2014)

United States v. *Files*, No. 19-11074 (May 21, 2021)

United States v. *Files*, No. 21-10703 (Aug. 19, 2021)

United States Supreme Court:

Files v. *United States*, No. 01-10866 (Oct. 7, 2002)

Files v. *Jarvis*, No. 14-9399 (May 26, 2015)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 63 F.4th 920. The opinion of the district court (Pet. App. 32a-45a) is not published in the Federal Supplement but is available at 2021 WL 3463784.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2023. The petition for a writ of certiorari was filed on June 22, 2023. 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 Southern District of Alabama, petitioner was convicted on one count of conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846; one count of conspiring to possess cocaine base

(crack cocaine) with intent to distribute, in violation of 21 U.S.C. 846; one count of conspiring to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846; three counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); one count of attempting to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846; seven counts of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); two counts of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and two counts of possessing crack cocaine with intent to distribute to a minor, in violation of 21 U.S.C. 859. Presentence Investigation Report (PSR) 1-2, 8. The district court sentenced petitioner to concurrent terms of life imprisonment on 11 counts, to be served concurrently to lesser sentences on other counts and to be followed by multiple concurrent terms of supervised release. Pet. App. 5a; see Judgment 2-3. The court of appeals affirmed, 31 Fed. Appx. 198 (Tbl.), and this Court denied a petition for a writ of certiorari, 537 U.S. 868.

In 2017, the district court granted petitioner's motion for sentence reductions under 18 U.S.C. 3582(c)(2) and reduced his 11 terms of life imprisonment, and two 40-year terms of imprisonment, to concurrent sentences of 30 years. D. Ct. Doc. 2398, at 1 (Apr. 5, 2017). After the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved to further reduce his 30-year terms of imprisonment under Section 404 of that Act. The district court denied the motion, petitioner appealed, and the court of appeals vacated and remanded for further consideration. 848 Fed. Appx. 412. On remand, the district court granted petitioner's Section 404 motion in part and denied it in part,

reducing his remaining sentences for crack-cocaine offenses to time served but leaving in place his remaining sentences for powder-cocaine offenses. Pet. App. 32a-45a. The court of appeals affirmed. *Id.* at 1a-31a.

1. From 1986 to 1997, petitioner and others conspired to distribute more than 150 kilograms of cocaine and other drugs in a sprawling drug-trafficking operation centered in Uniontown, Alabama. PSR ¶¶ 1, 9. The conspirators "orchestrated the movement of multiple-kilogram shipments of cocaine from California and Florida to Alabama, Ohio, and Michigan." PSR ¶ 10. They "arranged for transportation and storage of the cocaine; contacted and negotiated with individuals seeking to obtain cocaine; delivered the cocaine[;] and[] acquired property through nominees, in an effort to avoid detection of their activities." PSR ¶ 1. Petitioner personally served as a "major distributor of crack cocaine in the Uniontown area," "regularly converted powder to crack cocaine for local drug dealers," and also trafficked large quantities of marijuana. PSR ¶ 14; see PSR ¶¶ 26, 28, 44; see also, *e.g.*, Trial Tr. 411, 645-647 (testimony at trial that petitioner took delivery of kilograms of cocaine on a near-weekly basis and also distributed crack cocaine and marijuana).

In 1997, a federal grand jury in the Southern District of Alabama charged petitioner and dozens of codefendants with various drug-trafficking offenses. PSR ¶ 1; see Gov't C.A. Br. 3. The case proceeded to trial, and the jury found petitioner guilty on 18 counts: one count of conspiring to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846; one count of conspiring to possess crack cocaine with intent to distribute, in violation of 21 U.S.C. 846; one count of conspiring to possess marijuana with intent to distribute, in violation of

21 U.S.C. 846; three counts of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); one count of attempting to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846; seven counts of possessing crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); two counts of possessing marijuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1); and two counts of possessing crack cocaine with intent to distribute to a minor, in violation of 21 U.S.C. 859. PSR 1-2, 8; see Judgment 1; Pet. App. 4a-5a.

The Probation Office calculated petitioner's offense level under the Sentencing Guidelines to be 43 based on the quantities of drugs involved in his offenses, which were grouped together for Guidelines purposes. PSR ¶¶ 62, 90; see PSR ¶ 53 (finding that petitioner "was involved with substantially more than 1.5 kilograms of cocaine base, 50 kilograms of cocaine, and 50 kilograms of marijuana"). That offense level yielded a Guidelines range of life imprisonment. PSR ¶ 90. The Probation Office determined that the statutory penalty range for 11 of petitioner's offenses was prescribed directly or indirectly by 21 U.S.C. 841(b)(1)(A) (1994), which at the time specified the penalties applicable to violations of Section 841(a)(1) involving five kilograms or more of powder cocaine or 50 grams or more of crack cocaine. PSR ¶ 89.[1] The statutory maximum penalty for those

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[1] Petitioner was convicted on six counts of possessing crack cocaine with intent to distribute, where the offense involved at least 50 grams of crack cocaine (Counts 12, 26, 27, 28, 30, and 33), as well as one conspiracy count involving 50 grams or more of crack cocaine (Count 2) for which the penalties were specified by Section 841(b)(1)(A). See 21 U.S.C. 846 ("Any person who * * * conspires to commit any offense defined in this subchapter shall be subject to

offenses was life imprisonment. *Ibid.* For three other counts (two involving crack cocaine and one involving powder cocaine), the Probation Office determined that the statutory penalty range was prescribed by 21 U.S.C. 841(b)(1)(B) (1994), which at the time specified the penalties applicable to violations of Section 841(a)(1) involving 500 grams or more of powder cocaine or five grams or more of crack cocaine. PSR ¶ 89; see Superseding Indictment 10-13 (Counts 9, 11, and 13). The statutory maximum penalty for those offenses was 40 years of imprisonment. PSR ¶ 89.

At sentencing, the district court "adopt[ed] the factual findings * * * in the presentence report," including the drug quantities involved in petitioner's offenses, "based on trial testimony and the evidence presented at trial." Judgment 6 (emphasis omitted). The court also accepted the Probation Office's Guidelines calculations, except that the court sustained petitioner's objection to one aspect of the assessment of his criminal history. See *ibid.*; Sent. Tr. 17-18. Petitioner's Guidelines range remained life imprisonment even accounting for that objection. Judgment 6. The court then sentenced petitioner in line with the range prescribed by the Guidelines, which were at that time treated as mandatory, im-

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the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy."). Petitioner was additionally convicted on two counts involving the distribution of 50 grams or more of crack cocaine to a minor (Counts 25 and 29), in violation of a provision that incorporates the penalties specified in Section 841(b). See 21 U.S.C. 859(a) (maximum penalty for a first-time offense of "twice the maximum punishment authorized by section 841(b)"). The remaining two counts for which a life sentence was authorized involved the distribution of five kilograms or more of powder cocaine (Counts 1 and 65). See Judgment 1; Superseding Indictment 1-5, 12, 22-28, 58-59.

posing concurrent terms of life imprisonment on 11 counts, to run concurrently with statutory-maximum terms of 40 years, 20 years, and five years on the remaining counts, to be followed by concurrent terms of five, four, three, and two years of supervised release on various counts. Pet. App. 5a; see Sent. Tr. 24-25; Judgment 2-3.

The court of appeals summarily affirmed petitioner's convictions, 31 Fed. Appx. 198 (Tbl.), and this Court denied a petition for a writ of certiorari, 537 U.S. 868. Petitioner later filed several unsuccessful collateral attacks on his convictions. See, *e.g.*, 576 Fed. Appx. 938, cert. denied, 575 U.S. 1033.

2. In 2014, the Sentencing Commission amended the Guidelines to "reduce[] the base offense level by two levels for most drug offenses." *Hughes* v. *United States*, 138 S. Ct. 1765, 1774 (2018). The Commission later made that amendment retroactive, *ibid.*, and petitioner filed a motion under 18 U.S.C. 3582(c)(2) seeking a reduction of his sentences in light of those developments. D. Ct. Doc. 2391, at 2-4 (Jan. 17, 2017). Section 3582(c)(2) authorizes a district court to modify a previously imposed term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" on a retroactive basis. 18 U.S.C. 3582(c)(2). The district court granted petitioner's motion and reduced his 11 concurrent life sentences and other concurrent 40-year sentences to concurrent sentences of 30 years of imprisonment. D. Ct. Doc. 2398.

In 2019, after fully serving the lesser 20- and 5-year concurrent terms of imprisonment that he had received on certain offenses, "including all three marijuana-

only" offenses, petitioner filed a motion under Section 404 of the First Step Act to further reduce his 30-year terms of imprisonment for other offenses, all of which involved the distribution or attempted distribution of powder or crack cocaine. Pet. App. 5a; see *id.* at 33a. Petitioner did not seek any reduction in his previously imposed terms of supervised release.

Section 404 of the First Step Act permits "[a] court that imposed a sentence for a covered offense" to "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." First Step Act § 404(b), 132 Stat. 5222 (citation omitted). Section 404 defines a "covered offense" 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 of 2010, that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222 (citation omitted). Petitioner's motion relied on Section 2 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which modified the statutory penalties for offenses punishable under Section 841(b)(1)(A)(iii) and (B)(iii) by raising the quantity of crack cocaine necessary to trigger the penalties prescribed in those provisions (from 50 and 5 grams, respectively, to 280 and 28 grams). See *Terry* v. *United States*, 141 S. Ct. 1858, 1862-1863 (2021).

The district court initially denied petitioner's Section 404 motion, finding him ineligible for relief on the view that the sentencing for those counts was based on drug quantities, including 1.5 kilograms of crack cocaine, that would trigger the same range of statutory penalties after the Fair Sentencing Act as before that Act. D. Ct. Doc. 2412, at 1 (Mar. 7, 2019). Petitioner appealed, and the court of appeals vacated and remanded for further

consideration in light of intervening circuit precedent establishing that an offender's eligibility for a sentence reduction under Section 404 turns on the statutory penalties applicable to the offense at issue, rather than the amount of crack cocaine that was involved in the offense. 848 Fed. Appx. at 412; accord *Terry*, 141 S. Ct. at 1862.

On remand, the district court granted petitioner's Section 404 motion in part and denied it in part. Pet. App. 32a-45a. The court observed that, of petitioner's then-remaining 14 concurrent 30-year terms of imprisonment, three had been imposed for offenses involving "powder cocaine only"—namely, conspiring to possess cocaine with intent to distribute, possessing cocaine with intent to distribute, and attempting to possess cocaine with intent to distribute. *Id.* at 34a; see pp. 4-5 & n.1, *supra*. The court observed that those "three offenses of conviction involving only powder cocaine * * * are *not* 'covered offenses' under § 404(a) of the First Step Act," Pet. App. 36a, because the Fair Sentencing Act had modified the statutory penalties only for certain "crack cocaine offenses," *ibid.* (citation omitted); see *id.* at 41a (stating that "[p]owder-cocaine offenses that lack a crack-cocaine element are unquestionably not 'covered offenses'").

Petitioner "d[id] not * * * argue otherwise." Pet. App. 36a. He contended instead that Section 404 authorized a reduction of what he described as his "'overall sentence,'" which he viewed to include the concurrent terms of imprisonment that he had received both for covered crack-cocaine offenses and for "non-covered" powder-cocaine offenses. *Ibid.* (citation omitted). The district court, relying on circuit precedent, concluded that it lacked authority with respect to petitioner's

three powder-cocaine offenses. See *id.* at 37a-42a. But citing petitioner's age at the time of his violations and his "laudable record of rehabilitation and personal growth in prison," the court exercised its discretion to further reduce his 30-year terms of imprisonment for the covered crack-cocaine offenses to time served (approximately 24 years). *Id.* at 44a; see *id.* at 42a-45a.

3. The court of appeals affirmed. Pet. App. 1a-31a. The court understood its prior decision in *United States* v. *Denson*, 963 F.3d 1080 (11th Cir. 2020), to have already established that Section 404 does not authorize "chang[ing] the defendant's sentences on counts that are not 'covered offenses.'" Pet. App. 2a (quoting *Denson*, 963 F.3d at 1089). Petitioner argued that the relevant discussion in *Denson* was merely dicta, but the court examined *Denson* at length and concluded that its statement regarding Section 404 and noncovered offenses was part of an alternative holding and therefore constituted "a binding determination of law" to which the panel was obligated to adhere. *Id.* at 11a; see *id.* at 6a-21a. The panel further explained that no intervening decision by the en banc court or this Court had undermined the relevant portion of *Denson*. *Id.* at 21a-23a.

Judge Newsom (the author of the panel opinion), joined by Judge Tjoflat, concurred to express the view that three-judge panels "should issue fewer alternative holdings." Pet. App. 23a; see *id.* at 23a-31a. The two concurring judges also stated that "the only reading" of Section 404 "that makes any legal or practical sense" is that the provision authorizes reductions only for covered offenses. *Id.* at 24a.

ARGUMENT

Petitioner renews (Pet. 16-29) his contention that Section 404 of the First Step Act authorizes reductions

for his three drug-distribution offenses involving only powder cocaine, on the theory that the sentencing on those counts was "interconnected" to his sentencing for crack-cocaine violations that are themselves "covered offense[s]" under Section 404. That contention does not warrant further review in this case, which will soon become moot upon petitioner's scheduled release from federal prison in November 2023. Thus, while some tension exists in the courts of appeals on the extent of a district court's authority under Section 404 to reduce a sentence for a noncovered offense under the sentencing-package doctrine, this case would be an unsuitable vehicle in which to review that issue, which in any event is of diminishing prospective importance. This Court has recently denied a petition for a writ of certiorari presenting a similar question. *Contrera* v. *United States*, 143 S. Ct. 511 (2022) (No. 21-8111). It should follow the same course here.

1. Section 404 of the First Step Act permits a district court to impose a reduced sentence for an offender "only if he previously received 'a sentence for a covered offense.'" *Terry* v. *United States*, 141 S. Ct. 1858, 1862 (2021) (quoting First Step Act § 404(b), 132 Stat. 5222). Section 404(a) defines a "covered offense" 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 of 2010, that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222 (citation omitted). Sections 2 and 3 of the Fair Sentencing Act, in turn, prospectively amended certain provisions of the drug laws, with the effect of increasing the amounts of crack cocaine necessary to trigger certain statutory penalties. See Fair Sentencing Act §§ 2-3, 124

Stat. 2372; *Dorsey* v. *United States*, 567 U.S. 260, 273 (2012).

In appropriate circumstances, Section 404 authorizes a district court to reduce a sentence for a noncovered offense to the extent that the noncovered offense formed part of a single, integrated sentencing package with a covered offense. See U.S. Br. at 32, *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022) (No. 20-1650). As a general matter, when the record indicates that the sentencing court imposed what was effectively a single intertwined sentence that took into account the defendant's convictions for both a covered offense and a noncovered offense, then reducing the defendant's sentence for the noncovered offense is consistent with the text and purpose of Section 404 of the First Step Act. Section 404 authorizes a sentencing court to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act" had been in effect at the time of the covered offense. First Step Act § 404(b), 132 Stat. 5222. In sentencing-package cases, the court in essence imposes a single "sentence," *ibid.*, and revisiting the entire "sentence" may be appropriate to put the defendant in the position he would have occupied had the Fair Sentencing Act been in effect at the time of the covered offense.

2. The government embraced that view of Section 404 below, see Pet. 21, but contended that petitioner was nevertheless not entitled to relief because his prior sentences for noncovered powder-cocaine offenses were not imposed as part of "one global sentence," *United States* v. *Curtis*, 66 F.4th 690, 694 (7th Cir. 2023); see Gov't C.A. Br. 29-33. The lower courts, however, did not engage with the parties' arguments concerning the sentencing-package doctrine, and it therefore remains unresolved whether petitioner would prevail under an approach that

focuses on packaging. But determining whether such an approach should be adopted, and whether petitioner would prevail under it, will soon have no practical relevance to his particular case, because he is scheduled to be released from prison next month, thereby rendering his Section 404 motion moot.

Petitioner is scheduled for release from federal prison on his remaining 30-year sentences on November 8, 2023. See Federal Bureau of Prisons, *Find an inmate*, www.bop.gov/inmateloc/ (BOP No. 06339-003). After petitioner completes his term of imprisonment, he will be required to begin serving multiple concurrent five-year terms of supervised release. Judgment 3.[2] But he did not seek to have those supervised-release terms reduced under Section 404, instead assuring the district court that even if his sentences of imprisonment were reduced to time served he would still "be subject to five years of supervised release." D. Ct. Doc. 2459, at 20 (July 6, 2021). And petitioner has no concrete stake in reducing a term of imprisonment that he has already fully served. See, *e.g.*, *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 90-91 (2013) (explaining that "an 'actual controversy' must exist * * * through 'all stages' of [a] litigation" in order for the dispute to be fit for adjudication by an Article III court) (citation omitted); *United States* v. *Stevens*, 997 F.3d 1307, 1310 n.1 (11th Cir. 2021) ("A challenge to an imposed term of imprisonment is moot once that term has expired.") (citing

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[2] The district court imposed concurrent five-year terms of supervised release on 12 counts of conviction (including Counts 1 and 65, which involved only powder cocaine), to be served concurrently to four-, three-, and two-year terms of supervised release on the remaining counts. Judgment 3. All of those terms begin to run when petitioner is "released from imprisonment." 18 U.S.C. 3624(e).

United States v. *Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam)).

3. Because petitioner's Section 404 motion will soon be moot, his assertion (Pet. 16-18) that the courts of appeals are divided on the question presented provides no sound reason for this Court to review the lower courts' approach to that question in this case. In any event, although some tension exists in the case law, petitioner overstates the degree of disagreement and its practical significance. The government addressed the then-current state of circuit precedent in its brief in opposition in *Contrera* v. *United States*, see Br. in Opp. at 19-22, *Contrera*, *supra* (No. 21-8111) (*Contrera* Opp.), and petitioner offers no compelling additional reason why this Court's review is warranted.

Petitioner's contention (Pet. 16-17) that "[s]tatements by the Fourth and Eighth Circuits" indicate that their approach differs from the one taken below does not rely on decisions that involved multiple offenses, some covered and some not, but instead decisions involving a single conspiracy with multiple objects, including but not limited to the distribution of crack cocaine. See *United States* v. *Spencer*, 998 F.3d 843, 845 (8th Cir.) ("The issue is whether a 'covered offense' includes [the defendants'] multidrug conspiracy with the objects to distribute both crack and powder cocaine."), cert. denied, 141 S. Ct. 2715, and 142 S. Ct. 369 (2021); *United States* v. *Gravatt*, 953 F.3d 258, 262 (4th Cir. 2020) (addressing the same "narrow" question). Petitioner is wrong to suggest (Pet. 18 n.5) that such a multi-object conspiracy is no different than the circumstances here, where petitioner was convicted on one count of conspiring to distribute powder cocaine and a separate count of conspiring to distribute crack cocaine. A defendant generally

may be convicted of separate conspiracies only if they involved separate criminal agreements. See *Braverman* v. *United States*, 317 U.S. 49, 53-54 (1942) (explaining that a "single agreement to commit one or more substantive crimes" supports only a single conspiracy charge and a "single penalty"). And in any event, petitioner was also convicted on separate counts of possessing and attempting to possess powder cocaine with intent to distribute. See p. 8, *supra*.

As the brief in opposition in *Contrera* describes (*Contrera* Opp. 21-22), the Tenth Circuit stated in *United States* v. *Gladney*, 44 F.4th 1253 (2022), petition for cert. pending, No. 23-5556 (filed July 18, 2023), that Section 404 does not permit a district court to "reduc[e] the sentence on a non-covered offense, even if * * * the covered and non-covered offenses were grouped together under the Sentencing Guidelines and the covered offense effectively controlled the sentence for the non-covered offense," *id.* at 1262. When the government filed its brief in opposition in *Contrera*, the Tenth Circuit was considering whether to rehear *Gladney* en banc. See *Contrera* Opp. 21-22. The Tenth Circuit requested a response to the rehearing petition in *Gladney*, and the government informed the court of its position that Section 404 "allows courts to reduce sentences for non-covered offenses" in a "narrow subset of cases" involving intertwined sentence packages, but that *Gladney* itself was not such a case and did not otherwise warrant rehearing. Gov't Resp. to Pet. for Reh'g En Banc at 2, *Gladney*, *supra* (No. 21-1159). The Tenth Circuit subsequently declined to rehear *Gladney* en banc, but could consider reviewing the issue in an appropriate case—as could the court below, where petitioner did not seek en banc review.

At all events, whether and under what circumstances Section 404 permits a district court to reduce a defendant's sentence on both a covered offense and a noncovered offense is an issue of declining prospective importance. The issue can only possibly arise for the diminishing set of defendants who remain incarcerated for crack-cocaine offenses for which a sentence was imposed before August 3, 2010—the effective date of the Fair Sentencing Act—and for whom Section 404 proceedings have not yet concluded. See First Step Act § 404(b) and (c), 132 Stat. 5222. And within that set of defendants, the issue can only arise if the defendant was sentenced in the same proceeding on both a covered offense and a noncovered offense, and only if the sentence imposed for the noncovered offense has not yet been fully discharged when the Section 404 proceedings occur. Moreover, even if the court has authority under Section 404 to reduce the sentence for a noncovered offense in some circumstances, the court is never obligated to exercise it in any particular case; the sentence reductions authorized by Section 404 are expressly discretionary. See § 404(c), 132 Stat. 5222.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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