

No. 21-8146

ORIGINAL

Supreme Court, U.S.
FILED

JUN 02 2022

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

GREGORY THOMAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Mr. Gregory Thomas
Pro se Petitioner
Reg. No. 13366-052
F.C.I. Ray Brook
Post Office Box 900
Ray Brook, New York 12977

LIST OF PARTIES

All parties appeal in the caption of the case on the cover page.

QUESTION PRESENTED

This Court should issue a GVR Order so that the lower court can determine whether it is an abuse of discretion when a court fails to follow the law by ignoring the initial step in determining whether a defendant is eligible for First Step Act relief in violation of Due Process of Law

TABLE OF CONTENTS

	<u>Page</u>
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	9

INDEX OF APPENDICES

Appendix A — Decision of Court of Appeals	11
Appendix B — Decision of District Court	19

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
1. <u>Dorsey v. United States</u> , 567 U.S. 260 (2012)	4
2. <u>Lawrence v. Chater</u> , 516 U.S. 168 (1995)	8
3. <u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	4
4. <u>Terry v. United States</u> , 593 U.S. ____ (2021)	4, 8
5. <u>United States v. Easter</u> , 975 F.3d. 318 (2nd Cir. 2020)	6
6. <u>United States v. Jackson</u> , 984 F.3d. 197 (3rd Cir. 2020)	6
7. <u>United States v. Jones</u> , 299 F.3d. 103 (2nd Cir. 2002)	8
8. <u>United States v. Jones</u> , 962 F.3d. 1290 (11th Cir. 2020)	6
9. <u>United States v. Linton</u> , U.S. Dist Lexis 113450 (E.D.N.C. 2021)	7
10. <u>United States v. Maupin</u> , U.S. Appx. Lexis 27180 (4th Cir. 2019)	7
11. <u>United States v. Resto</u> , U.S. App. Lexis 34801 (3rd Cir. 2021)	7
12. <u>United States v. Smith</u> , 982 F.3d. 106 (2nd Cir. 2020)	7
13. <u>United States v. Sumler</u> , U.S. Dist. Lexis 246749 (D.D.C. 2021)	7
14. <u>United States v. Thomas</u> , 827 Fed. Appx. 63 (2nd Cir. 2020)	5
15. <u>United States v. Thomas</u> , U.S. Appx. Lexis 5761 (2nd Cir. 2022)	5

IN THE
SUPREME COURT OF THE
UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the United States court of appeals for the Second Circuit appears at Appendix A to the petition and is unpublished.

The Opinion of the United States district court for the Northern District of New York appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date of which the United States Court of Appeals for the Second Circuit decide my case was March 4, 2022.

No timely petition for rehearing or en banc was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

United States Constitution, Amendment V Due Process

First Step Act of 2018—Public Law 115-391, 132 Stat. 5194

STATEMENT OF THE CASE

On September 21, 2020, the United States District Court filed Petitioner's Motion for Reduction of Sentence under §3582(c) as amended by the First Step Act of 2018. Without seeking any response from the government, the district court immediately denied petitioner's motion in a Text Order on September 24, 2020, referring back to its previous order on September 10, 2019.

Petitioner timely sought review in the appellate court by filing a notice of appeal on October 1, 2020. Following the issuance of a briefing schedule in the appellate court, the Second Circuit court of appeals issued a summary order affirming the September 24, 2020 Order of the district court.

In its summary order, the appeals court panel acknowledged that the district court did not determine whether petitioner's RICO conviction was a covered offense pursuant to the First Step Act, §404(b).

Petitioner now seeks a GVR Order from this Court by filing a Petition for a Writ of Certiorari based on the violation of his rights under the Due Process of Law.

REASON FOR GRANTING THE WRIT

This Court should issue a GVR Order so that the lower court can determine whether it is an abuse of discretion when a court fails to follow the law by ignoring the initial step in determining whether a defendant is eligible for First Step Act relief in violation of Due Process of Law.

This Court has long established that Due Process gives a person the opportunity to be heard when litigating in a court of law. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976)(recognizing that a fundamental element of due process is the opportunity to be heard at a meaningful time and in a meaningful manner). Importantly, the broad concept of due process additionally requires that any action taken against a person be implemented in a fair manner. See United States v. Salerno, 481 U.S. 739, 746 (1987).

In this instance, petitioner's rights under the due process of law cannot be seen as allowing him meaningful review in a fair manner because the lower court failed to follow the established law as enacted by Congress.

Under the First Step Act, criminal defendant's convicted of drug offenses involving crack cocaine, but were not able to obtain the benefit of the Fair Sentencing Act of 2010 could seek relief of the more lenient penalties previously unavailable to them. See e.g., Dorsey v. United States, 567 U.S. 260, 273 (2012)("Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date"); see also, Terry v. United States, 593 U.S. ____ (2021)(holding that "[a] crack offender is eligible for a sentence reduction under the First Step Act only if convicted of a

crack cocaine that triggered a mandatory minimum sentence").

Accordingly, the First Step Act states in pertinent part that:

"(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."

Pub. Law No. 115-391, 132 Stat. 5194.

Considering the principles of statutory interpretation, the lower courts abused their discretion in failing to making the initial determination that petitioner's conviction was a "covered offense." See United States v. Thomas, U.S. App. Lexis 5761 *6 (2nd Cir. March 4, 2022)("In denying Thomas a further sentence reduction the district court found it unnecessary to decide whether Thomas's racketeering conviction was a 'covered offense' "); id *6-7 ("In affirming, this Court also did not decide 'whether Thomas was convicted of a 'covered offense'...[n]or did we decide whether the district court erred in concluding that Thomas had already 'received the benefits of the First Step Act' ")(quoting United States v. Thomas, 827 Fed. Appx. 63 (2nd Cir. 2020)).

Given the lower courts declined to make a determination as to whether petitioner was convicted of a "covered offense" its reasoning that it "need not conclusively decide the covered offense question" not only amounts to an abuse of discretion but more importantly violates petitioner's due process rights. Id., *9.

This is because petitioner had a fundamental constitutional right under the due process to have the issue of whether his offense was a covered offense under the First Step Act statute decided in this instance. Especially since, this is the initial step in the process

courts must take in determining whether to invoke its discretion in granting First Step Act relief. See United States v. Wirsing, 943 F.3d. 175, 181 (4th Cir. 2019)(recognizing that "First Step Act eligibility determination is a pure question of statutory interpretation").

It is clear Congress intended that the initial step in the process of considering whether a federal prisoner is eligible for First Step Act relief under §404 begins with the fact of whether he is convicted of a covered offense. Several courts which have been confronted with this question have agreed that prior to determining whether to invoke its discretion, "a district court must first determine that defendant committed a 'covered offense' " pursuant to the statute. United States v. Resto, U.S. Appx. Lexis 34801 *4 (3rd Cir. October 25, 2021)(citing United States v. Jackson, 964 F.3d. 197 (3rd Cir. 2020); Wirsing, supra; see also, United States v. Jones, 962 F.3d. 1290, 1298 (11th Cir. 2020); United States v. Walker, U.S. Dist. Lexis 150469 (E.D.Ky. August 20, 2020).

Once a court recognizes that the First Step Act is found to apply; Jones, supra at p. 1301 (holding a defendant is convicted of a covered offense if he was convicted of a crack cocaine offense that triggered the penalty in §841(b)(1)(A)(iii) or (B)(iii)), the district court must next consider the §3553(a) factors to the extent they are applicable. United States v. Easter, 975 F.3d. 318, 326 (2nd Cir. 2020).

There can be little doubt that petitioner was convicted of a covered offense even though he was not directly convicted of 21 U.S.C. §841(b)(1)(A) or (b)(1)(B). See Thomas, supra Lexis 5761

*8 (Thomas's "racketeering was based on activity—trafficking in 50 grams or more of crack—[] at the time of conviction"); In fact, other courts have found that a RICO offense is a covered offense for purposes of the First Step Act. See United States v. Linton, U.S. Dist. Lexis 113450 *2 (E.D.N.C. June 21, 2021) (finding RICO is a covered offense because one of the underlying acts involved trafficking in cocaine base, a statutory section the penalties for which were modified by the First Step Act) (citing United States v. Maupin, U.S. App. Lexis 27180 *9 (4th Cir. August 29, 2019); United States v. Sumler, U.S. Dist. Lexis 246749 *36 (D.D.C. December 28, 2021) (RICO conspiracy is a covered offense)).

Therefore, it was incumbent upon the lower courts in this case to determine whether petitioner was eligible for First Step Act relief, by instituting the first recognizable step i.e., whether he was convicted of a covered offense. After making that finding then the lower courts were required to consider the §3553(a) factors to determine if it should invoke its discretionary authority to reduce his sentence. See United States v. Smith, 982 F.3d. 106, 112-13 (2nd Cir. 2020) (rejecting plenary review but acknowledging the abuse of discretion standard) (citing cases).

Particularly, in light of the fact that, the Second Circuit has recognized a plenary resentencing is not required when entertaining a First Step Act motion, when a defendant files for First Step Act relief the fundamental principles of due process must be followed. Thus, any court that considers a prisoner's request for First Step Act relief must assure itself that he is eligible or it is contravening his procedural protections of due process and

essentially abusing its discretion. See United States v. Jones, 299 F.3d. 103, 112 (2nd Cir. 2002).

Clearly, this Court's decision in Terry v. United States, 593 U.S. ____ (2021) stands for the proposition that a federal defendant who has been convicted of a crack cocaine offense under subsections (b))(1)(A)(iii) or (B)(iii) is eligible for a sentence reduction in accordance with the First Step Act. Terry, supra (stating "[t]he First Step Act makes an offender eligible for a sentence reduction only if the offender previously received a sentence for a covered offense. §404(b), 132 Stat. 5222. The Act defines covered offense as a violation of the Federal criminal statute, the statutory penalties for which were modified by certain provisions in the First Step Act. §404(a)").

Significantly, even though the First Step Act left it to the district court's discretion whether to grant any reduction it determined appropriate, Congress's clear language requires the initial step in the process is premised on whether the defendant was convicted of a covered offense. This clear statutory requirement must be adhered to in order for any court to be in line with the expressed intent of the statutory purpose.

Thus, a court's failure to make this initial determination is error of a constitutional magnitude, which leaves this court to issue a GVR Order allowing the lower court to apply the law as recognized by Terry and intended in the First Step Act. Lawrence v. Chater, 516 U.S. 168, 167 (1995)(recognizing that where specific legal developments show reason which supports that a lower court did not fully consider when rendering its decision based on the law, and if given the opportunity for further consideration it may

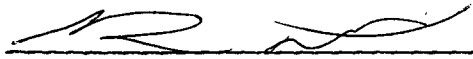
redetermine the outcome a GVR Order is potentially appropriate).

In this case, granting the petition for certiorari, vacating the lower court's judgment, and remanding the matter is certainly appropriate in light of the statutory implications shown herein and to avoid the continued due process violation spawned by the lower courts' decision.

In sum, the Second Circuit court of appeals has not given any clear direction to the district court's within its jurisdiction concerning the initial step to be taken when a federal prisoner seeks First Step Act relief based on Sections 404(a) & (b). See United States v. Wirsing, 943 F.3d. 175 (4th Cir. 2019).

CONCLUSION

This Court should grant the petition for a writ of certiorari in this case.



Mr. Gregory Thomas
Pro se Petitioner
Reg. No. 13366-052
F.C.I. Ray Brook
Post Office Box 900
Ray Brook, New York 12977