No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GUERLY ALEXIS,
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 WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant whose offense preceded the enactment of the Fair Sentencing Act of 2010, and who was sentenced after its enactment, but not necessarily pursuant to its revised punishments, is now entitled to relief under the First Step Act of 2018.

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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Petitioner Guerly Alexis respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit Court of Appeals' panel opinion in *United States v. Alexis,* 844 F. App'x 227 (11th Cir. Feb. 12, 2021), is reproduced here as Appendix A-1.

JURISDICTION

The judgment of the Eleventh Circuit was entered on February 12, 2021. For cases decided before July 19, 2021, this Court automatically extending the time to file a petition for certiorari to 150 days from the date of the lower court's judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

STATUTORY PROVISIONS INVOLVED

The First Step Act, Pub. L. 115-391, 132 Stat. 5194 (2018), states in relevant part:

> (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.

The Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010), states in relevant part:

> SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.
>
> (a) CSA.--Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
>
> (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and
>
> (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence ..."

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

Section 404 of the First Step Act has only three subsections. The first makes it broadly applicable to any defendant who was convicted of an offense: (1) the statutory penalties for which "were modified by section 2 or 3 of the Fair Sentencing Act of 2010,"[1] (2) that was "committed before August 3, 2010" (the date the FSA took effect). First Step Act of 2018 (Pub. L. No. 115-391, § 404(a)).[2] Subsection 404(b) provides a vehicle for relief, stating a court "**may**, on motion of the defendant ... 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." *Id.* at § 404(b) (emphasis added).

The third subsection, § 404(c) provides two narrow limitations on a court's authority to entertain a Section 404 motion and grants district courts with discretion to deny relief to those who are eligible. First, a court cannot entertain a Section 404 motion when it "previously imposed or previously reduced [a sentence] **in accordance with** the amendments made by sections 2 and 3 of the [2010 FSA]." *Id.* at § 404(c) (emphasis added). Second, a court cannot entertain a successive Section 404 motion if it has already denied a previous motion on the merits. *Id.* Furthermore, a court retains discretion to deny relief even if an individual is eligible for relief. *Id.*

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[1] From here on referred to as the "FSA."

[2] On August 3, 2010, Congress passed the FSA, which reduced the statutory and guideline penalties for crack. Fair Sentencing Act of 2010 (Pub. L. No. 111-220; 124). Under this new law, the statutory crack penalties were reduced as follows: under 28 grams of crack = 0-20 years with § 851 penalty 0-30 years; 28-280 grams of crack = 5-40 years with § 851 penalty 10 years-life; above 280 grams of crack = 10 years-life, with § 851 penalty 20 years-life.

The limitations in Section 404(c) are narrowly tailored to prevent successive attempts at relief. More specifically, the "in accordance with" limitation was necessary because both Section 404(a) and (b) define eligibility based on whether the defendant's offense occurred before August 3, 2010, the date the FSA took effect, but a small subset of people whose offenses occurred prior to August 3, 2010, already have been sentenced pursuant to the FSA. That is because this Court ruled in *Dorsey v. United States*, 567 U.S. 260 (2012), that the FSA applied to all individuals sentenced after its enactment. Therefore, individuals whose offenses occurred prior to August 3, 2010, but who were sentenced after that date **may** have been sentenced pursuant to the FSA already, and do not get another bite at the proverbial apple.

The word "may" is used, because some were not. Prior to *Dorsey,* the courts were divided on whether individuals whose offenses occurred pre-FSA, but who were sentenced post-FSA, could benefit from the change in statutory penalties. In *United States v. Gomes,* 621 F.3d 1343 (11the Cir. 2010), the Eleventh Circuit held that the FSA was not applicable to defendants whose crimes were committed prior to the FSA, but who were sentenced after it. *Id.* at 1346. However, *Gomes* was later abrogated by *Dorsey. See United States v. Joseph,* 842 F. App'x 471, 474 (11th Cir. 2021) (recognizing abrogation of *Gomes*).

Similarly, individuals whose offenses occurred prior to the enactment of the FSA and who were sentenced prior to *Dorsey* under pre-FSA penalties, but whose cases were on appeal at the time *Dorsey* was decided, may have had their cases remanded and seen their sentences "previously reduced in accordance with" *Dorsey*

and the FSA. *See, e.g., United States v. Hudson,* 426 F. App'x 748, 749–50 (11th Cir.), *reh'g en banc granted, opinion vacated,* 659 F.3d 1056 (11th Cir. 2011), and *on reh'g en banc,* 685 F.3d 1260 (11th Cir. 2012). They too, already received the relief Section 404 was intended to provide. The phrase "in accordance with," thus, has a temporal component: It reflects that some individuals whose offenses occurred prior to the FSA have nonetheless been sentenced pursuant to it because of *Dorsey*. Those individuals are ineligible for further relief under the First Step Act.

B. Procedural Background

Petitioner Guerly Alexis pled guilty to one count of conspiracy to possess with intent to distribute more than 5 kilograms of cocaine powder and more than 50 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)-(iii), and 846. Mr. Alexis was sentenced on August 24, 2010, just weeks after the enactment of the FSA. Mr. Alexis' sentencing transcript includes only a passing reference to the FSA, which suggested that neither the parties, nor the court, thought the FSA was applicable. In 2019, Mr. Alexis filed a motion for a sentence reduction in light of the First Step Act of 2018. The district court denied Mr. Alexis' motion, finding his offense was not a "covered offense" as contemplated by the First Step Act because it involved both powder and crack cocaine.

Mr. Alexis appealed, and a panel of the Eleventh Circuit affirmed the denial of his motion. *United States v. Alexis,* 844 F. App'x 227 (11th Cir. 2021). The panel rejected the district court's rationale, but affirmed the result. According to the panel, Mr. Alexis' offense was in fact a "covered offense" which would entitle him to

consideration for a sentence reduction under the First Step Act. *Id.* at *2. The panel determined, however, that because Mr. Alexis was sentenced 21 days after the enactment of the FSA, he was ineligible for consideration under section 404(c) of the Act. Without reference to the sentencing transcript, or his potential sentence with or without the FSA, the court concluded, "nothing indicates that [Mr. Alexis'] sentence was somehow not imposed 'in accordance with' the [FSA]." *Id.* Therefore, the panel decided, the directive in § 404(c) meant Mr. Alexis was ineligible, going so far as to state "[t]he district court lacked authority to provide what the statute barred: a sentence reduction for him." *Id.* Mr. Alexis subsequently filed a Petition for Rehearing, which was also denied.

REASONS FOR GRANTING THE WRIT

I. DIFFERENT COURTS ARE APPLYING THE LAW DIFFERENTLY, DENYING SIMILARLY SITUATED DEFENDANT'S THE SAME TREATMENT.

The Eleventh Circuit is the only court in the country using the date of a defendants' sentencing, with no other supporting facts, to preclude defendants from obtaining a reduced sentence under the FSA through the First Step Act. Furthermore, the Eleventh Circuit isn't even applying its own standard consistently. Every other court, district or circuit, presented with this issue has relied on a detailed recitation of the facts. These courts determine, as instructed to by the First Step Act itself, whether a defendant has already received the benefit of a lower sentence under the FSA. If they have, then they are ineligible. If they have not, they are eligible to be considered for a reduction. This determination goes beyond just the original sentencing date of the defendant.

The Court should grant certiorari to resolve the issue, and ensure the Eleventh Circuit no longer arbitrarily denies eligible defendants relief.

a. The Eleventh Circuit is ruling inconsistently on whether defendants are eligible for relief under the First Step Act.

As previously explained, Petitioner Alexis was denied relief by the Eleventh Circuit because he was sentenced three weeks after the FSA was enacted. This was done without any consideration for the facts or the applicable caselaw at the time Mr. Alexis was sentenced. Instead, the court merely identified the date of his sentencing and declared him ineligible for relief.

This is problematic, however, because in an earlier case a different panel applied a different standard, granting a similarly situated defendant a shot at a sentence reduction. In *United States v. Joseph,* the defendant also challenged the lower court's denial of his motion for relief under the First Step Act. 842 F. App'x 471 (11th Cir. 2021). Joseph's offenses, like Mr. Alexis', were committed before the enactment of the FSA. *Id.* at *1. However, also like Mr. Alexis, he was not sentenced until after the FSA. *Id.* When the defendant later sought relief under the First Step Act, the district court determined he was ineligible, because his original sentence was "imposed in accordance with the [FSA]." *Id.* at *2.

On appeal, a panel reviewed the history of the FSA, along with *Gomes* and *Dorsey*. *Id.* at *2-4. It concluded that "at the time [the defendant] was sentenced, we had decided *Gomes,* that the [FSA]'s quantity thresholds applied only to defendants who committed their crimes after the [FSA] ... [a]s a result, at the time of [the defendant's] sentencing, the district court and the parties would have understood the

[FSA] did not apply ...." *Id.* The panel concluded the date of a defendant's sentencing alone was not determinative of a district court's authority to reduce a defendant's sentence under the First Step Act. The case was remanded for the district court to determine if it should exercise its discretion to reduce Joseph's sentence. *Id.*

Less than a month later, another panel of the Eleventh Circuit arrived at the opposite conclusion, denying Mr. Alexis relief. However just like in *Joseph,* in Mr. Alexis' case there was no record to support the conclusion that the FSA had been applied. *See Joseph,* 842 F. App'x at 476. Not only was this in conflict within the circuit, but it also conflicts with how all other circuit and district courts are applying the First Step Act.

b. Eligibility in all other courts across the country is indisputably based on whether a defendant was previously sentenced "in accordance with" the FSA, not based upon the defendant's sentencing date.

Courts across the country have found that defendants sentenced after the enactment of the FSA, but without its benefits, are in fact eligible for consideration for a reduction under the First Step Act. In fact, in many of these cases, the government conceded as much.

In *United States v. Holmes,* No. 19-3066, slip op. (D.C. Cir. Sept. 4, 2020), the appellate court arrived at a similar conclusion. There, although the defendant was sentenced in the spring of 2011, almost a year after the FSA was enacted, the sentencing court did not "accurately account for the reduced statutory penalties" under the FSA when calculating the defendant's guidelines range. *Id.* Even the government conceded that despite the date of his sentencing, the defendant had not been sentenced "in accordance with" the FSA. *Id.* The appellate court overruled the

district court's finding that the defendant was ineligible for relief under the First Step Act and remanded the case for reconsideration. *Id.*[3]

In *United States v. Shaw,* 957 F.3d 734 (7th Cir. 2020), Appellant Robinson was convicted in 2010 of a crack cocaine offense, but not sentenced until 2012. Because the law of the circuit at that time was that the FSA did not apply to those sentenced after the FSA, he did not receive any benefit from the Act. When he moved for relief under the First Step Act in 2019, the government did not claim he was precluded from relief based on the date he was sentenced. The appellate court, in fact, found him eligible for consideration for relief. *Id.* at 738-39. *See also, United States v. Hogg,* 723 F.3d 730 (6th Cir. 2013) (defendant sentenced after the passage of the FSA was entitled to withdraw his plea where the sentencing court advised him of the pre-FSA statutory penalties when accepting his plea because at the time of sentencing it was unclear the FSA applied retroactively).

District courts have also found eligibility for defendants sentenced after, *but not in accordance with,* the FSA. *See, e.g., United States v. Woodson,* No. 11-CR-19, Dkt. 85 (E.D. Wis. Feb. 1, 2021) (where the government conceded a defendant sentenced after the FSA, but before *Dorsey,* was eligible for a consideration for a reduction pursuant to the First Step Act); *United States v. Coprich,* No. 1:08-cr-00401 (N.D. Ill. Aug. 26, 2020) (defendant sentenced in 2011, after passage of FSA, still eligible for relief under the First Step Act because at the time of his sentencing the

[3] Notably, Mr. Holmes has since received a reduction in his sentence in accordance with the First Step Act and the FSA, and has been released from custody. *United States v. Holmes,* 1:02-cr-24-BAH, Dkt. 147 (D.C. Apr. 16, 2021).

FSA did not apply retroactively); *United States v. Archie,* No. CCB-09-0244 (D. Md. filed Nov. 1, 2019); *United States v. Martin,* 2019 WL 4862055 (N.D.W. Va. Oct. 2, 2019) (Defendant who was sentenced in 2011 was eligible for consideration for a reduction in accordance with the FSA because at the time he was sentenced, "the [FSA] did not apply retroactively.").

II. THE COURT SHOULD RESOLVE THE INJUSTICE IN THIS CASE.

The question presented is important enough to warrant this Court's review. As this petition illustrates, the Eleventh Circuit is inconsistently applying the First Step Act. This petition catalogues at least two cases from the Eleventh Circuit where different standards have applied. The petition also references multiple examples from the other courts where the rule is applied as actually intended by Congress. This Court must weigh in, in order to instruct the Eleventh Circuit, and any other courts that may venture down the wrong path, on how the First Step Act should be applied. Defendants whose offenses were committed before the enactment of the FSA, who were sentenced after its enactment, but who did not receive the benefit of the FSA, are entitled to relief under the First Step Act.

III. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

The Eleventh Circuit erred in upholding the district court's denial of First Step Act relief. Although Mr. Alexis was sentenced 21 days after the enactment of the FSA, nothing in the record supports a claim that he already benefited from the FSA's reduced penalty scheme. Furthermore, a review of the relevant caselaw from the time of Mr. Alexis' sentencing, demonstrates that most district courts were under the impression that the FSA *did not* apply.

CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner Guerly Alexis prays that this Court will grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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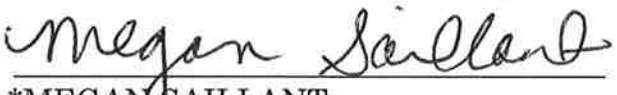

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