

No. 20-6841

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN JONES
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

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

REPLY BRIEF FOR THE PETITIONER

Patricia Kemp
Assistant Federal Defender
Southern District of Alabama
Federal Defenders Organization, Inc.
11 North Water Street, Suite 11290
Mobile, Alabama 36602
Tel: (251) 433-0910
Fax: (251) 433-0686
Email: Patricia_Kemp@fd.org
Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

The government now disagrees with the Eleventh Circuit’s interpretation of Section 404 of the First Step Act. *Terry v. United States*, No. 20-5904 (Gov’t Br. filed March 31, 2021). The question presented in *Terry* is “whether petitioner is eligible for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, because his prior conviction for possessing cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), is a “covered offense” as defined in Section 404(a).” Gov’t Br. at (I). In holding that the defendant was ineligible, the Eleventh Circuit relied on its published decision in Mr. Jones’s case. *United States v. Jones*, 828 Fed. Appx. 563, 564 (11th Cir. 2020) (unpublished). In light of its changed position in *Terry*, the government suggests that this Court should “grant [Mr. Jones’s] petition, vacate the judgment below, and remand for further consideration in light of the government’s position regarding the salience of previous judicial drug-quantity findings in Section 404 proceedings.” Gov’t Mem. at 3.

We agree. This Court should grant Mr. Jones’s petition, vacate the judgment below, and remand in light of the government’s position that the amount of drugs found by the jury or admitted by a defendant is controlling and that actual offense conduct does not bar a defendant from obtaining First Step Act review and relief. *See* Gov’t Br., *Terry v. United States*, 20-5904, at 16 n.* (U.S. Mar. 31, 2021); *see also* United States Department of Justice Letter, *United States v. White*, USCA Case No. 19-3059, Doc. No. 1864768 (D.C. Cir. Oct. 5, 2020) (“We do not agree with the

district court that relief was unavailable to appellants under Section 404(b) because of the actual quantity of crack cocaine involved in their offenses; as we explain, the position of the Department of Justice is that Section 404(b) contemplates determination of the statutory penalty range based on the quantity of crack cocaine reflected in the jury verdict or admitted by the defendant in a guilty plea.”) (internal citations omitted).

We have already asked this Court to grant, vacate, and remand in light of intervening Eleventh Circuit authority in *United States v. Taylor*, 982 F.3d 1295 (11th Cir. 2020). The relevant factual and procedural posture in *Taylor* is identical to *Jones*, but the outcomes are irreconcilably different. Since the decision in *Taylor* cannot be reconciled with the Eleventh Circuit’s decision below, it provides another reason upon which to grant Mr. Jones’ petition, vacate the judgment below, and remand to the Eleventh Circuit.

If this Court is unwilling to grant, vacate, and remand, it should grant this petition. At the time of Mr. Jones’s 1994 sentencing, his sentencing judge commented that Mr. Jones’s situation was “a tragedy” that the court was powerless to correct because it was “bound” by the drug laws created under the 100-to-1 crack/powder disparity. Doc. 429-2, p. 63. And there is still a remaining conflict among the Circuits over the interpretation of § 404(b) in pre-*Apprendi* cases like Mr. Jones’s case. *See United States v. Kirtman*, 836 F. App’x 700 (10th Cir. 2020) (affirming grant of reduction for pre-*Apprendi* defendant accountable for 1.5 kilograms of crack); *United States v. White*, 984 F.3d 76 (D.C. Cir. 2020) (vacating a lower court’s denial of First

Step Act motions for two defendants convicted and sentenced before *Apprendi* was decided and remanding for discretionary review under § 404(b)). The government does not dispute the existence of this conflict. Nor does it claim that this conflict is too unimportant to address. Indeed, the facts of this case highlight the importance of this conflict. Therefore, if the Court decides not to GVR Mr. Jones's case, he asks this Court to grant this petition to resolve this conflict and hear the case on its merits, as discussed in his petition for a writ of certiorari.

Finally, if this Court does not grant the petition, at a minimum, the Court should hold this petition pending the outcome of *Terry*. This Court's analysis in *Terry* will almost certainly necessitate a GVR of this case (regardless of the outcome for Mr. Terry) so that the Eleventh Circuit can reconsider its decision based on an updated understanding of Section 404 of the First Step Act, as informed by this Court's analysis in *Terry*.

CONCLUSION

This Court should grant the petition, vacate the judgment, and remand for further proceedings in light of the government's changed position and intervening, contrary precedent from the Eleventh Circuit. Otherwise, this Court should grant this petition to resolve an extremely important conflict over the interpretation of Section 404(b) of the First Step Act. At a minimum, this Court should hold this petition pending the outcome in *Terry*.

Respectfully Submitted,

/s/ Patricia Kemp

Patricia Kemp, Esq.
Southern District of Alabama
Federal Defenders Organization, Inc.
11 North Water Street, Suite 11290
Mobile, Alabama 36602
Tel: (251) 433-0910
Fax: (251) 433-0686
Email: Patricia_Kemp@fd.org
Counsel for Petitioner