No. 21-____

IN THE
Supreme Court of the United States

MICHAEL HARPER,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented here is the same as that presented in *Concepcion* v. *United States*, No. 20-1650, on which this Court recently granted certiorari:

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

PARTIES TO THE PROCEEDING

Michael Harper, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *United States* v. *Harper*, No. 20-13296 (11th Cir. May 11, 2021)
- *United States* v. *Harper*, No. 99-cr-00125-KMM (S.D. Fla. Aug. 3, 2020)

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Michael Harper respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is not reported but is available at 855 F. App'x 564. Pet. App. 1a-6a. The Southern District of Florida's order denying relief under the First Step Act is not reported but is available at 2019 WL 8348957. Pet. App. 14a-17a. That court's order denying reconsideration is not reported. Pet. App. 7a-13a.

JURISDICTION

The Eleventh Circuit entered judgment on May 11, 2021. Pursuant to this Court's order of March 19, 2020, the deadline to petition for a writ of certiorari was extended to 150 days from the date of the lower court judgment. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

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

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion

> made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

INTRODUCTION

This petition presents the same question as *Concepcion* v. *United States*, No. 20-1650, in which this Court recently granted certiorari. *See* 2021 WL 4464217 (U.S. Sept. 30, 2021) (mem.). Both petitions ask whether, when deciding whether to "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal developments. *See* Petition for Writ of Certiorari at I, *Concepcion* v. *United States*, No. 20-1650 (U.S. May 24, 2021) (hereinafter "*Concepcion* Petition"). This Court's answer in *Concepcion* will likely resolve the question in this case. This Court should thus hold this petition in abeyance pending the disposition in *Concepcion*.

The First Step Act authorizes courts to "impose a reduced sentence" on certain defendants "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). The courts of appeals are divided on the scope of that authority. Like the Eleventh Circuit did in the case applied by the decision below, the Fifth and Ninth Circuits read the "as if" language to mean that courts can consider *only* the effect of the Fair Sentencing Act on the defendant's sentence—not any other intervening legal developments. The Third, Fourth, and Tenth Circuits, on the other hand, say that courts *must* consider intervening

legal developments. And the First, Second, Sixth, Seventh, and Eighth Circuits split the difference; they allow—but do not require—courts to consider intervening legal developments.

This question is important, as evidenced by the decision below. The Eleventh Circuit applied its strained reading of the "as if" requirement to hold that the district court could not consider the effect this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), would have on Michael Harper's sentence. On June 6, 2000, Harper was sentenced to life imprisonment based on judge-found facts that increased the penalty for his crime beyond the statutory maximum sentence associated with the crime found beyond a reasonable doubt by the jury. This Court decided *Apprendi* three weeks later, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum"—such as drug quantity—"must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

In 2018, when Harper sought relief under the First Step Act, the district court relied on the judge-found drug quantity to leave Harper's life sentence in place. The Eleventh Circuit affirmed, citing prior circuit precedent holding that district courts are precluded from taking *Apprendi* into account when considering First Step Act motions. *See United States* v. *Jones*, 962 F.3d 1290, 1302, 1303-04 (11th Cir. 2020). In short, even though the drug quantity used at Harper's original sentencing was found only by a judge and only by a preponderance of the evidence, under the Eleventh Circuit's rule, the district court was "bound" by that pre-*Apprendi* (and now known to be

unconstitutional) finding when deciding whether to impose a reduced sentence in a proceeding taking place 20 years *after* this Court decided *Apprendi*.

Given the identity of issues between this case and *Concepcion*, this Court should hold this petition in abeyance pending disposition of that granted case.

STATEMENT

A. Original Sentencing

In March 2000, a jury found Michael Harper "guilty of one count of conspiracy to possess with intent to distribute cocaine powder and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846." Pet. App. 2a. The indictment alleged that the conspiracy involved more than 50 grams of cocaine base, more commonly known as crack cocaine. *Id.* at 8a. But the jury did not make any finding regarding the quantity of drugs attributable to Harper. *Id.* At the time, a crack-cocaine offense involving a detectable, but unspecified, amount of crack-cocaine carried a statutory maximum penalty of 20 years, while a crack-cocaine offense involving more than 50 grams carried a statutory penalty of 10 years to life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2000); *id.* § 841(b)(1)(C) (2000).

In Harper's presentence investigation report, a probation officer recommended life imprisonment. *See* Pet. App. 8a. The presentence investigation report concluded that Harper was responsible for at least 1.5 kilograms of crack cocaine. *Id.* It also discussed Harper's uncharged conduct as the getaway driver in a 1994 homicide. *Id.* This alleged involvement was based on the hearsay testimony of one witness, who was not present at the shooting, but who claimed that he had been told by the alleged gunman that Harper

drove the getaway car. *See United States* v. *Baker*, 432 F.3d 1189, 1212-13 (11th Cir. 2005). This testimony was the sole basis for the sentencing judge's finding, by a preponderance of the evidence, that Harper was responsible for the murder. *Id*. at 1252-53. That finding triggered Sections 2D1.1(d)(1) and 2A1.1 of the U.S. Sentencing Guidelines, which set Harper's base offense level to 43. U.S.S.G. § 2A1.1 (2000). And that led to a guidelines sentence of life imprisonment. *Id.*; *see also* Pet App. 8a.

The district court sentenced Harper to life imprisonment. Pet App. 8a-9a.

The Eleventh Circuit affirmed in relevant part. *See Baker*, 432 F.3d at 1252-55, 1259. The court did not reach Harper's argument that his sentence was invalid under *Apprendi*, since the jury had not found beyond a reasonable doubt that he was responsible for more than 50 grams of crack cocaine. Under the jury-found facts, the maximum statutory penalty was 20 years. The court nevertheless concluded that any *Apprendi* error with respect to the judge-found drug quantity was "harmless" because of the sentencing judge's separate finding that Harper was responsible for a murder. *Baker*, 432 F.3d at 1255. The court of appeals did not explain, however, how that separate finding could have resulted in a sentence of life imprisonment *without* the drug-quantity finding, which raised the statutory maximum penalty to life. *See United States* v. *Brown*, 42 F. App'x 601, 603-604 (4th Cir. 2002) (per curiam) (finding that defendant could not be sentenced to life imprisonment pursuant to U.S.S.G. § 2A1.1 because drug quantity was not "submitted to the jury" in accordance with *Apprendi* and

therefore defendant's maximum sentence was 20 years for each such relevant count).

B. The Fair Sentencing Act of 2010 And The First Step Act of 2018

The statutory scheme under which Harper was sentenced imposed penalties on crack-cocaine crimes that were "far more serious" than those imposed on the same offenses involving powder cocaine. *Dorsey* v. *United States*, 567 U.S. 260, 266 (2012). To trigger certain mandatory minimum statutory sentences, an offense would have to include *100 times* more powder cocaine than crack cocaine. *Id.* at 268. Over time, "the public had come to understand" this disparity "as reflecting unjustified race-based differences." *Id.*

Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, to address these concerns. In Section 2 of that Act, Congress reduced the disparate treatment between crack-cocaine and powder-cocaine offenses by significantly raising the amount of crack cocaine required to trigger each escalating statutory sentencing range. *Terry* v. *United States*, 141 S. Ct. 1858, 1861 (2021); *see also id.* at 1866 (Sotomayor, J., concurring in part and concurring in the judgment). Prior to the Fair Sentencing Act, only 50 grams of crack cocaine triggered a sentencing range of 10 years to life. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2006); *see also Terry*, 141 S. Ct. at 1863. After the Fair Sentencing Act, that range applied only to offenses involving more than 280 grams of crack cocaine. *See* Fair Sentencing Act § 2. Likewise, prior to the Fair Sentencing Act, 5 grams of crack cocaine triggered a sentencing range of 5 to 40 years. *See* 21 U.S.C. § 841(b)(1)(B)(iii) (2006); *see also Terry*, 141 S. Ct. at 1863. But after the Act, that range

applied only to offenses involving more than 28 grams of crack cocaine. *See* Fair Sentencing Act § 2. Both before and after the Fair Sentencing Act, a statutory maximum sentence of 20 years was set for defendants whose offenses involved a detectable, but unspecified, amount of crack cocaine. *See* 21 U.S.C. § 841(b)(1)(C) (2006); 21 U.S.C. § 841(b)(1)(C) (2012); *Terry*, 141 S. Ct. at 1863.

Had Harper been sentenced after the passage of the Fair Sentencing Act, he could not have been sentenced to life imprisonment. His statutory maximum sentence would have been 20 years, because the jury had never found that he was responsible for a specific drug quantity beyond a reasonable doubt. *See* 21 U.S.C. § 841(b)(1)(C); *Apprendi*, 530 U.S. at 490. But the Act was initially not made retroactive to those whose convictions were already final. *See Dorsey*, 567 U.S. at 280-281.

That changed in 2018, when Congress passed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Among other criminal-justice reforms, the Act made the relevant provisions of the Fair Sentencing Act retroactive. *See Terry*, 141 S. Ct. at 1861-62. Defendants whose "statutory penalties * * * were modified by section 2 or 3 of the Fair Sentencing Act" were considered to have a "covered offense" under the First Step Act. First Step Act § 404(a). Section 404(b) then gave such defendants a mechanism to receive a new sentence: "A 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." *Id.* § 404(b). The Act contained a few limitations: Defendants get only one

shot at relief, and cannot get relief if their sentence "was previously imposed or previously reduced in accordance with * * * the Fair Sentencing Act." *Id.* § 404(c).

C. Harper's First Step Act Motion And Appeal

1. In February 2018, Harper filed a *pro se* motion under Section 404 of the First Step Act. *See* Pet. App. 14a, 16a. He explained that his federal offense qualified as a "covered offense" under Section 404(a), and that, per Section 404(b), his statutory sentencing range would be lower had the Fair Sentencing Act been "in effect at the time" he committed his offense. This was Harper's first such motion, and his sentence had not previously been imposed or reduced under the Fair Sentencing Act. *See* First Step Act § 404(c).

The district court denied Harper's motion. *Id.* at 16a-17a. The way the district court saw it, Harper was ineligible for resentencing because "[e]ven if the First Step Act somehow acts to lower" Harper's "initial offense level for his conduct involving cocaine base," Section 2A1.1 of the Sentencing Guidelines "would nonetheless raise any reduced base level up to 43, resulting in the same guideline range that Defendant faced at sentencing." *Id.* at 16a.

2. Harper subsequently engaged counsel and moved for reconsideration. *See id.* at 9a. Through counsel, he explained that eligibility for relief under the First Step Act turns solely on the statute of conviction and that he was accordingly eligible for relief. *Id.*

After Harper filed his counseled motion for reconsideration, but before the district court ruled on that motion, the Eleventh Circuit issued its decision in *United States* v. *Jones*, 962 F.3d 1290 (11th Cir. 2020). *See* Pet. App. 7a-8a & n.1. There, the Eleventh Circuit

held that "a movant has a 'covered offense'" under Section 404(a) "if his offense triggered a statutory penalty that has since been modified by the Fair Sentencing Act." *Jones*, 962 F.3d at 1298. But "a movant's satisfaction of the 'covered offense' requirement does not necessarily mean that a district court can reduce his sentence." *Id.* at 1303. That is because "[a]ny reduction must be 'as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed.'" *Id.* (quoting First Step Act § 404(b)).

The *Jones* Court perceived "two limits" in "[t]his 'as-if' requirement." *Id.* First, a court cannot reduce "a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Id.* "Second, in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Id.* As the court's application to the four defendants involved in that case illustrated, that rule in practice meant that district courts *could not* take *Apprendi* into account in Section 404 proceedings—they were instead required to use judge-found drug quantities. *Id.* at 1303-04; *see also United States* v. *Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021) ("Under *Jones*, if a movant was sentenced before the Supreme Court's decision in *Apprendi*, the court generally can look to a drug-quantity finding made by the sentencing judge because that determination was used to set the movant's statutory penalty range.").

After Harper and the government submitted supplemental briefing on *Jones*, the district court denied the

motion for reconsideration. *See* Pet. App. 12a. Applying *Jones*, the court first found that Harper "was convicted and sentenced of a covered offense." *Id.* at 11a. But under *Jones*, the court explained, it was "bound by its prior finding as to [the] drug quantity attributable to" Harper in the presentencing report: 1.5 kilograms. *Id.* "As such, if the Fair Sentencing Act were in effect at the time that [Harper] was sentenced, [Harper] would be subject to the same guidelines, ten years to a term of life imprisonment." *Id.* at 11a-12a. And because Harper "would be subject to a maximum sentence of life imprisonment, the life sentence provided in [U.S.S.G.] § 2A1.1 is applicable." *Id.* at 12a. The court finally concluded that "[e]ven if the life sentence provided in § 2A.1.1 is not mandatory, * * * a downward departure would be inappropriate." *Id.*

3. Harper appealed, raising, among other issues, that *Jones* was erroneously decided. Harper explained that *Jones*'s requirement that courts use judge-found drug quantities is inconsistent with the Sixth Amendment, which requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Harper further explained that this aspect of *Jones* runs counter to the text and purpose of the First Step Act. And he finally pointed out that it breaks with every other circuit to have considered the question.

The Eleventh Circuit affirmed. *See* Pet. App. 2a-6a. As relevant here, the court held that it was bound by *Jones* and could not revisit its holdings. *Id.* at 5a-6a n.2.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION PRESENTS THE SAME QUESTION AS *CONCEPCION* V. *UNITED STATES* AND SHOULD BE HELD PENDING RESOLUTION OF THAT CASE.

To ensure similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases pending before it and, once the related case is decided, resolves the held petitions in a consistent manner. *See, e.g., Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam) (noting that the Court has "[granted, vacated, and remanded ('GVR'd')] in light of a wide range of developments, including [its] own decisions"); *id*. at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." (emphasis omitted)).

This petition presents the same question as *Concepcion* v. *United States*, No. 20-1650, on which this Court recently granted certiorari. 2021 WL 4464217. The same cases that form the basis for the split discussed in *Concepcion* form the basis for the split discussed in this petition. *See Concepcion* Petition at 15-18; *infra* Part II.

The outcome of this case is governed by the outcome of *Concepcion*. If this Court rules that courts must or may take into account intervening legal developments when imposing a reduced sentence under Section 404, then the district court in this case erred in failing to

consider *Apprendi* in Harper's First Step Act proceeding. The Eleventh Circuit is the only circuit on its side of the split that has held that district courts cannot consider *Apprendi* under Section 404. No matter this Court's decision in *Concepcion*, that court will need to reconsider its rule.

Given the identity of issues in this case and *Concepcion*, this petition should be held pending resolution of *Concepcion* and then disposed of accordingly. *See, e.g.*, *Bettcher* v. *United States*, No. 19-5652, 2021 WL 2519034 (June 21, 2021) (mem.) (GVR'ing for further consideration in light of *Borden* v. *United States*, 141 S. Ct. 1817 (2021)); *Vickers* v. *United States*, No. 20-7280, 2021 WL 2519058 (June 21, 2021) (mem.) (same); *Diaz-Morales* v. *United States*, 136 S. Ct. 2540 (2016) (mem.) (GVR'ing for further consideration in light of *Mathis* v. *United States*, 136 S. Ct. 2243 (2016)); *Smith* v. *United States*, 134 S. Ct. 258 (2013) (mem.) (GVR'ing for further consideration in light of *Descamps* v. *United States*, 133 S. Ct. 2276 (2013)); *Deane* v. *United States*, 568 U.S. 1022 (2012) (GVR'ing for further consideration in light of *Dorsey*, 567 U.S. 260); *Robinson* v. *United States*, 567 U.S. 948 (2012) (same).

II. THE DECISION BELOW IMPLICATES THE SAME DEEP CIRCUIT SPLIT PRESENTED IN *CONCEPCION* V. *UNITED STATES*.

The decision below implicates a sharp circuit split over whether courts must or may take intervening legal developments into account when imposing a reduced sentence under the First Step Act. This is the same split this Court granted review in *Concepcion* to resolve. This Court should accordingly hold this petition in abeyance pending its resolution of *Concepcion*.

1. The petitioners in *Concepcion* drew this Court's attention to the deep division over whether courts must or may take intervening legal developments into account when resentencing under the First Step Act. *See Concepcion* Petition at 13-19. The root of the confusion is Section 404(b)'s language that "[a] 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."

On one side of the split, the Eleventh, Fifth, and Ninth Circuits hold that this language forbids district courts from considering intervening legal developments when resentencing defendants under the First Step Act. *United States* v. *Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) ("[T]he district court * * * is permitted to reduce a defendant's sentence only * * * 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense * * * ."); *United States* v. *Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) (holding that a district court must "decide[ ] on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act"); *United States* v. *Kelley*, 962 F.3d 470, 475 (9th Cir. 2020) (holding that district courts must "consider the state of the law at the time the defendant committed the offense, and change only one variable: the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape"); *see also Concepcion* Petition at 17-18.

Taking the opposite position are the Third, Fourth, and Tenth Circuits, all of which require district courts to consider intervening law when imposing a reduced sentence under the First Step Act. *See United States*

v. *Easter*, 975 F.3d 318, 325-326 (3d Cir. 2020) ("[T]he necessary [§ 404] review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing * * * ."); *United States* v. *Chambers*, 956 F.3d 667, 672 (4th Cir. 2020) (holding that courts must recalculate the Guidelines sentencing range in light of "intervening case law"); *United States* v. *Brown*, 974 F.3d 1137, 1144-46 (10th Cir. 2020) (similar); *see also Concepcion* Petition at 13-15.

And the First, Second, Sixth, Seventh, and Eighth Circuits have charted a middle course: There, district courts may—but need not—consider intervening legal developments. *See United States* v. *Concepcion*, 991 F.3d 279, 289-290 (1st Cir. 2021) ("[A] district 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 under the First Step Act." (emphasis added)); *United States* v. *Moore*, 975 F.3d 84, 90-91, 92 n.36 (2d Cir. 2020) (holding that while "the First Step Act does not *obligate* a district court to consider post-sentencing developments," neither does it forbid such consideration (emphasis added)); *United States* v. *Maxwell*, 991 F.3d 685, 691 (6th Cir. 2021) (holding that courts can "consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much"), *petition for cert. filed*, No. 20-1653 (U.S. May 24, 2021); *United States* v. *Fowowe*, 1 F.4th 522, 524 (7th Cir. 2021) (extending *United States* v. *Shaw*, 957 F.3d 734 (7th Cir. 2020), to hold that "[Section] 404(b) authorizes but does not require district courts to apply an intervening judicial decision in evaluating First Step Act motions"); *United States* v. *Harris*, 960 F.3d

1103, 1106 (8th Cir. 2020) ("First Step Act sentencing *may* include consideration of the defendant's advisory range under the current guidelines." (emphasis added)); *see also Concepcion* Petition at 15-17. This Court recently granted certiorari to resolve this confusion.

2. This petition implicates one facet of this split: whether courts may or must take account of *Apprendi* when resentencing defendants who were originally sentenced before *Apprendi*.

The Eleventh Circuit holds that "in ruling on a defendant's First Step Act motion, the district court * * * is not free to * * * reduce the defendant's sentence on the covered offense based on changes in the law beyond those mandated by sections 2 and 3." *Denson*, 963 F.3d at 1089. That restriction is rooted in the Eleventh Circuit's conclusion that Section 404(b) "only" permits courts to reduce sentences " 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when [the defendant] committed the covered offense." *Id.* This is the same language the *Jones* Court interpreted to mean that district courts *are forbidden from* taking into account *Apprendi* when considering whether to reduce the sentence of a defendant who was originally sentenced before *Apprendi*. *See Jones*, 962 F.3d at 1303-04. Harper explained on appeal that a district court cannot ignore *Apprendi* when considering a motion under Section 404(b). The Eleventh Circuit nevertheless held that it could "not reconsider" *Jones*, Pet. App. 5a-6a n.2, affirming that the district court could not take *Apprendi* into account and was instead "bound" by its pre-*Apprendi* judge-found drug quantity, *Jones*, 962 F.3d at 1303.

Other courts have applied the cases implicated in the *Concepcion* split to come out the opposite way on whether judge-found drug quantities are binding at resentencing.

In *Maxwell* (discussed in *Concepcion* Petition at 16), the Sixth Circuit explained that its rule that district courts can "consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much" included the discretion to consider " 'the impact that *Apprendi* would have had on [the defendant's] statutory sentencing range.' " 991 F.3d at 691 (quoting *United States* v. *Ware*, 964 F.3d 482, 488 (6th Cir. 2020)).

In *United States* v. *Mason*, 855 F. App'x 298, 299 (7th Cir. 2021), the Seventh Circuit similarly applied *Fowowe*—which extended *Shaw* (discussed in *Conception* Petition at 16) to hold that "[Section] 404(b) authorizes but does not require district courts to apply an intervening judicial decision in evaluating First Step Act motions," 1 F.4th at 524—to the *Apprendi* context. The defendant in *Mason* had been convicted in 1998 of several drug offenses and sentenced to 360 months. 855 F. App'x at 299. He later moved for First Step Act relief, but the district court "declined to disturb the overall prison term," observing that the defendant "still would face a within-guidelines sentence even if he were sentenced today under the updated penalties that would apply to him." *Id.* On appeal, Mason argued that "the judge ran afoul of *Apprendi* by calculating the updated statutory penalties based on drug quantities that were not found by the jury." *Id.* The Seventh Circuit rejected that argument, explaining that *Fowowe* permits—but does not

require—courts "to apply intervening judicial decisions." *Id.* (quoting *Fowowe*, 1 F.4th at 531-532).

In *United States* v. *White*, (discussed in *Concepcion* Petition at 15), the D.C. Circuit held that "defendant-specific drug quantities" cannot be used to "deem relief categorically unavailable" under Section 404(b) of the First Step Act. 984 F.3d 76, 88 (D.C. Cir. 2020). The district court had held that "relief was not 'available' to [the defendants] under Section 404(b)" because "the Fair Sentencing Act would have had no effect on" their sentences, which were "based on [pre-*Apprendi*] judge-found quantities of crack cocaine." *Id.* at 84. That was wrong, the D.C. Circuit held. *Id.* at 86. The court explained that this sort of "availability test * * * * has no basis in the text of section 404(b)," and rejected the idea that a court even *could*—as a practical matter—"determine, using judge- or jury-found drug quantities, what effect the Fair Sentencing Act 'would have had' on a defendant's sentence." *Id.* at 86-87. Thus, while judge-found drug quantities could be used "as part of [a court's] exercise of discretion," a district court cannot "deem relief categorically unavailable due to defendant-specific drug quantities." *Id.* at 88 (citing *Ware*, 964 F.3d at 488-489).

The same is true in the Eighth Circuit. In *United States* v. *Robinson*, the court considered the case of a defendant who had been sentenced to life imprisonment based on a pre-*Apprendi* judge-found drug quantity. 9 F.4th 954, 956 (8th Cir. 2021) (per curiam). The district court concluded "that it could not reduce [the defendant]'s sentence" under Section 404(b) because the judge-found drug quantity would have triggered "the same mandatory life sentence had the Fair

Sentencing Act been in effect at the time he committed the covered offense." *Id.* at 958. The Eighth Circuit rejected this approach, explaining that it is "contrary to the principle that '[t]he First Step Act applies to offenses, not conduct.'" *Id.* (citation omitted). The court thus held that a defendant's "offense of conviction—not the underlying drug quantity—determines his applicable statutory sentencing range." *Id.* at 959. A district court can, however, take that underlying quantity "into account when deciding whether to exercise its discretion." *Id.* Both the majority opinion and the dissenting opinion recognized that this approach diverged from the Eleventh Circuit's. *See id.* at 959; *id.* at 960 (Grasz, J., dissenting).

* * *

This petition thus presents one facet embedded within the question presented in *Concepcion*. Indeed, even if some courts had not already faced the general *Concepcion* question in the specific context of *Apprendi*, Harper's case would be covered by the question presented in *Concepcion*. The district court determined that Harper's guidelines sentencing range was the statutory maximum—life imprisonment. But had Harper been sentenced in the Third, Fourth, or Tenth Circuits, the district court would have had to apply *Apprendi*—plainly an intervening legal development—when determining his Fair Sentencing Act sentence. And that would have resulted in a maximum statutory sentence of 20 years—a sentence Harper has already served—because the jury never found a specific drug quantity beyond a reasonable doubt. *See* 21 U.S.C. § 841(b)(1)(C). Or had he been sentenced in the First, Second, Sixth, Seventh, or Eighth Circuits, the district court would have at least had the

option to take into account that lower statutory maximum. But because he was sentenced in the Eleventh Circuit, the district court was required to use the same judge-found drug quantity it had used two decades before. And so his sentence remained unchanged.

Given that this petition presents the same question presented on the same split as *Concepcion*, this Court should hold this case pending the disposition in *Concepcion*.

III. THE DECISION BELOW IS WRONG.

This Court should also grant certiorari or at least hold this petition pending disposition in *Concepcion* because the Eleventh Circuit's decision is wrong.

1. Section 404(b) of the First Step Act permits courts to "*impose* a reduced sentence." (emphasis added). "Not 'modify' or 'reduce,' which might suggest a mechanical application of the Fair Sentencing Act, but 'impose.' " *Chambers*, 956 F.3d at 672. And the way Congress uses the word "impose" in other federal sentencing statutes makes two things clear. First, the word is used to broadly authorize courts to consider anything relevant to sentencing. *See, e.g.*, 18 U.S.C. § 3553(a) ("[I]n determining the particular sentence to be imposed," district courts "shall consider" a host of factors); *id.* § 3582(a) (requiring courts to consider § 3553(a) factors when a district court "determin[es] whether to impose a term of imprisonment, and, if a term of imprisonment is imposed, in determining the length of the term"); *id.* § 3661 (prohibiting any "limitation" on what a court may "consider for the purpose of imposing an appropriate sentence"). And second, the word is used when directing courts to *sentence* a defendant in the first instance. *See id.* § 3553(a). This

usage aligns with the dictionary definition of "impose." *See, e.g.*, *Impose*, Merriam-Webster Dictionary (online ed. 2021) ("to establish or apply by authority," for example, to "*impose* penalties").

When a court imposes a reduced sentence under Section 404, it should therefore follow the bedrock sentencing principle of applying the law as it stands at the time of sentencing. *See Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972) (explaining that the Court presumes that Congress "uses a particular word with a consistent meaning in a given context"). That means determining a defendant's Fair Sentencing Act sentence in light of intervening constitutional law—like *Apprendi*'s rule that only jury-found facts can increase the maximum penalty applicable to a crime. Imposing a sentence also necessitates "*correctly* calculating the applicable Guidelines range," which this Court in *Gall* v. *United States* highlighted as the way district courts "should begin *all* sentencing proceedings." 552 U.S. 38, 49 (2007) (emphases added). A First Step Act resentencing thus must "include[] an accurate calculation of the amended guidelines range at the time of resentencing." *Easter*, 975 F.3d at 325-326; *see also Brown*, 974 F.3d at 1145 ("A correct Guideline range calculation is paramount, and the district court can use all the resources available to it to make that calculation."); *Chambers*, 956 F.3d at 673-674 (rejecting argument that "a court must perpetuate a Guidelines error that was an error even at the time of initial sentencing"). And an accurate guidelines range must account for all intervening legal developments at the time of resentencing—such as *Apprendi*, which in this case would have lowered Harper's statutory maximum sentence and thereby his guidelines range.

Applying intervening legal developments bearing on a defendant's sentence also respects the separation of powers. As even the *Jones* Court recognized, the First Step Act was part of an effort to undo "the disparity between the penalties for crack- and powder-cocaine offenses." 962 F.3d at 1296–97. Indeed, it "represents a rare instance in which Congress has recognized the need to temper the harshness of a federal sentencing framework that is increasingly understood to be much in need of tempering." *Concepcion*, 991 F.3d at 313 (Barron, J., dissenting). But Congress did not afford carte blanche relief; it instead granted certain federal prisoners a vehicle to go to court and request relief. *See, e.g.*, *United States* v. *Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019) (explaining that "[t]he First Step Act provides a vehicle for defendants sentenced under a starkly disparate regime to seek relief"). And in so doing, it explicitly recognized that district courts have *discretion* to grant relief. *See* First Step Act § 404(c). This recognition accords with "the remedial discretion that" courts "are accustomed to exercising when revisiting a sentence that may have been too harsh when first imposed." *Concepcion*, 991 F.3d at 313 (Barron, J., dissenting). Given this context and statutory purpose, the First Step Act should not be construed "in a way that would attribute to Congress an intent to constrain district courts from exercising" their traditional remedial discretion. *Id.* But tying judges' hands to old constitutional law effectively does just that.

2. The Eleventh Circuit's approach cannot be reconciled with the text and purpose of the First Step Act. That court based its rule on Section 404(b)'s requirement that courts should 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." *Jones*, 962 F.3d at 1303 (emphasis added) (quoting First Step Act § 404(b)). In the Eleventh Circuit's view, a court that took account of *Apprendi* in a Section 404 proceeding would not be imposing a reduced sentence "as if" the Fair Sentencing Act "were in effect at the time the covered offense was committed." There are three issues with that.

First, the "as if" language tells courts to act as if the Fair Sentencing Act had been in effect "at the time the *covered offense was committed*." First Step Act § 404(b) (emphasis added). It says nothing about what courts should do with facts that existed "at the time of sentencing." *Jones*, 962 F.3d at 1303; *see Concepcion*, 991 F.3d at 302 n.9 (Barron, J., dissenting) ("[T]he only time frame referenced in the 'as if' clause is the time of the commission of the offense."). Congress's silence on that makes sense. As multiple courts have explained, it is impossible "to speculate as to how a charge, plea, and sentencing would have looked had the Fair Sentencing Act been in effect" given the vagaries of plea negotiations, the discretion of prosecutors and courts, and the limits of evidence. *White*, 984 F.3d at 87 (quoting *United States* v. *Jackson*, 964 F.3d 197, 205 (3d Cir. 2020)); *see also United States* v. *Davis*, 961 F.3d 181, 192 (2d Cir. 2020); *United States* v. *Broadway*, 1 F.4th 1206, 1211-12 (10th Cir. 2021). As the Tenth Circuit put it, "[c]ourts are not time machines which can alter the past and see how a case would have played out had the Fair Sentencing Act been in effect" at the time of sentencing. *Broadway*, 1 F.4th at 1212. So while a Section 404 proceeding "is inherently backward looking," it is doubtful that Congress imposed on courts the "futile role" of speculating that facts that existed at a pre-Fair Sentencing Act sentencing would *necessarily*

have existed at a post-Fair Sentencing Act sentencing. *Id.* And if Congress *had* wanted courts to endeavor so, it would have stated it plainly.

Second, the Eleventh Circuit's interpretation simultaneously erases the word "impose" from the text—requiring courts to follow normal sentencing procedures—and adds the word "only"—forcing courts to consider *only* sections 2 and 3 of the Fair Sentencing Act. But the Act does not say that "only" those changes can be considered. Instead, the "as if" clause merely clarifies what drug-quantity thresholds and sentencing rules the district court should apply in conducting the new sentencing. "In effect, it makes" sections 2 and 3 of the Fair Sentencing Act "retroactive." *Chambers*, 956 F.3d at 672.

Finally, Congress's stated purpose in enacting Section 404 of the First Step Act was to remedy the injustice of defendants whose offenses occurred after August 3, 2010, facing significantly less-harsh penalties than those defendants whose offenses occurred before August 3, 2010. *See, e.g.*, *United States* v. *Collington*, 995 F.3d 347, 354 (4th Cir. 2021) ("Congress intended section 404 of the First Step Act to give retroactive effect to the Fair Sentencing Act's reforms and correct the effects of an unjust sentencing regime."). But the *Jones* Court's specific version of its no-intervening-case-law rule effectively erects a new date-based dividing line—June 26, 2000, when this Court decided *Apprendi*. It is absurd to think Congress limited the reach of a remedial statute removing an arbitrary date-based right to relief with another arbitrary date-based right to relief. Not in the subsection of the statute entitled "Limitations." Nor in the section defining the defendants who are eligible for relief. But by

implication in a sentence that gives courts the authority to impose reduced sentences on defendants previously subject to the harsh, pre-Fair Sentencing Act statutory regime.

IV. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is obviously important, as this Court has already confirmed by granting certiorari on a case presenting the same question.

Like in *Concepcion*, the question presented here affects federal prisoners across the country who are eligible for resentencing under the First Step Act. And requiring courts to consider intervening legal developments will have an immense impact on the reductions granted under the First Step Act. Harper's case is a prime example: He remains sentenced to life imprisonment despite the fact that, had intervening law been taken into account, the statutory maximum sentence he would face is 20 years (which he has already served). The importance cannot be understated. Decades of imprisonment are at stake depending on whether intervening law applies at First Step Act proceedings.

This element of the *Concepcion* question is particularly important given the constitutional implications of the Eleventh Circuit's rule. The practical effect of the Eleventh Circuit's two-tiered approach to the First Step Act is to limit, if not preclude, relief for defendants sentenced in violation of the Sixth Amendment before *Apprendi* was decided on June 26, 2000, but to leave the door open for the same category of defendants after that date. Compare Harper's case with *United States* v. *Bryan*, 844 F. App'x 231 (11th Cir. 2021) (per curiam). Because Harper was sentenced

before *Apprendi* was decided, the courts used the quantity he was held responsible for at sentencing—1.5 kilograms—to conclude that he was subject to the *same* maximum statutory sentence even after the Fair Sentencing Act: life. And because the sentencing guidelines recommend the statutory maximum sentence, Harper's guidelines sentence remained life.

The story is different in *Bryan*. Bryan, like Harper, was convicted of a crack-cocaine offense involving more than 50 grams. 844 F. App'x at 232. But because Bryan was sentenced *after Apprendi*, when the Eleventh Circuit considered his First Step Act motion, the court looked to the drug quantity involved in his conviction to determine his statutory sentencing range under the Fair Sentencing Act. *Id.* at 233. And that quantity allowed the court to conclude that "[t]he statutory maximum penalty" for his offense "was changed by the Fair Sentencing Act from life imprisonment to 40 years imprisonment." *Id.* That statutory maximum, in turn, lowered Bryan's guidelines sentencing range. *Id.*

The key difference between this case and *Bryan* is a date: June 26, 2000. Because Harper was sentenced three weeks before that date, his sentence remains unchanged. But had he been sentenced after this date, he—like Bryan—could have received a lower sentence. "The random injustice of this result is clear." *United States* v. *Jackson*, 995 F.3d 1308, 1316 (11th Cir. 2021) (Martin, J., dissenting from the denial of rehearing en banc).

And Harper is not alone. *See, e.g.*, *United States* v. *Perez*, 859 F. App'x 356 (11th Cir. 2021) (per curiam); *United States* v. *Ford*, 858 F. App'x 325 (11th Cir. 2021) (per curiam); *United States* v. *Ford*, 855 F. App'x

542 (11th Cir. 2021) (per curiam); *United States* v. *Ingram*, 831 F. App'x 454 (11th Cir. 2020) (per curiam); *United States* v. *Malone*, No. CR 98-0183-WS, 2020 WL 4721244 (S.D. Ala. Aug. 13, 2020), *appeal dismissed*, No. 20-13195-BB, 2021 WL 3902436 (11th Cir. Aug. 18, 2021); *United States* v. *Saldana*, No. 95-CR-00605-SEITZ, 2020 WL 7062495, at *4 (S.D. Fla. Nov. 25, 2020), *appeal filed*, No. 21-10634 (11th Cir. Feb. 26, 2021); *United States* v. *Williams*, No. CR 493-082-12, 2020 WL 6325709 (S.D. Ga. Oct. 28, 2020), *appeal dismissed*, No. 20-14277 (11th Cir. Aug. 10, 2021). All of these cases include defendants whose right to relief under Section 404 was foreclosed because the district court could not consider the effect *Apprendi* would have on their sentencing range.

CONCLUSION

This Court should hold this petition in abeyance pending the disposition of *Concepcion*.

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