NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

WARREN JACKSON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
TRACY DREISPUL*
Assistant Federal Public Defender
Deputy Chief, Appellate Division
Counsel of Record
150 W. Flagler Street, Suite 1500
Miami, FL 33130
305-536-6900

September 30, 2021

QUESTION PRESENTED

Section 404(b) of the First Step Act of 2018 provides, in relevant part:

> A court that imposed a sentence for a covered offense 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.

The question presented is:

Whether the "as if" language in Section 404(b) of the First Step Act requires a sentencing court to disregard intervening, but well-established constitutional precedent (*i.e.*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), in determining the revised statutory penalties for a "covered offense".[1]

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[1] This question is similar, but not identical, to the question before the Court in *Concepcion v. United States*, 2021 WL 4464217 (U.S. Sept. 30, 2021) (No. 20-1650) (granting certiorari to resolve: "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 and factual developments.").

INTERESTED PARTIES

Pursuant to Sup. Ct. R. 14.1(b)(i), Mr. Jackson submits that there are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

The following proceedings directly relate to the case before the Court:

United States v. Jackson, 2:99-cr-14021-DMM-1 (S.D. Fla.), *aff'd*, *United States v. Jackson*, 99-14021 (11th Cir. Dec. 29, 2000), and *cert. denied*, *Jackson v. United States*, No. 00-9426 (U.S. Oct 1, 2001).

United States v. Jones, 962 F.3d 1290 (11th Cir. 2020), *rehearing denied*, *United States v. Jackson*, 995 F.3d 1308 (11th Cir. 2021).

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PETITION FOR WRIT OF CERTIORARI

Warren Jackson respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 19-11955-JJ, in that court on June 16, 2020. *See United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), *rehearing denied*, *United States v. Jackson*, 995 F.3d 1308 (11th Cir. 2021).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1). A copy of the Eleventh Circuit's published decision denying rehearing *en banc* is contained in the Appendix at A-2.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The United States Court of Appeals had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. The decision of the court of appeals was entered on June 16, 2020. *See United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020). Mr. Jackson filed a timely petition for rehearing, which was denied on May 3, 2021. *See United States v. Jackson*, 995 F.3d 1308 (11th Cir. 2021). This petition is timely filed pursuant to SUP. CT. R. 13.1 and the Court's March 19, 2020 Order temporarily extending the time to file petitions for certiorari to 150 days from the judgment of the lower court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

THE FAIR SENTENCING ACT OF 2010

Section 2 of the Fair Sentencing Act of 2010 provides, in relevant part:

(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".

Pub. L. No. 111-220, 124 Stat. 2372, § 2(a).

THE FIRST STEP ACT OF 2018

Section 404 of the First Step Act of 2018 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.

Pub L. No. 115-391, 132 Stat. 5194, § 404. [2]

[2] Title 21, United States Code, as amended by the Fair Sentencing Act of 2010, is included in the Appendix.

STATEMENT OF THE CASE

A. Statutory Background

The history of the crack-to-powder sentencing disparity is well-known to the Court. *See, e.g., Terry v. United States*, 141 S. Ct. 1858, 1860-62 (2021); *Dorsey v. United States*, 567 U.S. 260, 265-69 (2012); *Kimbrough v. United States*, 552 U.S. 85, 97-100 (2007). In 1986, Congress prescribed "mandatory minimum penalties of 5 and 10 years applicable to a drug offender depending primarily upon the kind and amount of drugs involved in the offense." *Dorsey*, 567 U.S. at 266 (citing 21 U.S.C. §§ 841(b)(1)(A)-(C) (2006 ed. and Supp. IV). The 1986 Act "treated crack cocaine crimes as far more serious" than powder cocaine crimes. *Id*. Specifically, "[i]t applied its 5-year minimum to an offender convicted of possessing with intent to distribute only 5 grams of crack (as opposed to 500 grams of powder) and its 10-year minimum to one convicted of possessing with intent to distribute only 50 grams of crack (as compared to 5,000 grams of powder), thus producing a 100-to-1 crack-to-powder ratio." *Id.* (citing 21 U.S.C. § 841(b)(1)(A)(iii)-(B)(iii) (2006 ed.)).

Hence, at the time of Mr. Jackson's offense, 50 grams of cocaine base was sufficient to trigger the 10-year mandatory minimum penalty, and 5-year term of supervised release, required by 21 U.S.C. § 841(b)(1)(A). In the case of a defendant with a prior drug felony, if the government invoked the recidivist penalties provided by 21 U.S.C. §§ 841 and 851, the sentence would double to a mandatory prison term of 20 years, followed by a supervised release term of at least 10 years. In the case of

a defendant like Mr. Jackson, with two or more qualifying prior offenses, the statute required a mandatory term of life imprisonment. *See* 21 U.S.C. § 841 (1999 ed.).

"During the next two decades, the [Sentencing] Commission and others in the law enforcement community strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100-to-1." *Dorsey*, 567 U.S. at 268. "The Commission issued four separate reports telling Congress that the ratio was too high and unjustified because, for example, research showed the relative harm between crack and powder cocaine less severe than 100-to-1, because sentences embodying that ratio could not achieve the Sentencing Reform Act's 'uniformity' goal of treating like offenders alike, because they could not achieve the 'proportionality' goal of treating different offenders (*e.g.*,, major drug traffickers and low level dealers) differently, and because the public had come to understand the sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences." *Id.* (citations omitted). Ultimately, the Commission "asked Congress for new legislation embodying a lower crack-to-powder ratio." *Id*. at 269.

That change came with the Fair Sentencing Act of 2010. Section 2 of that statute increased the amount of crack cocaine required to trigger the mandatory ten-year penalty provided by § 841(b)(1)(A)(iii) from 50 to 280 grams, and the amount required to trigger the 5-year sentence in § 841(b)(1)(B)(iii) from 5 to 28 grams. *See* Pub. L. No. 111-220, 124 Stat. 2372 § 2(a). "The change had the effect of lowering the 100-to-1 crack-to-powder ratio to 18-to-1." *Dorsey*, 567 U.S. at 269. Additionally, Section 3 of the Fair Sentencing Act eliminated any minimum mandatory penalty for

simple possession of crack cocaine. *See id*. Congress did not, however, make those amendments retroactive at the time.

That changed on December 21, 2018, with the enactment of the First Step Act of 2018. Section 404 of the First Step Act authorizes sentencing courts to impose new sentences, retroactively applying Sections 2 and 3 of the Fair Sentencing Act to defendants who were sentenced before August 3, 2010.

Eligibility for relief under Section 404 turns on whether the defendant was sentenced for a "covered offense," which the statute defines to mean "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." § 404(a). For those offenses, a sentencing court may, in its discretion, "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." § 404(b).

Section 404(c) is entitled "Limitations," and imposes just two restrictions on a sentencing court's authority under the Act: first, it disallows a further reduction for any sentence already imposed or reduced in line with the changes effected by the Fair Sentencing Act, and second, it disallows a reduction on a second or successive motion under the First Step Act, so long as the court denied the first motion "after a complete review…on the merits." § 404(c). The statute imposes no other express limitations on what the sentencing court may consider; nor does it limit to what extent the court may reduce the sentence for a covered offense.

B. Procedural History

1. In 1999, Warren Jackson was charged with possessing with intent to distribute "greater than 50 grams of a mixture and substance containing a detectable amount of cocaine in the form of cocaine base, commonly known as crack cocaine," in violation of 21 U.S.C. § 841(a)(1). (DE 1). Mr. Jackson proceeded to trial and was convicted by a jury. (DE 24). Consistent with prevailing law at the time, the jury made no finding as to drug quantity. (*See* DE 24). A Pre-Sentence Investigation Report ("PSI"), prepared by the United States Probation Office and used for sentencing purposes, found that the offense involved 287.2 grams of crack cocaine. (PSI ¶ 8).

At the time of Mr. Jackson's offense, 21 U.S.C. § 841(b)(1)(A)(iii) required a 10-year mandatory minimum term of imprisonment and a term of supervised release of at least 5 years, for any person convicted of an offense involving 50 grams or more of cocaine base. Prior to Mr. Jackson's trial, the government filed a notice pursuant to 21 U.S.C. § 851, that it intended to seek a mandatory term of life imprisonment based on two qualifying prior convictions. (DE 19). On March 8, 2000, the district court sentenced Mr. Jackson to life imprisonment, followed by a 10-year term of supervised release. (DE 50). The sentence, which was imposed approximately three months before the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), was based

on a judicial finding that the offense involved 50 grams or more of crack cocaine, and the government's filing of the Section 851 enhancement.[3]

2. On March 26, 2019, Mr. Jackson moved the district court to reduce his sentence under Section 404 of the First Step Act. (DE 167). The government objected to any reduction of Mr. Jackson's sentence, alleging that the Fair Sentencing Act would have had "no impact" on Mr. Jackson's sentence due to the quantity of drugs involved in the offense. (DE 169:3). Mr. Jackson responded that "[b]ased on the facts charged in the Indictment and found by the jury, if the Fair Sentencing Act of 2010 had been in effect at the time of Mr. Jackson's offense, the statutory penalties for his offense — after the filing of the § 851 enhancement — would have been 0-30 years." (DE 170:5). He argued that even if the court considered the 50 grams of cocaine base alleged in the Indictment, for which there had been no jury finding, he would only be subject to a 10-year mandatory term of imprisonment, followed by "'at least 8 years' of supervised release." (DE 170:5).

The district court denied Mr. Jackson's motion, finding that:

> had Section 2 of the Fair Sentencing Act been in effect at the time of the defendant's sentencing, it would have had no impact on the defendant's sentence. Because the offense involved 278 [sic] grams of cocaine base, Section 841(b)(1)(A) would still have applied, resulting in the same statutory range of imprisonment of 10 years to life. With the § 851 enhancement his statutory range would still be life because the underlying predicate convictions are not subject to challenge in a § 3582 proceeding. As a result, his guideline range would have been

[3] On November 22, 2016, Mr. Jackson's sentence was commuted by President Barack Obama to 300 months' imprisonment. (DE 156:2). He has since completed his sentence of incarceration and is currently serving the 10-year term of supervised release imposed by the district court.

> unchanged. Mr. Jackson received a commutation down to 300 months; no further reduction is warranted.

(DE 172).

3. Mr. Jackson appealed the district court's ruling to the Eleventh Circuit.[4] The primary question on appeal was the proper definition of the term "covered offense."

Mr. Jackson argued that a defendant's "covered offense" must be determined based on the statutory elements of his crime, and not by reference to his particular 'relevant conduct' found by a preponderance of the evidence for sentencing purposes. This argument was based on basic principles of statutory interpretation, as well as Sixth Amendment jurisprudence holding that a defendant's "statutory penalties" may be determined only by those elemental facts which are charged by indictment and proven to a jury beyond a reasonable doubt (or admitted as part of a guilty plea). *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (statutory maximum); *Alleyne v. United States*, 570 U.S. 99, 114–16 (2013) (statutory minimum); *Burrage v. United States*, 571 U.S. 204, 210 (2014) (applying *Apprendi* and *Alleyne* to 21 U.S.C. § 841(b)(1)). The government maintained in opposition that Congress' use of the term "violation" in Section 404(a) suggested a conduct-based approach. Thus, the government argued that, in considering a defendant's eligibility for a sentence

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[4] The appeal was resolved in tandem with three unrelated cases, which raised similar questions regarding the First Step Act of 2018. For ease of reference, Mr. Jackson refers to the panel opinion, which resolved all four defendants' appeals, simply as *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020).

reduction under the First Step Act, the district court may consider the entire record available at the time of the prisoner's original sentencing, including findings made by the district court at sentencing and any uncontested findings in a presentence report.

The Eleventh Circuit resolved Mr. Jackson's case in a published decision, issued on June 16, 2020. *See United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020). The court determined that the term "the penalties clause" in Section 404(a) referred back to the "whole phrase 'violation of a Federal criminal statute'" – an interpretation later adopted by this Court in *Terry*. *See Terry v. United States*, 141 S. Ct. 1858, 1862 (2021) ("Here 'statutory penalties' references the entire, integrated phrase, ' a violation of a Federal Criminal statute.'") (citing *Jones*, 962 F.3d at 1298). "And that phrase means 'offense.'" *Id.* (citing Black's Law Dictionary 1300 (11th ed. 2019)).

The Eleventh Circuit thus correctly found that Mr. Jackson had been sentenced for a "covered offense." *Jones*, 962 F.3d at 1303. The court noted that the indictment had charged Jackson of an offense involving 50 grams or more of crack cocaine, and "although the jury did not make a drug quantity finding, the district court found at sentencing a drug quantity of at least 50 grams of crack cocaine." *Jones*, 962 F.3d at 1303. "The statutory penalty for Jackson's offense was originally life imprisonment because of Jackson's drug quantity and three prior felony drug convictions. *See id.* § 841(b)(1)(A)(iii)(1994). The Fair Sentencing Act modified the penalties for his offense to be 10 years to life imprisonment. *See id.* § 841(b)(1)(B)(iii) (2012)." *Jones*, 962 F.3d at 1303.

"But" – unlike ever other circuit to have addressed the issue – the Eleventh Circuit held that "[a] movant's satisfaction of the 'covered offense' requirement does not necessarily mean that a district court can reduce his sentence." *Id.* The court interpreted the "*as if*" language in § 404(b) to apply a strict requirement that "[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.* (citation omitted). This imposed "two limits" relevant to Mr. Jackson's case: "First, it does not permit reducing 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.*

The court rejected Jackson's argument that "district courts may not, in making the 'covered offense' determination, consider a previous drug-quantity finding that was necessary to trigger the statutory penalty if it was made by a judge." *Id.* The court held that the Constitution does not prohibit district courts from relying on earlier judge-found facts in Fair Sentencing Act proceedings, because the court is not increasing the defendant's penalty, "[i]t is either maintaining the movant's penalty or decreasing it." *Id.* (emphasis and citation omitted). "And unlike the statutory penalties that applied when the movants were originally sentenced, the amended statutory penalties in the First Step Act apply to the movants as an act of legislative grace left to the discretion of the district court." *Id.* at 1304.

In Mr. Jackson's case, that meant that the district court lacked authority to reduce his sentence, because the quantity of crack cocaine in the PSI would still have been sufficient to trigger the mandatory life sentence under the amended statute: "Jackson was sentenced to a statutory mandatory sentence of life imprisonment based on a drug-quantity finding of 287 grams of crack cocaine and his three prior felony drug convictions. The district court correctly concluded that it could not reduce Jackson's sentence because his drug-quantity finding meant that he would face the same statutory penalty of life imprisonment under the Fair Sentencing Act. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2012)." *Jones*, 962 F.3d at 1304.

The Eleventh Circuit has since acknowledged that, pursuant to *Jones*, "whether a [district] court can look at a drug-quantity finding made at sentencing to determine what a movant's statutory penalty range would have been under the Fair Sentencing Act generally depends on whether the movant was sentenced before or after the Supreme Court's decision in [*Apprendi*]." *United States v. Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021). *See also United States v. Perez,* 2021 WL 2170422 (11th Cir. May 21, 2021) (recognizing the same principle).

5. Mr. Jackson filed a petition for rehearing *en banc*, arguing that the decision conflicts with the law of other circuits and creates unwarranted intra-circuit disparity between defendants who were sentenced before and after *Apprendi*. On May 3, 2021, the court issued a published decision denying rehearing *en banc*. *United States v. Jackson*, 995 F.3d 1308 (11th Cir. 2021). Chief Judge William Pryor, who had authored the *Jones* decision, issued an opinion respecting the denial of rehearing *en*

banc. *Jackson*, 995 F.3d at 1309-1311. Judge Martin issued a dissent from the denial of rehearing *en banc*. *See id.* at 1311-1316.

In his opinion respecting the denial of rehearing, Chief Judge Pryor wrote that "Section 404(b) unambiguously directs a district court to consider only one variable in the sentencing calculus: the modified statutory penalty." *Jackson*, 995 F.3d at 1310. Chief Judge Pryor reasoned that "Section 404 allows a district court to proceed 'as if' the penalty ranges of the Fair Sentencing Act 'were in effect at the time the covered offense was committed,' First Step Act § 404(b), but it does not say that the district court may proceed 'as if' other factual or legal changes were in effect." *Id*. at 1311 (citing *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020), *cert. denied*, 2021 WL 2637994 (U.S. June 28, 2021) (No. 20-7474)). "Because section 404(b) does not expressly grant a district court the authority to re-evaluate the drug quantity element, 'the district court is bound by [its] previous finding of drug quantity,' ... in the same way that is bound by its previous finding of drug type." *Id*. at 1310 (citation omitted).

Chief Judge Pryor responded to the dissent's criticism "that several circuits have afforded sentence reductions to traffickers ineligible to receive relief under *Jones*." 995 F.3d at 1311. Chief Judge Pryor discounted these courts as – with the exception of the D.C. Circuit in *United States v. White*, 984 F.3d 76, 86-87 (D.C. Cir. 2020) – having failed to "consider the effect of the 'as if' language in Section 404(b)." *Id*. Finally, Chief Judge Pryor rejected the notion that *Jones* unfairly distinguished between offenders who were sentenced before and after *Apprendi*, finding that "this

'discrepancy' is not the doing of the First Step Act, much less *Jones*. It instead reflects the settled rule that neither *Apprendi* nor *Alleyne* . . . has retroactive effect." *Jackson*, 995 F.3d at 1311 (citation omitted).

In her dissenting opinion, Judge Martin argued that *Jones* "wrongly interprets § 404 of the First Step Act in a way that does harm to Warren Lavell Jackson." *Id*. at 1311-12 (footnote omitted). Judge Martin wrote that the panel opinion "attributes a drug amount to Mr. Jackson that was neither found by a jury not charged in his indictment," and in so doing, "creates a limit on First Step Act relief found nowhere in the text of that statute." *Id.* "The result is that *Jones* drastically curtains the relief of the First Step Act in our Circuit and creates a troubling disparity between defendants sentenced before and after" *Apprendi*.

Judge Martin further observed that, "[i]n almost any other circuit, defendants like Mr. Jackson can have a district court consider their motions." *Jackson*, 995 F.3d at 131. "The vast majority of circuits to consider the question have held that the availability of § 404 relief turns only on the statute of conviction." *Id*. at 1314 & n.4 (collecting cases). "*Jones* cannot be reconciled with these decisions."

REASONS FOR GRANTING THE PETITION

I. The Decision Below Creates Unwarranted Disparity Regarding A Defendant's Threshold Eligibility For Relief.

Section 404 of the First Step Act predicates eligibility for relief on whether the defendant was sentenced for a "covered offense." *See Terry v. United States*, 141 S. Ct. 1858, 1862 (2021) ("An offender is eligible for a sentence reduction ... only if he previously received 'a sentence for a covered offense.'") (quoting § 404 (b), 132 Stat 5222). To determine eligibility under the Act, "[w]e thus ask whether the Fair Sentencing Act modified the statutory penalties for petitioner's offense." *Id*.

In the majority of circuits, this is both the beginning and the end of the matter. *See, e.g., United States v. Shaw*, 957 F.3d 734, 739 (7th Cir. 2020) ("[T]he statute of conviction alone determines eligibility for First Step Act relief."); *United States v. Boulding*, 960 F.3d 774, 781 (6th Cir. 2020) ("[E]ligibility for resentencing under the First Step Act turns on the statute of conviction alone"); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019) ("The First Step Act applies to offenses, not conduct, ... and it is [the] statute of conviction that determines ... eligibility for relief.") (citations omitted); *United States v. Jackson,* 945 F.3d 315, 320 (5th Cir. 2019) ("[W]hether a defendant has a 'covered offense' under section 404(a) depends only on the statute under which he was convicted."), *cert. denied*, No. 19-8036, 2020 WL 1906710 (U.S. Apr. 20, 2020); *United States v. White*, 984 F.3d 75, 87 (D.C. Cir. 2020) (holding that district court erred by requiring an additional inquiry into whether relief was "available" under the Act; "This was error because, ... there is no additional

'availability' requirement in section 404 beyond the covered offense requirement in section 404(a) and the limitations set forth in section 404(c)"). *See also United States v. Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019) ("Congress listed specific limitations in the First Step Act, including emphasizing district courts' discretion. ... There is no indication that Congress intended a complicated and eligibility-limiting determination at the "covered offense" stage of the analysis.") (citations omitted). No circuit, other than the Eleventh, has held that a defendant who satisfied the "covered offense" requirement, was ineligible for relief based on the particular facts of that same covered offense. *See White*, 984 F.3d at 88-89 ("The court may consider both judge-found and jury-found drug quantities as part of its exercise of discretion. ... But the court may not deem relief categorically unavailable due to defendant-specific drug quantities.").

The Eleventh Circuit, however, reasoned that the "as if" language in § 404(b) imposes two limitations on a defendant's eligibility for relief, that are not expressly contained in the "Limitations" provisions in § 404(c). "First, it does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Jones*, 962 F.3d at 1304. "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*. In Mr. Jackson's case, these judicially-derived limitations thwarted his right to seek a reduced sentence for his covered offense. "[B]ecause his drug-

quantity finding meant that he would face the same statutory penalty of life imprisonment under the Fair Sentencing Act," Mr. Jackson was ineligible for relief. *See Jones*, 962 F.3d at 1304.

The Eleventh Circuit's "quantity-based limitation 'has no basis in the text of section 404(b)." *United States v. Jackson*, 995 F.3d 1308, 1314 (11th Cir. 2021) (Martin, J., dissenting from the denial of rehearing en banc) (quoting *White*, 984 at 87). Rather, as the other circuits agree, "it is the statute under which a defendant was convicted, not the defendant's actual conduct, that determines whether a defendant was sentenced for a 'covered offense' within the meaning of Section 404(a)." *United States v. Davis,* 961 F.3d 181, 182 (2d Cir. 2020).

The Second, Fifth and Sixth Circuits have all found defendants eligible for relief under Section 404, notwithstanding the fact of their cases would have triggered the same mandatory sentences that those defendants were already serving, had they been charged and convicted under the amended statutory thresholds. *See United States v. Boulding*, 960 F.3d 774, 776 (6th Cir. 2020) (finding defendant sentenced to mandatory life sentence under 21 U.S.C. §§ 841(b)(1)(C) and 851 eligible for a reduced sentence, even though PSI found him responsible for 650.4 grams of crack cocaine); *Jackson*, 945 F.3d at 320 (agreeing that defendant sentenced to mandatory life sentence was eligible for a reduced sentence, even though PSI had found him responsible for more than 280 grams of crack cocaine); *Davis*, 961 F.3d at 182 (2d Cir. 2020) (affirming the grant of relief to a defendant who was originally sentenced to a mandatory term of 20 years, notwithstanding the fact that his 'relevant conduct'

would have been sufficient to trigger the same sentence, if he had been charged by an indictment alleging 280 grams or more of crack cocaine). "*Jones* cannot be reconciled with these decisions." *Jackson,* 995 F.3d at 1314.

The decision below additionally creates unwarranted intra-circuit disparity based on whether the defendant was originally sentenced before or after *Apprendi*. The Eleventh Circuit held that "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." *Jones*, 962 F.3d at 1302 (emphasis added). Because this rule only applies to factual findings that "could have been used ... at the time of sentencing," it sets up a distinction in the treatment of defendants who were sentenced prior to *Apprendi*, when judicially-found facts "could have been used to determine" their statutory penalties, and those who were sentenced after *Apprendi* prohibited this practice. *See Jones*, 962 F.3d at 1303. *See also United States v. Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021) ("Applying this standard, whether a court can look at a drug-quantity finding made at sentencing to determine what a movant's statutory penalty range would have been under the Fair Sentencing Act generally depends on whether the movant was sentenced before or after the Supreme Court's decision in *Apprendi* . . . .").

This holding has resulted in unwarranted *intra*-circuit disparity between defendants sentenced before and after *Apprendi*:

> The injustice of this discrepancy is apparent in our caselaw. Compare Mr. Jackson's case with the case of Bruce Hermitt Bell in *United States v. Bell*, 822 F. App'x 884 (11th Cir. 2020) (per curiam) (unpublished). Both Mr. Jackson and Mr. Bell were found guilty by a jury of offenses involving at least 50 grams of crack cocaine and subject to a mandatory minimum sentence of life imprisonment. *Jones*, 962 F.3d at 1295, 1304; *Bell*, 822 F. App'x at 885. Like in Mr. Jackson's case, Mr. Bell was held responsible for a higher quantity at sentencing—for Bell, 1.5 kilograms—based on a finding in his PSR. *See Bell*, 822 F. App'x at 885. Unlike in Mr. Jackson's case, however, the District Court found Mr. Bell eligible for a sentence reduction under § 404 of the First Step Act and reduced his sentence from life to a 30-year term of imprisonment. *See id.* at 886. Our court affirmed Mr. Bell's shortened sentence. *Id.* The only difference between Mr. Bell and Mr. Jackson—other than Bell having been found responsible for a far higher drug quantity—is that Bell was sentenced after *Apprendi*. *See id.* at 885. And based on mere timing, the 1.5 kilogram finding was not a fact that "could have been used ... at the time of sentencing." *Jones*, 962 F.3d at 1303. The random injustice of this result is clear. Although Mr. Bell was found responsible for a far greater quantity of crack cocaine than Mr. Jackson, the Jones opinion gives Bell relief while denying Jackson entirely.

995 F.3d at 1316. *See also United States v. Perez,* 2021 WL 217042 at *2 (11th Cir. May 21, 2021) (holding that defendant remained subject to mandatory life sentence based on judicial finding of 616.4 grams of crack cocaine; "Because Perez was convicted and sentenced before the Supreme Court's decision in *Apprendi*, we look to the drug quantity finding made at sentencing to determine what Perez's statutory penalty range would have been under the Fair Sentencing Act"); *United States v. Ingram*, 831 F. App'x 454, 458 (11th Cir. Oct. 14, 2020) ("Applying these limitations, the district court did lack authority to reduce Ingram's sentence for Count 1. Based on Ingram's prior felony drug convictions and the sentencing court's finding that Ingram was responsible for 4,167 grams of crack cocaine, Ingram's sentence of life

imprisonment is still the lowest possible penalty that would be available to him under the Fair Sentencing Act").

Nothing in the text of the First Step Act warrants this result. Nor is there any reason to believe that Congress intended for pre-*Apprendi* offenders to, once again, get the short end of the stick. "Congress enacted the First Step Act at a time when some, but not all, pre-Fair Sentencing Act inmates had received relief by reference to their offense conduct through application of the post-Fair Sentencing Act Guidelines Amendments. On the face of the statute, Congress's clear intent was to apply the Fair Sentencing Act to pre-Fair Sentencing Act offenders, including those who were heretofore ineligible for such relief." *Wirsing*, 943 F.3d at 186. Defendants sentenced prior to *Apprendi*, like Mr. Jackson, were those subject to the greatest and most persistent injustices, and are precisely "those who were heretofore ineligible for ... relief." *Wirsing*, 943 F.3d at 186. The decision in this case contravened clear Congressional intent, by prejudicing the very class of defendants Congress sought to benefit by the enactment of Section 404.

II. The Decision Below Expands An Existing Circuit Split Regarding The Law To Be Applied In First Step Act Proceedings.

The decision below further added to a multiply fractured split of authority over the question of which laws govern Section 404 proceedings. On the very date of this filing, the Court has granted certiorari to resolve "[w]hether, 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 and factual

developments." *See Concepcion v. United States*, 2021 WL 4464217 (U.S. Sept. 30, 2021) (No. 20-1650). There are arguably as many of ***five*** different answers among the circuits, to the question.

1. In addition to the Eleventh Circuit, the Second, Fifth, and Ninth Circuits have held that district courts are precluded from applying intervening changes in law during First Step Act proceedings. *See United States v. Taylor*, 982 F.3d 1295, 1032 (11th Cir. 2020) ("The authority to reduce Taylor's sentence 'as if sections 2 and 3 of the Fair Sentencing Act' were in effect when Taylor committed his offense does not permit the court to reduce Taylor's 'sentence on the covered offense based on changes in the law beyond those mandated by' those sections.") (citation omitted); *United States v. Moore*, 975 F.3d 84, 91 (2d Cir. 2020) ("§ 404(b) issues no directive to allow re-litigation of other Guidelines issues—whether factual or legal—which are unrelated to the retroactive application of the Fair Sentencing Act"); *United States v. Hegwood*, 934 F.3d 414 (5th Cir. 2019) ("The district court decides 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), *cert. denied*, 2021 WL 2637994 (U.S. June 28, 2021) (No. 20-7474) ("Because the First Step Act asks the court to consider a counterfactual situation where only a single variable is altered, it does not authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense.").

2. In direct opposition to these holdings, the Third and Fourth Circuits have held that district courts must apply the law at the time of the resentencing. *See United States v. Murphy*, 998 F.3d 549, 555 (3d Cir. 2021) (""[T]he court must make 'an accurate calculation of the amended guidelines range at the time of resentencing,' which includes a fresh inquiry into whether the defendant qualifies as a career offender."); *United States v. Lancaster*, 997 F.3d 171, 175 (4th Cir. 2021) ("To determine the sentence that the court would have imposed under the Fair Sentencing Act, the court must engage in a brief analysis that involves the recalculation of the Sentencing Guidelines in light of 'intervening case law' ... and a brief consideration of the factors set forth in § 3553(a).") (citations omitted).

3. The Tenth Circuit requires district courts to apply intervening changes in law that clarify, but not that amend, the guidelines. *United States v. Brown*, 974 F.3d 1137, 1146 (10th Cir. 2020) (remanding for consideration of intervening precedent, where that precedent "was not an amendment to the law between Mr. Brown's original sentencing and his First Step Act sentencing; it was a clarification of what the law always was").

4. There is even a division among those circuits that suggest a district court "may", but need not, account for intervening legal developments. The First and Sixth Circuits have issued opinions rejecting the notion that the First Step Act authorizes the application of intervening developments in the law. In both cases, however, the courts expressly sanction a district court's authority to "consider" such developments, in the exercise of their discretion to determine whether, and to what extent, a

resentencing is warranted under the advisory guidelines. *See United States v. Concepcion*, 991 F.3d 279 (1st Cir. 2021) (finding that "[n]othing in the First Step Act invites the district court to apply changes in the law external to the Fair Sentencing Act"; but holding that district courts remain free to "consider" intervening guideline changes when considering whether, and to what extent, it should exercise its discretion to grant relief.), *cert. granted*, 2021 WL 4464217 (U.S. Sept. 30, 2021) (No. 20-1650); *United States v. Maxwell*, 991 F.3d 685, 690 (6th Cir. 2021) (rejecting the argument that courts must "redetermine the guidelines range based on all intervening legal developments, not just passage of the Fair Sentencing Act," but acknowledging that a court may "consider" intervening legal and factual developments in exercising its discretion), *petition for cert. filed*, 2021 WL 2181527 (U.S. May 24, 2021) (No. 20-1653).

5. Finally, the Seventh Circuit has held that a district court may "apply" the intervening law at its discretion. *United States v. Fowowe*, 1 F.4th 522, 531-52 (7th Cir. 2021) (holding that "§ 404(b) authorizes but does not require application of intervening judicial decisions"). The Seventh Circuit stated that it was following *Maxwell,* in rendering this holding. Nonetheless, the Seventh Circuit expressly held that Section 404 authorizes district courts to ***apply*** intervening changes in law, whereas the Sixth Circuit stated only that district courts may ***consider*** those changes, among many other factors affecting the exercise of their discretion. Considering the importance that the advisory guidelines play in sentencing, the distinction seems significant. *See Molina-Martinez v. United States*, 138 S. Ct. 376

(2018) ("In the usual case ... the systemic function of the selected Guidelines range will affect the sentence.").

III. The Question Presented Warrants Review And This Case Would Be An Excellent Companion For *Concepcion.*

The Court has already acknowledged the importance of resolving this chaos by granting review in *Concepcion*. And while *Concepcion* may well speak to the issue herein, all of the cases addressed above deal with a district court's application of the law at the second, discretionary, stage of the proceedings. This case asks whether the district court must consider intervening developments in law at the threshold eligibility stage of the inquiry. It thus arguably presents a broader inquiry than the one presented by *Concepcion.*

In *Terry*, this Court held the phrase "violation of a Federal criminal statute," in Section 404(a) of the First Step Act, referred to the petitioner's "offense." This case asks what that "offense" was, for purposes of the Act.

In 2000 – shortly after Mr. Jackson was sentenced – this Court made clear that "facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition 'elements' of a separate legal offense," *id.* at 483 n.10, and that "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." *Id.* at 490. Thirteen years later, in *Alleyne v. United States,* 570 U.S. 99 (2013), the Court held that any fact that increases a mandatory minimum is an element that must be charged in an indictment and proved to a jury beyond a

reasonable doubt. *Alleyne*, 570 U.S. at 114-15 (holding that a fact that raises the statutory maximum, the mandatory minimum, or both "constitutes an element of a separate, aggravated offense"). Under these precedents, the drug quantity that establishes the "statutory penalty" for the offense is the quantity charged as an element in the indictment and found as an element by a jury beyond a reasonable doubt. It is not the quantity alleged in the presentence report, stated in a plea agreement, or found by the judge at sentencing.

This always was and remains the law. Using uncharged judge-found facts by a preponderance to increase a statutory range was always unconstitutional. That practice did not become unconstitutional when *Apprendi* or *Alleyne* were announced. *See Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). Rather, "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law." *Id.* "Accordingly, the underlying right necessarily pre-exists [the Court's] articulation of the new rule." *Id.*

Congress was well-aware of these precedents when it passed the First Step Act. Nothing in the statute suggests that Congress intended to override 18 years constitutional jurisprudence, by the insertion of two monosyllabic words ("as if"), intended only to invoke the retroactive application of the Fair Sentencing Act. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988) ("The courts will ... not lightly assume that Congress intended to infringe constitutionally protected liberties[.]").

CONCLUSION

Based upon the foregoing, the petition should be granted. Mr. Jackson respectfully asks the Court to grant review and take this case as a companion case to *Concepcion.* Alternatively, he asks the Court to hold this petition pending the Court's decision in *Concepcion*, and then to grant relief, vacate the decision, and remand this case to the lower court.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

/s/ Tracy Dreispul
TRACY DREISPUL*
Assistant Federal Public Defender
Deputy Chief, Appellate Division
**Counsel of Record*
150 W. Flagler Street, Suite 1500
Miami, FL 33130
305-536-6900

Miami, Florida
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