No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TREVIN NUNNALLY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

The first question presented in this case is the same question that the Court granted certiorari to consider in *Concepcion v. United States*, 2021 WL 4464217 (U.S. Sept. 30, 2021) (No. 20-1650):

> "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."

The second question presented in this case is the same question that is pending before the Court in *Jackson v. United States* (No. 21-5874):

> "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.'"

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

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2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

The Petitioner, TREVIN NUNNALLY, requests the Court to issue a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeals entered in this case on September 27, 2021. (A-3).[1]

D. CITATION TO ORDER BELOW

The opinion below was not reported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the Eleventh Circuit Court of Appeals.

F. STATUTORY PROVISION INVOLVED

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

[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

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.

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

This case concerns the district court's denial of the Petitioner's motion for a reduction of sentence filed pursuant to the First Step Act of 2018. In 2005, a grand jury returned a one-count indictment charging the Petitioner and two co-defendants with conspiring to distribute and possess with the intent to distribute 50 grams or more of cocaine base and 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii), (b)(1)(A)(iii), and 846. In 2006, at the conclusion of a two-day trial, a petit jury found the Petitioner guilty as charged. Specifically, by its verdict, the petit jury found the Petitioner guilty of conspiring to distribute and possess with the intent to distribute cocaine and/or cocaine base, and the jury found that the amount of cocaine and cocaine base involved in the conspiracy was, respectively, 5 kilograms or more and 50 grams or more. The presentence investigation report recommended that the Petitioner be held responsible for 25.5 kilograms of powder cocaine and 1.4 kilograms of cocaine base – drug amounts that, although not found by the jury, the district court accepted for purposes of sentencing the Petitioner. The district court ultimately sentenced the Petitioner to 328 months of imprisonment.

The offense in this case ordinarily would have carried a mandatory minimum sentence of 10 years, but because the Government filed an information pursuant to 21 U.S.C. § 851 alleging a prior felony drug conviction, the mandatory minimum sentence was 20 years. The Petitioner committed the predicate offense, the Georgia offense of possession with intent to contribute a controlled substance, when he was eighteen. For

the predicate offense, the court sentenced him to a suspended sentence with 120 days at a boot camp. Notably, *today* the predicate offense would *not* qualify as the requisite "serious felony drug conviction," as the sentence did not require the Petitioner to serve "a term of imprisonment of more than 12 months." 21 U.S.C. §§ 841(b), 802(57)(A).

In subsequent years, the district court reduced the Petitioner's sentence to 20 years pursuant to Sentencing Guideline amendments 706 and 782. However, as explained above, the Petitioner has no serious felony drug convictions, so his mandatory minimum, for the purpose of the First Step Act, is ten years – a sentence he has already served.

The Petitioner thereafter filed a motion for a reduction of sentence pursuant to the First Step Act. The district court denied the Petitioner's motion for a reduction of sentence based on *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020):

> This Court has considered whether Defendant is eligible for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2), §1B1.10 of the Federal Sentencing Guidelines based on Amendment 782, as well as Section 404 of the First Step Act of 2018. Section 404 of the First Step Act of 2018 serves to retroactively apply the Fair Sentencing Act of 2010 (FSA) to all cases with a cocaine base conviction. The statutory penalties were revised pursuant to the threshold drug weight necessary to apply various statutes. Where the statutory penalties are reduced pursuant to the retroactive administration of the FSA, the Defendant may be eligible for a modification of the sentencing guideline range and possible reduction of sentence.
>
> Defendant has filed a *pro se* Motion for Immediate Relief from Retroactive Supreme Law in the First Step Act, ECF No. 465. This Court appointed the Federal Public Defender to represent Defendant and ordered the Government and the Federal Public Defender to respond to this Court's order as to eligibility of Defendant for a reduction of sentence. ECF No. 470. The Government and Defendant filed their respective responses. ECF Nos. 475 and 477.
>
> This Court ordered additional briefing addressing Defendant's

eligibility for First Step Act relief under the Eleventh Circuit's recent decisions in *Jones* and *Brown*. ECF No. 479. In *Jones*, the Eleventh Circuit held that a conviction under 21 U.S.C. § 841(a) was a "covered offense" if a defendant was convicted of committing a crack-based offense before August 3, 2010, and his "offense triggered a statutory penalty that has since been modified by the Fair Sentencing Act." *United States v. Jones*, 962 F.3d 1290, 1289 (11th Cir. 2020). The court found Congress intended eligibility to turn on a defendant's statute of conviction rather than his conduct. *Id.* at 1300; *see also, e.g, United States v. Boulding*, 960 F.3d 774, 775 (6th Cir. 2020). Movants have "covered offenses" if they had been sentenced pursuant to the statutory penalties in 21 U.S.C. §§ 841(b)(1)(A)(iii) or (B)(iii). *Jones*, 962 F.3d at 1300. The *Jones* court specifically rejected "the argument that a movant's covered offense is determined by the actual quantity of crack cocaine in his violation." *Id.* at 1301.

Besides the determination of whether a movant has a "covered offense," the court held that any 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." First Step Act § 404(b). According to the court, the "as if" provision gives rise to two limitations:

> 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. 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 a drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing.

Jones at 1303. Expressed differently, the court held the "as if" provision (1) prohibits a district court from imposing a sentence below the sentence available to the defendant under the Fair Sentencing Act, and (2) that the mandatory minimum is established by the offense of conviction in post-*Apprendi* cases and by the quantity determined by the court in pre-*Apprendi* cases.

The Government and Defendant have filed their responses. ECF Nos. 480 and 481. Defendant acknowledges that the Eleventh Circuit's "as if" analysis in *Jones* disqualifies Defendant from relief. *See* ECF No. 480 at 5. Defendant encourages this Court to apply a "better reading" of the statute to Defendant's case; however, this Court is bound by the Eleventh Circuit's analysis in *Jones*. Defendant is ineligible for a

> sentence reduction under the First Step Act. Accordingly, Defendant's motion, ECF No. 465, is DENIED**.**

(A-8-10).

On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's order. (A-3). The Eleventh Circuit ruled that the Petitioner cannot get relief under the First Step Act because the quantity of drugs involved in his offense would have still triggered a 20-year mandatory minimum under the Fair Sentencing Act of 2010. The Petitioner asserts that the Eleventh Circuit's opinion attributes a drug amount to the Petitioner that was neither found by a jury nor charged in his indictment. Thus, the Eleventh Circuit creates a limit on First Step Act relief found nowhere in the text of the statute. The result is that the Eleventh Circuit is drastically curtailing the reach of the First Step Act.

H. REASON FOR GRANTING THE WRIT

The questions presented are important and are pending before the Court.

Both of the questions presented in this case are important. The first question presented in this case is the same question that the Court granted certiorari to consider in *Concepcion v. United States*, 2021 WL 4464217 (U.S. Sept. 30, 2021) (No. 20-1650):

> "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."

As explained above, under the law as it exists today, the predicate offense that was relied upon by the Government to increase the Petitioner's mandatory minimum to 20 years would *not* qualify as the requisite "serious felony drug conviction."

The second question presented in this case is the same question that is pending before the Court in *Jackson v. United States* (No. 21-5874):

> "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.'"

As explained above, the sentence in this case was based on a drug quantity found by a judge – not the jury.

Accordingly, the Petitioner requests the Court to either grant the instant petition and further consider these important questions or stay consideration of this case pending the outcomes of *Concepcion* and *Jackson*.

I. CONCLUSION

The Petitioner requests the Court to either grant his petition for writ of certiorari or stay consideration of this case pending the outcomes of *Concepcion* and *Jackson*.

Respectfully Submitted,

/s/ Michael Ufferman

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