No. 22-_____

In the
Supreme Court of the United States

MICHAEL JEROME FILES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for 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

Section 404(b) of the First Step Act of 2018 gives district courts the authority to "impose a reduced sentence" for defendants convicted of "covered" crack-cocaine offenses. In *Concepcion v. United States*, this Court held that "[t]he only two limitations on district courts' discretion" to impose a reduced sentence "appear in § 404(c)" of that Act. 142 S. Ct. 2389, 2401 (2022). Congress did not "hide" any such limit "outside of § 404(c)." *Id.* at 2402.

When Petitioner sought relief under the First Step Act, he was serving concurrent, identical sentences for "covered" crack-cocaine offenses and related powder-cocaine offenses. Nothing in § 404(c) of the First Step Act makes Petitioner ineligible for a reduced sentence, and the District Court imposed a sentence of "time served" for the crack-cocaine offenses. Yet the Eleventh Circuit held that § 404(b) bars the District Court from imposing a reduced sentence for Petitioner's related powder-cocaine offenses. That squarely conflicts with the Seventh Circuit's holding that when a defendant has a covered offense, a court may grant relief on "non-covered offenses that are grouped with the covered offenses to produce the aggregate sentence." *United States v. Hudson*, 967 F.3d 605, 610 (7th Cir. 2020). The question presented is:

Does § 404 of the First Step Act authorize district courts to impose a reduced sentence for both crack-cocaine offenses and related offenses that are part of the same overall sentence package?

PARTIES TO THE PROCEEDING

Petitioner Michael Jerome Files was the defendant–appellant below.

Respondent United States of America was the plaintiff–appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from these proceedings:

- *United States of America v. Michael Jerome Files*, No. 21-12859, United States Court of Appeals for the Eleventh Circuit. Judgment entered March 24, 2023.
- *United States of America v. Michael Jerome Files*, No. 2:97-cr-99-WS-B-10, United States District Court for the Southern District of Alabama. Judgment on appeal entered August 5, 2021.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Jerome Files respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1a–31a) is reported at 63 F.4th 920. The unpublished order of the United States District Court for the Southern District of Alabama (Pet. App. 32a–45a) is available at 2021 WL 3463784.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on March 24, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222 (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 of-

> fense 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.

STATEMENT OF THE CASE

At age 22, Petitioner was convicted of being part of a drug conspiracy that allegedly began when he was 11 years old. And in 1999, he was sentenced to spend the rest of his life in prison for crack-cocaine and powder-cocaine offenses. Though his prison term was reduced to 360 months in 2017, every other co-defendant has already been released.

After Congress enacted the First Step Act to remedy sentencing disparities, the Eleventh Circuit held that Petitioner is eligible for relief under § 404 of that Act. *United States v. Files*, 848 F. App'x 412 (11th Cir. 2021) (per curiam). The District Court then reduced

Petitioner's sentence to "time served" for his crack-cocaine offenses. But the District Court held that § 404 did not permit relief for Petitioner's related powder-cocaine offenses. Pet. App. 42a. The Eleventh Circuit agreed. Pet. App. 23a. This petition concerns whether the District Court had authority to impose a reduced sentence for Petitioner's related powder-cocaine offenses.

A. Statutory Background

The First Step Act is Congress's response to unwarranted sentencing disparities that plague convictions from years back. When Petitioner was first sentenced in 1999, the statutory penalties for crack-cocaine offenses were unforgiving. The statutory penalties for crack-cocaine offenses were the same as those for offenses involving 100 times as much powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007). A statutory range of 10 years to life imprisonment applied if a crime involved "50 grams or more" of crack cocaine, but it took "5 kilograms or more" of powder cocaine to trigger the same statutory range. 21 U.S.C. § 841(b)(1)(A)(ii), (iii) (1994 ed. & Supp. IV). Similarly, a statutory range of 5 to 40 years' imprisonment applied if a crime involved "5 grams or more" of crack cocaine, but the same range required "500 grams or more" of powder cocaine. *Id.* § 841(b)(1)(B)(ii), (iii).

Worse yet, when Petitioner was sentenced, courts treated the Sentencing Guidelines—which then reflected the 100-to-1 disparity between crack-cocaine and powder-cocaine—as mandatory. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1 comment. n.10, at 106 (1997) ("1997 U.S.S.G."); *United States v. Doyle*, 857

F.3d 1115, 1119 (11th Cir. 2017) (noting "the mandatory guidelines regime"). And it was thought that a trial judge's drug-quantity findings could subject a defendant to a higher mandatory minimum. *See, e.g.*, *United States v. Perez*, 960 F.2d 1569, 1574 (11th Cir. 1992) (per curiam). Thus, juries did not always make drug-quantities findings. *See, e.g.*, 1 C.A. App. 153–55, 234–35.

If Petitioner were sentenced for the first time today, things would be different in at least three ways.

First, Congress has modified the statutory penalties for crack-cocaine offenses. For years, the Sentencing Commission condemned the 100-to-1 disparity between the penalties for crack- and powder-cocaine offenses. According to the Commission, the 100-to-1 ratio was unjustified for at least three reasons. One was that "research showed the relative harm between crack and powder cocaine [was] less severe than 100-to-1." *Dorsey v. United States*, 567 U.S. 260, 268 (2012). A second reason was that sentences embodying the 100-to-1 disparity "could not achieve" Congress's goals "of treating like offenders alike" and "of treating different offenders (*e.g.*, major drug traffickers and low-level dealers) differently." *Ibid.* A third reason was that "the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences." *Ibid.*

In response to these criticisms, Congress enacted § 2 of the Fair Sentencing Act of 2010, which modified the statutory penalties for crack-cocaine offenses. Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372. Now, an offense must involve at least 280 grams of crack cocaine—not 50 grams—to trigger the highest statutory sentencing range. 21 U.S.C. § 841(b)(1)(A)(iii)

(2018 ed. & Supp. III). And an offense requires at least 28 grams of crack cocaine—not 5 grams—to trigger the five-year mandatory minimum. *Id.* § 841(b)(1)(B)(iii). Meanwhile, the minimum drug quantities for powder cocaine stayed the same. *See id.* § 841(b)(1)(A)(ii), (B)(ii). So instead of a 100-to-1 disparity, there is an 18-to-1 disparity. *See Dorsey*, 567 U.S. at 269. The Guidelines reflect the new ratio. *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1 comment. n.8(D), at 159 (2021) ("2021 U.S.S.G.").

Second, courts have changed how they view the Sentencing Guidelines. This Court held in *United States v. Booker* that the Guidelines are not mandatory. 543 U.S. 220, 245 (2005) (Breyer, J., opinion of the Court). Instead, because of the Sixth Amendment, they are advisory only. *See id.* at 226–27 (Stevens, J., opinion of the Court). Thus, a sentencing court may vary from the Guidelines and impose a below-Guideline sentence.

Third, a judge's drug-quantity findings can no longer subject a defendant to a higher mandatory minimum or support a sentence above an otherwise-applicable statutory maximum. Instead, under *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and *Alleyne v. United States*, 570 U.S. 99, 116 (2013), the jury must make any such drug-quantity finding beyond a reasonable doubt.

But at first, none of these changes helped people like Petitioner. Courts held that the Fair Sentencing Act did not apply retroactively to defendants who were sentenced before Congress enacted that statute in 2010. *See, e.g.*, *United States v. Hippolyte*, 712 F.3d 535, 542 (11th Cir. 2013). *Booker*'s holding that it violates the Sixth Amendment to treat the Guidelines as

mandatory also did not apply retroactively. *See, e.g.*, *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005) (per curiam). Nor do the Guidelines (typically) let judges reduce existing sentences below the Guideline range. *See* 2021 U.S.S.G. § 1B1.10(b)(2)(A), comment. n.3, at 41. And though the rule in *Apprendi* and *Alleyne* rests on the Sixth Amendment, courts held that rule did "not apply retroactively on collateral review." *Jeanty v. Warden*, 757 F.3d 1283, 1285 (11th Cir. 2014) (per curiam). The upshot is that, before 2018, defendants like Petitioner remained subject to excessive sentences.

But then Congress enacted the First Step Act "to rectify disproportionate and racially disparate sentencing penalties." *United States v. White*, 984 F.3d 76, 81 (D.C. Cir. 2020). Section 404 of the First Step Act has three subsections.

Section 404(a) is a definitional section. It defines "covered offense" to include "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 … of the Fair Sentencing Act of 2010, that was committed before August 3, 2010." First Step Act § 404(a) (citation omitted). That is, the term "covered offense" includes crack-cocaine offenses for which 21 U.S.C. § 841(b)(1)(A)(iii) or (B)(iii) (1994 ed. & Supp. IV) provided the penalty. *See Terry v. United States*, 141 S. Ct. 1858, 1862 (2021).

Next, § 404(b) provides that "[a] court that imposed a sentence for a covered offense may … impose a reduced sentence as if [section 2] of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act § 404(b) (citation omitted). A district court may do so "on motion of the defendant, the Director of the Bureau of

Prisons, [or] the attorney for the Government," as well as on the court's own motion. *Ibid.*

Section 404(c) then creates two limits on the relief authorized by § 404(b). One is that no court may "entertain a motion" under § 404 by a defendant whose "sentence was previously imposed or previously reduced in accordance with the amendments made by section 2 … of the Fair Sentencing Act." First Step Act § 404(c). The other limit is that if a motion under § 404 "was … denied after a complete review on the merits," a court cannot entertain a second motion. *Ibid.* Finally, § 404(c) clarifies that relief is discretionary, not mandatory. *Ibid.* ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

B. Procedural History

1. Petitioner was convicted of crack-cocaine offenses in 1997.

In 1997, Petitioner was indicted and arrested for drug offenses. He was just 22 years old. Besides Petitioner, the Superseding Indictment named 36 co-defendants. 1 C.A. App. 66–67. According to that indictment, the defendants were in a Uniontown, Alabama, conspiracy that began when Petitioner was only 11 years old. *See* 1 C.A. App. 67.

Six defendants went to trial in 1997. At trial, a joint-defense agreement apparently broke down, and counsel for a co-defendant appeared to blame Petitioner in front of the jury. *See* 1 C.A. App. 202; *see also* 1 C.A. App. 243–45, 248–49. After closing statements, the District Court instructed the jury that the government did not have to prove the "actual amount" of the

controlled substances alleged in the Superseding Indictment. 1 C.A. App. 235. Rather, the District Court instructed, the government needed to prove only "a measurable amount." *Ibid.*

After deliberations, the jury convicted Petitioner of Counts 1–3, 9, 11–13, 24–30, 32–33, 65, and 73 of the Superseding Indictment. *See* 1 C.A. App. 153–55. The Superseding Indictment had alleged that Counts 2, 9, 12–13, 25–30, and 33 involved crack cocaine (or "cocaine base"). 1 C.A. App. 70, 75, 77–78, 88–93. The Superseding Indictment had also alleged that Counts 1, 11, 32, and 65 involved powder cocaine. 1 C.A. App. 68, 77, 92, 124. And it had alleged that Counts 3, 24, and 73 involved marijuana. 1 C.A. App. 71, 87, 131.

2. The District Court originally sentenced Petitioner to life imprisonment.

After trial, a probation officer prepared a Presentence Investigation Report ("PSI"). That PSI calculated that Petitioner was subject to a life sentence under the Sentencing Guidelines, which were then thought to be mandatory.

The PSI calculated Petitioner's "base offense level" as a 38 based on his alleged involvement with "more than 1.5 kilograms of cocaine base." D.C. Dkt. No. 2395 at 21–22, ¶ 53. In doing so, the PSI stated that Petitioner "was involved with substantially more than 1.5 kilograms of cocaine base, 50 kilograms of cocaine, and 50 kilograms of marijuana." *Ibid.* Even so, the PSI did not calculate a base offense level using those other drugs; it relied solely on the amount of crack-cocaine. *See ibid.* The PSI then added two levels for possessing a firearm, three levels for supposedly being a manager or supervisor of the conspiracy, and two levels for ob-

struction of justice. *Id.* at 22, ¶¶ 54, 56–57. This resulted in an adjusted offense level of 45, which was reduced to a total offense level of 43. *Id.* at 22–23, ¶¶ 58, 60, 62.

Petitioner objected to the PSI, arguing that "[e]vidence from the trial … did not conclusively establish that the alleged activities involved the [drug] amounts stated" in the PSI. 1 C.A. App. 146. The District Court, however, said it was "satisfied that its own record does support … all of the findings of the Presentence Investigation Report, and the Court would deny and overrule all of the objections." 1 C.A. App. 212. Thus, the District Court sustained the findings in the PSI and calculated a total offense level of 43. 1 C.A. App. 217. The Court also calculated Petitioner's criminal history category as a "II." 1 C.A. App. 211, 217.

Based on that offense level and criminal-history category, the 1997 Sentencing Guidelines seemed to require a life sentence. *See* 1997 U.S.S.G. § 5A, at 304. The District Court therefore ordered Petitioner to serve life in prison on Counts 1, 2, 12, 25–30, 33, and 65. D.C. Dkt. No. 2395 at 36. Those counts included crack-cocaine offenses (Counts 2, 12, 25–30, and 33) subject to a maximum life term under 21 U.S.C. § 841(b)(1)(A)(iii) (1994 ed. & Supp. IV).[1] The District Court also ordered Petitioner to serve 40 years' imprisonment on Counts 9, 11, and 13, all of which were subject to a 40-year maximum under 21 U.S.C. § 841(b)(1)(B) (1994 ed. & Supp. IV). D.C. Dkt. No. 2395 at 36. That included two crack-cocaine offenses (Counts 9 and 13) subject to § 841(b)(1)(B)(iii). On the

[1] Under 21 U.S.C. § 859(a) (1994 ed. & Supp. IV), the maximum punishment for Count 25 was "twice the maximum punishment authorized by" § 841(b)(1)(A)(iii).

four remaining counts, the District Court imposed either a 20-year prison term (Counts 3 and 32) or a 5-year prison term (Counts 24 and 73). D.C. Dkt. No. 2395 at 36. "[A]ll terms [were] to run CONCURRENTLY." *Ibid.* In short, at the age of 24, Petitioner was sentenced to die in prison.

3. The District Court denied a sentence reduction in 2012.

In 2012, Petitioner moved to reduce his sentence under Amendment 750 to the Sentencing Guidelines, but the District Court denied that request because Petitioner's Guideline range had not changed. 1 C.A. App. 181. In doing so, the District Court calculated that Petitioner was responsible for the equivalent of 15,406.5 kilograms of marijuana. *Ibid.*

4. The District Court granted a partial sentence reduction in 2017.

In 2017, Petitioner moved to reduce his sentence under Amendment 782 to the Sentencing Guidelines. 2 C.A. App. 21. Based on that motion, the District Court recalculated Petitioner's Guideline range, which had been reduced from "life" to "360 months to life." 2 C.A. App. 74. So the District Court ordered that the "previously imposed sentence of imprisonment … of LIFE" was "reduced to 360 months." 2 C.A. App. 81 (emphasis omitted). That "reduced term of imprisonment" applied to all counts for which Petitioner had originally been sentenced to 40 years or more in prison —that is, to Counts 1, 2, 9, 11–13, 25–30, 33, and 65. *Ibid.* The reduction in no way distinguished crack-cocaine offenses (Counts 2, 9, 12–13, 25–30, and 33) from powder-cocaine offenses (Counts 1, 11, and 65). *See ibid.* The United States did not oppose that relief. *See* 2 C.A. App. 78.

5. The Eleventh Circuit held that Petitioner is eligible for relief under the First Step Act.

After Congress enacted the First Step Act, Petitioner sought a sentence reduction under that Act. The District Court initially held that Petition was ineligible for any relief whatsoever. 2 C.A. App. 87, 113–14. On appeal, however, the United States "conceded that [Petitioner] is eligible for a sentence reduction under § 404 of the First Step Act." *Files*, 848 F. App'x at 412. The Eleventh Circuit accepted that confession of error, "vacate[d]" the orders denying a sentence reduction, and "remand[ed] for further proceedings" so that the District Court could "decide whether to exercise its discretion under § 404 to award [Petitioner] a sentence reduction." *Ibid.*

6. The District Court reduced Petitioner's sentence to "time served" for crack-cocaine offenses but held that it lacked authority to reduce his sentence for related offenses.

On remand, the District Court partially granted and partially denied Petitioner's motion. Pet. App. 45a. After reviewing the evidence, the District Court exercised its discretion and reduced Petitioner's sentence to "time served" for crack-cocaine offenses. *Ibid.* But the District Court held that it lacked statutory authority to alter Petitioner's sentence for powder-cocaine offenses. Pet. App. 42a.

The District Court explained that Petitioner has served his time for Counts 3, 24, 32, and 73 (which include his marijuana offenses). Pet. App. 33a. So all that remained were his concurrent 30-year prison terms for eleven crack-cocaine offenses (Counts 2, 9,

12–13, 25–30, and 33) and three powder-cocaine offenses (Counts 1, 11, and 65). Pet. App. 33a–34a.

For the eleven crack-cocaine offenses, the District Court found that Petitioner "laid out a compelling case for reduction of his concurrent sentences." Pet. App. 44a. It explained that many facts supported Petitioner's request for relief, including:

- Petitioner's "youthful age (late teens and early 20s) at the time of the offense conduct";
- "[T]he fact that every single one of his co-conspirators, including those classified as upper-level managers, has already been released from prison, most of them at least several years ago";
- Petitioner's "laudable record of rehabilitation and personal growth in prison";
- Petitioner's "stated intention to give back to his community via education and outreach programs"; and
- "[T]he 24 years that [Petitioner] has already served in federal prison for the subject convictions."[2]

Pet. App. 44a.

The District Court then found that "reducing [Petitioner's] sentences" on the eleven crack-cocaine offenses to "time served" was "an appropriate exercise of its discretion." Pet. App. 45a. In doing so, it considered the sentencing factors in 18 U.S.C. § 3553(a), "the probation office's submissions," Petitioner's "post-sentence rehabilitation," "the need for his sen-

[2] Petitioner has now spent 26 years in custody. He is currently in a residential reentry program.

tence to reflect the seriousness of his offense and provide just punishment," and "all other relevant facts and circumstances." Pet. App. 45a. The District Court thus exercised its discretion and, under § 404 of the First Step Act, imposed a sentence of "time served" for the crack-cocaine offenses. *Ibid*.

The District Court, however, did not exercise its discretion one way or the other when it came to Petitioner's powder-cocaine offenses. Instead, the District Court held that it lacked authority under the First Step Act to impose a reduced sentence for those offenses. Pet. App. 42a.

Petitioner appealed the partial denial of relief. 2 C.A. App. 232. The United States did not cross-appeal the District Court's decision to impose a sentence of "time served" for the crack-cocaine offenses.

7. The Eleventh Circuit held that the First Step Act does not authorize relief for any non-covered offense.

The Eleventh Circuit affirmed the District Court's partial denial of relief. The panel acknowledged that this case "tees up an interesting question of statutory interpretation." Pet. App. 6a. But the panel did not resolve that question by analyzing the text of the First Step Act. Instead, the panel held it was bound to reject Petitioner's argument, "whatever its merits," due to an earlier opinion in *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020). Pet. App. 6a, 23a.

Denson involved a defendant (Tony Denson) who was sentenced in 2009, receiving nearly 22 years for a crack-cocaine offense and a concurrent 10 years for a firearm offense. 963 F.3d at 1083. In 2019, Denson sought relief under the First Step Act, and the district court reduced his sentence to around 15 years. *See id.*

at 1084. Denson still appealed. "The lone 'issue on appeal'" in *Denson* "was 'whether a district court is required to first hold a hearing at which the defendant is present' before deciding a sentence-reduction motion." *United States v. Edwards*, 997 F.3d 1115, 1120 (11th Cir. 2021) (quoting *Denson*, 963 F.3d at 1082) (internal brackets omitted); *accord Denson*, 963 F.3d at 1086 ("The *only* issue is whether Denson had a legal right to be present at a hearing before the district court ruled on his motion." (emphasis added)). Thus, according to the United States' brief in another case, *Denson* "did not squarely present the question" of whether a court can grant relief for a non-covered offense. Second Supp. Br. of Appellee 11 n.3, *United States v. Spencer*, 998 F.3d 843 (8th Cir. 2021) (No. 19-2685).

In determining that a defendant has no right to an in-person hearing in a First Step Act proceeding, the Eleventh Circuit nevertheless made this statement in *Denson*:

> [A] sentence reduction based on the First Step Act is a limited remedy, and the district court is not called upon to answer questions it did not consider at the original sentencing. Rather, in ruling on a defendant's First Step Act motion, the district court (1) is permitted to reduce a defendant's sentence only on a "covered offense" and only "as if" sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense, and (2) is not free to change the defendant's original guidelines calculations that are unaffected by sections 2 and 3, to reduce the defendant's sentence on the covered offense based on changes in the law beyond those mandated by sections 2 and 3, or to change the

> defendant's sentences on counts that are not "covered offenses."

963 F.3d at 1089 (citations omitted).

In the opinion below, the Eleventh Circuit panel held that it was bound by *Denson*'s statement about the availability of relief on non-covered offenses. Pet. App. 23a. The panel recognized that this Court's opinion in *Concepcion* "abrogated aspects of *Denson*." Pet. App. 21a; *see Concepcion*, 142 S. Ct. at 2398 n.2, 2404. But according to the Eleventh Circuit, "*Concepcion* didn't address a sentencing court's authority to deal with non-covered offenses one way or the other—presumably because the defendant there didn't have one." Pet. App. 22a. Thus, the panel concluded *Concepcion* did not abrogate *Denson*'s statements about non-covered offenses. *Ibid.* The result is that Petitioner did not receive any meaningful relief under the First Step Act.

Judge Newsom also wrote a concurring opinion in which Judge Tjoflat joined. Most of that concurrence argued that appellate courts should issue fewer "alternative holdings," and it briefly opined—without explanation—that *Denson* was right about the availability of relief for related covered and non-covered offenses. Pet. App. 23a–31a. But Judge Newsom also explained that the statutory-interpretation issue presented here "isn't just interesting, it's important." Pet. App. 24a. "Thousands of federal prisoners were eligible for sentence reductions under the First Step Act, and so determining the extent of courts' authority under the Act has practical, real-world significance." *Ibid.* Judge Newsom also noted that this important statutory-interpretation issue "is squarely presented in this case," having been "thoroughly briefed" and "fully vetted at

oral argument." *Ibid*. Yet the Eleventh Circuit did not base its decision on the text of the First Step Act.

REASONS FOR GRANTING THE PETITION

This petition presents an acknowledged conflict on an important issue affecting thousands of individuals. The decision below conflicts with the text of the First Step Act, this Court's decision in *Concepcion*, the holistic nature of federal sentencing, and the United States' own statements in other cases. Only this Court can resolve the conflict.

A. Lower courts are split about whether the First Step Act authorizes district courts to impose a reduced sentence for offenses that are part of the same sentence package.

There is "a circuit split" on the question presented. *United States v. Gladney*, 44 F.4th 1253, 1262 n.5 (10th Cir. 2022). The Seventh Circuit has squarely held that if a defendant has a "covered" crack-cocaine offense, then a district court may impose a reduced sentence for interconnected non-covered offenses so that the defendant receives a reduced aggregate sentence. Statements by the Fourth and Eighth Circuits—as well as holdings by numerous district courts—support that conclusion. On the other hand, the Tenth and Eleventh Circuits hold that the First Step Act does not permit any relief on non-covered offenses. This Court's review is needed to resolve the split.

The leading decision is the Seventh Circuit's opinion in *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020). There, the Seventh Circuit explained that "a defendant's conviction for a covered offense is a

threshold requirement of *eligibility* for resentencing on an aggregate penalty." *Id.* at 611. "Once past that threshold, a court may consider a defendant's request for a reduced sentence, including for non-covered offenses that are grouped with the covered offenses to produce the aggregate sentence." *Id.* Thus, the Seventh Circuit held that a defendant who was serving concurrent 40-year sentences for a covered offense and a non-covered offense was eligible for relief on his non-covered offense. *Id.* at 607–08, 611; *see also United States v. Hible*, 13 F.4th 647, 652 (7th Cir. 2021) ("*United States v. Hudson* holds that, when a defendant has been sentenced for two crimes, one covered by the First Step Act and the other not, a district judge has discretion to revise the entire sentencing package." (citation omitted)).

Similarly, the Eight Circuit wrote that § 404(b) did "not limit[] … relief to defendants who were sentenced only for a covered offense." *United States v. Spencer*, 998 F.3d 843, 845 n.1 (8th Cir. 2021). And the Fourth Circuit explained that it saw "nothing in the text of the [First Step] Act requiring that a defendant be convicted of a single violation of a federal criminal statute whose penalties were modified by … the Fair Sentencing Act." *United States v. Gravatt*, 953 F.3d 258, 264 (4th Cir. 2020). "If Congress intended for the [First Step] Act not to apply if a covered offense was combined with an offense that is not covered, it could have included that language. But it did not." *Ibid.* Though the Fourth Circuit wrote in the context of a single, multi-drug conspiracy offense, *id.* at 261, its logic applies the same when the government charges a defendant with a crack-cocaine offense and a separate powder-cocaine offense. *See also United States v. Chambers*, No. 21-1331, 2022 WL 612805, at *7 (6th

Cir. Mar. 2, 2022) (Clay, J., dissenting) (observing that *Spencer*, *Gravatt*, and other circuit decisions "indicate[] a willingness to follow" *Hudson*), *cert. denied*, 143 S. Ct. 493 (2022).[3]

Countless district courts also agree that when a defendant is sentenced for related covered and non-covered offenses, the court may reduce the defendant's time in prison for the non-covered offenses. *See, e.g.*, *United States v. Holmes*, No. 02-cr-24, 2021 WL 1518336, at *5 n.4 (D.D.C. Apr. 16, 2021); *United States v. Najar*, No. 95-cr-538, 2020 WL 6781809, at *7 (D.N.M. Nov. 18, 2020); *United States v. German*, No. 04-cr-50134, 2020 WL 6092348, at *3 (W.D. La. Oct. 15, 2020); *United States v. Luna*, 436 F. Supp. 3d 478, 489 (D. Conn. 2020); *United States v. Ervin*, 423 F. Supp. 3d 127, 136–37 (W.D. Pa. 2019); *see also, e.g.*, *United States v. Black*, 388 F. Supp. 3d 682, 692 (E.D. Va. 2019) (reducing term of imprisonment on non-covered offense); *United States v. Hughes*, No. 08-cr-120, 2019 WL 4621973, at *7 (W.D. Mich. Sept. 24, 2019) (same); *United States v. Anderson*, No. 04-cr-353, 2019 WL 4440088, at *3–4 & n.2 (D.S.C. Sept. 17, 2019) (same). In fact, another member of the *same* alleged Uniontown, Alabama, conspiracy for which Petitioner was convicted—James Rhone—received relief under the First Step Act for both crack-cocaine *and* powder-cocaine offenses. *United States v. Rhone*, No. 97-cr-

[3] In fact, multiple circuits agree that multi-drug conspiracy offenses—that is, offenses involving both crack cocaine and powder cocaine—are "covered offenses" for which relief is available under § 404. *See, e.g.*, *United States v. Reed*, 7 F.4th 105, 110 (2d Cir. 2021) (collecting decisions). But the decision below would deny relief if, decades ago, a prosecutor chose to charge the same conduct in multiple counts of the indictment instead of in a single count.

119, 2019 WL 13079212, at *1, *4–5 (S.D. Ala. Dec. 11, 2019).

Yet the Eleventh Circuit's opinion denies that relief for Petitioner, holding that "a district court is permitted to reduce a defendant's sentence under the First Step Act only on a 'covered offense' and is not free to change the defendant's sentences on counts that are not 'covered offenses.'" Pet. App. 23a (internal quotation marks, alterations, and citations omitted). The Tenth Circuit likewise holds that the First Step Act does not authorize relief for non-covered offenses. *United States v. Mannie*, 971 F.3d 1145, 1153 (10th Cir. 2020). This Court should resolve the split.

B. The question presented is important.

Whether a defendant can receive meaningful relief under the First Step Act is "important." Pet. App. 24a (Newsom, J., joined by Tjoflat, J., concurring). The question presented affects thousands of individuals, and "determining the extent of courts' authority under the Act has practical, real-world significance." *Ibid.*

This case is a perfect example. When Petitioner sought relief under § 404 of the First Step Act, he was serving concurrent, identical, 30-year prison terms for related crack-cocaine and powder-cocaine offenses. He was eligible for relief under § 404 because he was convicted and sentenced for at least one "covered" crack-cocaine offense. *Files*, 848 F. App'x at 412. And citing Petitioner's "laudable record of rehabilitation and personal growth" during his decades in prison—plus the fact that "every single one of his co-conspirators, including those classified as upper-level managers, has already been released from prison"—the District Court imposed a reduced sentence of "time served" for

Petitioner's crack-cocaine offenses. Pet. App. 44a–45a.[4]

Yet the courts below held that § 404 does not authorize any relief on any non-covered offense—no matter how interconnected that offense may be to a covered offense. Pet. App. 23a, 42a. To be clear: The District Court did not partially deny relief because of anything about Petitioner's powder-cocaine offenses in particular; the District Court did not exercise its discretion one way or the other when it came to those offenses. *See* Pet. App. 32a–45a. Instead, the lower courts concluded that § 404 permits relief for certain crack-cocaine offenses only. As a result, Petitioner did not receive any meaningful relief.

C. The decision below is wrong.

Finally, the decision below is wrong. The United States agrees that § 404 of the First Step Act permits courts to grant relief on at least some non-covered offenses. That is correct. The First Step Act's text, this Court's decision in *Concepcion*, and the nature of federal sentencing all show that district courts have authority to grant meaningful relief on interconnected offenses.

1. The United States agrees that the First Step Act permits relief on some non-covered offenses.

The United States does not dispute that the First Step Act permits district courts to grant relief on some

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[4] Even the co-defendant that the United States described as the "kingpin" of the Uniontown, Alabama, conspiracy was apparently released in 2016. *See* 1 C.A. App. 189; *Find an inmate*, FED. BUREAU OF PRISONS (last visited June 22, 2021), www.bop.gov/inmateloc (BOP Register No. 19557-112)

powder-cocaine offenses. To the contrary, in its brief in the Eleventh Circuit, the United States contended that, in at least some cases, § 404(b) "authorize[s] a district court to reduce a defendant's concurrent sentence on a non-covered offense." Gov't C.A. Br. 28. The United States also recognized "that a court granting a Section 404 reduction is not limited solely to reducing the specific 'sentence for a covered offense' to the extent that the offender's overall sentence embodies an intertwined sentencing package." *Id.* at 25. And the United States agreed that unless precedent dictated otherwise, the Eleventh Circuit "should conclude that a sentencing court may reduce a defendant's total sentence in appropriate cases." *Id.* at 28; *see also id.* at 12 (stating that "a court *may* impose a reduced aggregate sentence in certain circumstances"); *id.* at 23–24.

Likewise, the United States argued to this Court that under § 404, a district court "is not limited to reducing 'the sentence' for [a] covered offense, but may also correspondingly reduce the overall sentence to the extent it embodies an intertwined sentencing package." Br. in Opp. 16, *Concepcion v. United States*, 142 S. Ct. 2389 (2022) (No. 20-1650); *see also* U.S. Br. 32, *Concepcion v. United States*, 142 S. Ct. 2389 (2022) (No. 20-1650).

And the United States took a similar view in the Eighth Circuit, writing that "§ 404(b) allows the district court to impose the total (reduced) sentence it would have imposed had § 2 of the Fair Sentencing Act been in effect when the covered offense was committed." Second Supp. Br. of Appellee 3–4, *United States v. Spencer*, 998 F.3d 843 (8th Cir. 2021) (No. 19-2685). "This is true," the United States continued, "even when the defendant's aggregate sentence in-

cludes a concurrent sentence for a non-covered offense, provided that the district court reduces any sentence for a non-covered offense only 'as if' § 2 of the Fair Sentencing Act was 'in effect.'" *Id.* at 4; *see also* Jonathan D. Colan, *A Brief History of Section 404's Crack Sentencing Reform*, 69 DOJ J. FED. L. & PRAC. 57, 87 (2021) (observing that the United States "has taken the position that a district court may reduce concurrent sentences for non-covered offenses if the sentences for those offenses were effectively determined by the sentence for the covered offense").

2. The decision below conflicts with the text of the First Step Act.

Section 404's text shows that the First Step Act gives district courts the authority to impose reduced sentences for non-covered offenses that are related to covered offenses. The decision below conflicts with that plain text.

Start with the structure of § 404 as a whole. Section 404(a) defines "covered offense." Section 404(b) then provides that "[a] court that imposed a sentence for a covered offense may … impose a reduced sentence as if [section 2] of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act § 404(b) (citation omitted). And § 404(c) then creates two—but only two—limits on the relief authorized by § 404(b). One restricts § 404 to those who did not receive relief under § 2 of the Fair Sentencing Act, and the other prevents a defendant from obtaining relief under § 404 if a prior motion under that section "was … denied after a complete review on the merits." Finally, § 404(c) clarifies that relief is discretionary, not mandatory. As a

whole, then, § 404 shows that a conviction for a "covered offense" is simply a threshold question of eligibility. If a defendant is eligible, then Congress gives district courts broad discretion to grant relief, trusting the courts to deny relief when it is not appropriate. There are a few limits on that discretion, but none bar courts from granting relief on non-covered offenses.

The text of § 404(b) by itself confirms this reading. Section 404(b) grants courts the authority to "impose a reduced sentence." "That language," the Seventh Circuit held, "does not bar a court from reducing a non-covered offense." *Hudson*, 967 F.3d at 610. Instead, it shows that Congress created a scheme in which it is easy to be eligible for meaningful relief. Congress then left it up to district courts to decide, case by case, what relief is warranted. To hold that a court may grant relief on crack-cocaine offenses only would impermissibly "impose an extra-textual limitation on the [First Step] Act's applicability." *Ibid*.

If Congress had intended to say that courts could only "impose a reduced sentence *for a covered offense*," then Congress would have done so. *See Luna*, 436 F. Supp. 3d at 487. It did not, and courts "are not free to rewrite the statutory text." *McNeil v. United States*, 508 U.S. 106, 111 (1993); *accord, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms."); *Ali v. Fed. Bureau of Prison*s, 552 U.S. 214, 228 (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted …." (footnote omitted)). After all, Congress created other limits on the scope of relief, *see* First Step Act § 404(c), and it knew how to

specify when a sentence is imposed "for a covered offense," *id.* § 404(b). That omission is significant, because courts typically presume that Congress "acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015).

In addition, § 404(b) says that a court may "impose a reduced sentence." Elsewhere in § 404(b), Congress used the word "imposed" to refer to a defendant's original sentence. When the District Court first "imposed" a sentence for Petitioner's offenses, it could consider the sentences imposed on each count and craft an overall sentencing package. *See Dean v. United States*, 581 U.S. 62, 67–69 (2017). The District Court should have the same authority when it "impose[s]" a reduced sentence. After all, "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). Finally, § 404(b) is titled "Defendants Previously Sentenced," and it allows both the Director of the Bureau of Prisons and the court itself to move for a reduced sentence. First Step Act § 404(b) (capitalization altered). That underscores that § 404(b) applies to individual offenders—not just individual offenses—and is designed to afford meaningful, aggregate relief.

3. The decision below conflicts with this Court's emphasis in Conception *that courts have broad authority to impose reduced sentences under the First Step Act.*

This Court's recent decision in *Concepcion* reflects that district courts have broad authority under § 404. This Court made clear that Congress did not hide any

limits on relief outside of § 404(c). Yet the decision below denied relief based on a limit that appears nowhere in the text.

In *Concepcion*, the question presented was "whether a district court adjudicating a motion under the First Step Act may consider other intervening changes of law … or changes of fact." 142 S. Ct. at 2396. Citing the Eleventh Circuit's opinion in *Denson*, this Court observed that some courts had said that trial judges could not consider intervening changes under § 404. *Id.* at 2398 n.2 (citing *Denson*, 963 F.3d at 1089). But this Court disagreed, abrogating *Denson* and holding that courts may consider intervening legal and factual developments. *Id.* at 2396. This Court explained its reasoning in two steps.

First, this Court stressed that district courts have broad discretion in sentencing. *See, e.g.*, *id.* at 2398 ("'From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.'" (citation omitted)). Such discretion "also characterizes sentencing modification hearings"—not just initial sentencings. *Id.* at 2399. That traditional discretion can, of course, be limited in certain ways. *See, e.g.*, *id.* at 2400–01. But "only Congress and the Constitution limit the historic scope of district courts' discretion." *Id.* at 2401 n.4.

Second, this Court explained that the First Step Act's "very purpose is to reopen final judgments," *id.* at 2398 n.3, and that the Act "simply did not contravene th[e] well-established sentencing practice" of broad discretion, *id.* at 2401. To the contrary: "Nothing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion."

Ibid. There are "only two limitations" on district courts' discretion in § 404 proceedings, and both are in § 404(c). *Ibid.* Congress did not "hide" any such limits outside of § 404(c). *Id.* at 2402. So, for example, the "as if" clause in § 404(b) "simply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act." *Ibid.* That "as if" clause does not restrict relief. *See ibid.*

The view that § 404 only permits relief for covered offenses contradicts this Court's reasoning in *Concepcion*. It was critical to this Court's analysis that "[t]he only two limitations on district courts' discretion appear in § 404(c)." *Id.* at 2401; *see also id.* at 2402 ("Nor did Congress hide any limitations on district courts' discretion outside of § 404(c). Section 404(b) does not erect any additional such limitations."). Section 404(c) says nothing about non-covered offenses, and district courts have broad discretion to craft an overall sentencing package. *See Dean*, 581 U.S. at 67–69. Yet the decision below limits district courts from exercising that traditional discretion for non-covered offenses that are closely related to covered offenses. In short, then, *Concepcion* confirms that the decision below is erroneous.

4. The decision below conflicts with how federal sentencing works.

Lastly, the nature of federal drug sentencing confirms that—and explains why—Congress gave courts the authority to reduce a defendant's time in prison for related crack-cocaine and powder-cocaine offenses. The decision below, by contrast, conflicts with how federal sentencing works.

Especially in the era of the Sentencing Guidelines, it is common to think of sentences as a "package." "The

notion is that, especially in the guidelines era, sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence—the 'sentence package'—that reflects the guidelines and the relevant § 3553(a) factors." *United States v. Fowler*, 749 F.3d 1010, 1015 (11th Cir. 2014); *see Pepper v. United States*, 562 U.S. 476, 507 (2011) ("'A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent.'" (citation omitted)).

The Guidelines themselves "provide[] rules for determining a single offense level that encompasses all the counts of which the defendant is convicted." 2021 U.S.S.G. § 3D, intro. comment., at 364. So when, for example, a defendant is convicted of multiple related counts, the Guidelines require the sentencing court to create "Groups of Closely Related Counts" and to determine a "combined offense level applicable to all Groups taken together." *Id.* § 3D1.1(a), at 365. This means that drug-related offenses are grouped together, even if they involve different drugs. *See id.* § 3D1.2, comment. n.6, at 370. Similarly, the Guidelines include rules for combining quantities of different drugs to determine a single offense level based on aggregate drug quantities. *See id.* § 2D1.1, comment. n.8, at 157–61. The sentencing court then imposes a single, "total punishment" to run "concurrently" on all counts (except as otherwise required by law). 2021 U.S.S.G. § 5G1.2(b)–(c) & comment. n.1, at 450. This process matters even though the Guidelines are not mandatory. As this Court has recognized, the Guidelines are "the starting point" and "lodestar" for most federal sentences. *Molina-Martinez v. United States*, 578 U.S. 189, 200 (2016). "In the usual case, then, …

the selected Guidelines range will affect the sentence." *Ibid.*

This "sentence package" concept explains Petitioner's sentence. The PSI calculated that Petitioner's "base offense level" was 38, given the amount of crack cocaine listed in the PSI. D.C. Dkt. No. 2395 at 21–22, ¶ 53; *see* 1997 U.S.S.G. § 2D1.1(c)(1), at 95. After adjustments, Petitioner's total offense level was 43. D.C. Dkt. No. 2395 at 23, ¶ 62. Because his criminal history category was "II," *id.* at 40, his Guideline sentence was "life," 1997 U.S.S.G. § 5A, at 304. The District Court then imposed the statutory maximum sentence on all counts—including life prison terms for powder-cocaine and marijuana offenses. *See* D.C. Dkt. No. 2395 at 36; *see also id.* at 27, ¶ 89. Even when Petitioner received a sentence reduction in 2017, the District Court grouped all of his offenses together and aggregated the drug quantities. 2 C.A. App. 74. The calculation yielded a single Guideline range: "360 months to life." *Ibid.* The District Court then imposed a 360-month sentence on all counts that were not already capped at a 20-year or 5-year statutory maximum. *See* 2 C.A. App. 81.

"Statutes should be interpreted 'as a symmetrical and coherent regulatory scheme.'" *Mellouli v. Lynch*, 575 U.S. 798, 809 (2015) (citation omitted). The sentence-package doctrine is part of the overall sentencing scheme, and it helps explain that the authority to "impose a reduced sentence" is not limited to sentences for covered offenses. If a defendant received an inflated sentence for a crack-cocaine offense—such as a sentence reflecting a 100-to-1 disparity between crack cocaine and powder cocaine—that would likely have also inflated the punishment for non-covered offenses. The Guidelines generally instruct a sentencing

court to impose one "total punishment" on all drug offenses, 2021 U.S.S.G. § 5G1.2 comment. n.1, at 450. Granting meaningful relief to crack-cocaine offenders thus requires the authority to reduce interconnected drug sentences. Yet the decision below prevents that kind of relief.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

In the
United States Court of Appeals
for the Eleventh Circuit

No. 21-12859

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL JEROME FILES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 2:97-cr-00099-WS-B-10

Before NEWSOM, LUCK, and TJOFLAT, Circuit Judges.*

NEWSOM, Circuit Judge:

The First Step Act of 2018 allows federal courts to reduce certain drug-related criminal sentences. In particular, § 404(b) of the Act permits "[a] court that imposed a sentence for a covered offense" to "impose a

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* Judge Luck joins the opinion of the Court except for Section II.A.2.

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." This case presents the following question: For what offenses may a court "impose a reduced sentence" under § 404(b)—only "covered offenses," all offenses, or some unspecified middle-ground subset of offenses?

Before we can answer that question, though, we have to decide whether this Court has *already* answered it in a way that binds us. In *United States v. Denson*, a panel of this Court said that a district court "is permitted to reduce a defendant's sentence" under § 404(b) "only on a 'covered offense'" and "is not free . . . to change the defendant's sentences on counts that are not 'covered offenses.'" 963 F.3d 1080, 1089 (11th Cir. 2020) (citations omitted). The parties here vigorously dispute whether that statement controls our decision. Applying our prior-panel-precedent rule, we must determine whether the *Denson* panel's statement was a holding and, if it was, whether the Supreme Court's intervening decision in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), abrogated it. Although the first question turns out to be somewhat more complicated than at first it may appear, we conclude (1) that *Denson*'s statement *was* a holding and (2) that *Concepcion* did *not* abrogate it—and, accordingly, that we are obliged to follow it.

I

A

Federal law makes it illegal to sell a "controlled substance" without authorization. 21 U.S.C. § 841(a). The baseline penalties for violations are set forth in § 841(b)(1)(C). Larger quantities of drugs authorize (and sometimes require) higher penalties. *Id.*

§ 841(b)(1)(A)–(B). But these quantities vary from one drug to another. Before 2010, it took a hundred times more powder cocaine than crack cocaine to trigger the increased penalties. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1302, 100 Stat. 3207, 3207-16. Public outcry about that discrepancy—and, in particular, its racially disparate impact—led Congress to pass the Fair Sentencing Act of 2010. *See Dorsey v. United States*, 567 U.S. 260, 268 (2012). Section 2 of that statute increased the quantity of crack cocaine required to trigger heightened penalties—but it did so only prospectively. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372.

In 2018, Congress adopted the First Step Act to make these changes retroactive. *See* Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). Section 404 of the Act—at issue here—comprises three subsections. The first two are particularly relevant to what we'll call the "*Denson* issue." Section 404(b), the operative provision, allows "[a] court that imposed a sentence for a covered offense" to "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.* § 404(b). Section 404(a), the definitional provision, explains that 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." *Id.* § 404(a).[1] Because their penalties *were* "modified

[1] The complete text of § 404's first two subsections:

(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.

by section 2 or 3 of the Fair Sentencing Act," crack-cocaine offenses *are* "covered offenses"; powder-cocaine offenses, whose penalties were *not* changed in the Fair Sentencing Act, are *not* "covered offenses." *See United States v. Taylor*, 982 F.3d 1295, 1299 (11th Cir. 2020), *abrogated on other grounds by Concepcion*, 142 S. Ct. at 2396.

Separately, § 404(c)—which will become relevant to what we'll call the "*Concepcion* issue"—precludes successive motions and clarifies that relief is discretionary:

> 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 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.

Id. § 404(c) (citation omitted).

B

In 1997, a jury convicted Michael Files of eighteen federal drug crimes involving crack cocaine, powder cocaine, and marijuana. A district judge sentenced

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(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.

him to life in prison on eleven counts, forty years on three counts, and twenty years or less on the other four counts—all to run concurrently. In 2017, the judge reduced Files's sentences to reflect retroactive guidelines changes, trimming the life and forty-year sentences to a bottom-of-the-revised-guidelines-range thirty years.

In 2019, Files sought a further reduction under the First Step Act. By that time, he had completed four of the sentences—including all three marijuana-only sentences. The district court initially denied relief, holding that even Files's crack-related convictions weren't "covered offenses." Files appealed, the government confessed error, and we vacated and remanded. *United States v. Files*, 848 F. App'x 412 (11th Cir. 2021). The district court then reduced Files's sentences to time served on the eleven crack-related convictions but held that, under *Denson*'s interpretation of § 404(b), it lacked authority to modify his sentences on the three non-covered powder-related offenses.

This is Files's appeal.

II

To reset briefly, under § 404(b) of the First Step Act, "[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." Files contends that, read literally, § 404(b) doesn't limit the convictions for which a federal court "may impose a reduced sentence" to those involving covered offenses—and, accordingly, that § 404(b) gave the district court here authority to reduce even his *non*-covered powder-related sentences.

Files's argument tees up an interesting question of statutory interpretation. But first, *Denson*. As we've already noted—and as we'll explain in greater detail—the panel there said that a district court "is permitted to reduce a defendant's sentence" under § 404(b) "only on a 'covered offense'" and "is not free . . . to change the defendant's sentences on counts that are not 'covered offenses.'" 963 F.3d at 1089. Needless to say, if we're bound by that statement, then we must reject Files's position, whatever its merits.

Under our prior-panel-precedent rule, an earlier panel's holding is controlling "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (citations omitted). So, two questions, which we'll address in turn: (1) Was *Denson*'s statement—that § 404(b) permits a court to reduce a defendant's sentence "only on a 'covered offense'" and not "on counts that are not 'covered offenses'"—a holding? (2) And if so, has it since been overruled or abrogated?

A

In order to determine whether *Denson*'s statement regarding sentencing courts' authority under § 404(b) was a holding, we need to situate it within the context of the panel's opinion, which was ultimately addressed to a different issue. That requires some doing.

In *Denson*, a district court had partially denied a defendant's First Step Act motion—reducing his sentence but by less than he had requested—and had done so "[w]ithout a hearing." 963 F.3d at 1082. "The issue on appeal," the panel explained, was "whether the district court [was] required to first hold a hearing at which Denson was present." *Id.* In answering that

question, the panel concluded that neither the First Step Act nor the Due Process Clause required the district court to hold an in-person hearing before ruling on Denson's sentence-modification motion. *Id.* Importantly here, though, the panel also said a number of other things along the way—including, again, and most notably for our purposes, that a district court "is permitted to reduce a defendant's sentence" under § 404(b) "only on a 'covered offense'" and not "on counts that are not 'covered offenses.'" *Id.* at 1089. Our task is to determine exactly how that statement figured into the panel's ultimate no-hearing conclusion. To that end, we provide the following detailed description of the panel's multilayered opinion.

The *Denson* panel determined, as an initial matter, that neither the First Step Act itself nor Federal Rule of Criminal Procedure 43 entitles a defendant to an in-person sentence-reduction hearing. *Id.* at 1086–87. Having cleared away that underbrush, the panel turned its attention to Denson's "due process claim," which it rejected on two grounds. *Id.* First, the panel held that there was "no due process concern" because "the right to be present under Rule 43 is at least as broad as the right under the Due Process Clause"; because Denson had no right to an in-person hearing under the Rule, he necessarily had no such right as an element of due process. *Id.* at 1087–88 (citations omitted). Second, and separately, the panel addressed Denson's contention—which he premised on our decision in *United States v. Brown*, 879 F.3d 1231 (11th Cir. 2018)—that his sentence-reduction hearing was a "critical stage" of his criminal proceeding at which due process required his presence. *See Denson*, 963 F.3d at 1088. In particular, Denson asked the panel to apply "two fact-intensive inquiries" from *Brown* to hold that

his First Step Act motion constituted a "critical stage": He was entitled to an in-person hearing, he said, because (1) the "errors" that he alleged "undermine[d his] sentence as a whole" and (2) "the sentencing court [had] exercise[d] significant discretion in modifying [his] sentence." *Id.* at 1088 (citation omitted).

The *Denson* panel rejected the defendant's *Brown*-based argument on two independent bases. First, it held, flatly, that "*Brown*'s two-part framework," which had been adopted for 28 U.S.C. § 2255 proceedings, "does not apply to sentencing modifications based on [18 U.S.C.] § 3582(c) motions," including those brought under the First Step Act. 963 F.3d at 1088–89. Second—and more importantly for our purposes—the *Denson* panel proceeded to say the following: "Alternatively, and as an independent holding, even assuming arguendo that we should apply *Brown*'s fact-intensive framework, [the defendant's] § 3582(c) sentence modification based on the First Step Act is not a critical stage under *Brown*'s two-part test." *Id.* at 1089. In particular, the *Denson* panel found that neither of *Brown*'s two necessary preconditions was satisfied.

As to *Brown*'s first prong, the panel concluded that Denson's First Step Act motion "was not concerned with any 'errors' at his original sentencing that may or may not 'undermine' his sentence in its entirety." *Id.* Then, having concluded that *Brown* didn't apply to First Step Act motions at all, and that even if it did its first precondition wasn't satisfied, the *Denson* panel went on to address *Brown*'s second prong, the treatment of which is our focus here. *Brown*'s second factor, again, asks the following question: "'[W]ill the sentencing court exercise significant discretion in modifying the defendant's sentence, perhaps on questions

the court was not called upon to consider at the original sentence?'" *Id.* at 1088 (quoting *Brown*, 879 F.3d at 1239–40). In holding that the court deciding *Denson*'s First Step Act motion hadn't exercised "significant discretion" within the meaning of *Brown*, the panel emphasized that the First Step Act creates only a "limited remedy"—and in explaining why, the panel highlighted several of the First Step Act's "limit[ations]," which we'll regroup slightly for the sake of clarity. "[I]n ruling on a defendant's First Step Act motion," the *Denson* panel observed, "the district court"—

> (1) *is "permitted to reduce a defendant's sentence only on a 'covered offense'" and "is not free . . . to change the defendant's sentences on counts that are not 'covered offenses'"*;
>
> (2) may make reductions "only 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense";
>
> (3) may not "change the defendant's original guidelines calculations that are unaffected by sections 2 and 3"; and
>
> (4) may not reduce the defendant's sentence "based on changes in the law beyond those mandated by sections 2 and 3."

Id. at 1089 (emphasis added) (first quoting § 404(b) and then citing *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019)).

Based on those four "limit[ations]," the panel stated—as one part of what it called its "[a]lternative[]," "independent holding"—that the court adjudicating Denson's First Step motion hadn't exercised "significant discretion" within the meaning of *Brown*

and, therefore, that "a sentencing modification under the First Step Act does not qualify as a 'critical stage in the proceedings,'" and, therefore—back to the question presented in that case—that Denson was not entitled to an in-person hearing. *Id.*

That is, we understand, a lot to digest. So here's a recap of the *Denson* panel's multiple, cascading due-process holdings, in outline form:

> **Holding 1:** Denson has no due-process right to a hearing on his First Step Act motion because the Due Process Clause doesn't demand more than Rule 43—which doesn't require a hearing.
>
> **Holding 2:** Denson has no due-process right to a hearing because *Brown*'s two-part "critical stage" test "does not apply" to First Step Act motions.
>
> **Holdings 3 and 4:** Denson has no due-process right to a hearing because, even assuming that the *Brown* test does apply, it isn't satisfied for two independent reasons:
>
> - **3:** *Brown* isn't satisfied because Denson's First Step Act motion didn't allege "errors" that "undermine[d his] sentence."
> - **4:** *Brown* isn't satisfied because the court deciding Denson's First Step Act motion hadn't exercised "significant discretion."

Importantly here, *Denson* predicated that fourth and final holding on the ground that the Act grants only a "limited remedy"—which, in turn, it seemed to predicate, at least in part, on the ground that a reviewing court "is permitted to reduce a defendant's sentence only on a 'covered offense'" and not "on counts that are not 'covered offenses.'" The question

we must decide is whether that particular statement—that a district court may modify a defendant's sentence only for a covered offense, and not for a non-covered offense—is a binding determination of law that controls our decision.[2] For the reasons that follow, we conclude that it is.

1

At the outset, we should dispel two common misconceptions. First, the mere fact that the *Denson* panel *called* its statement a "holding" doesn't make it a holding. As Judge Friendly has explained, "[a] judge . . . cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'" *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring); *see also* Bryan A. Garner, et al., *The Law of Judicial Precedent* 59 (2016) ("[W]hile the court's statement of [its own] holding is important, it doesn't necessarily decide the matter."). Accordingly, "[t]o the extent [an] opinion says one thing but does another, what it *does* is the holding of the decision." *Ingram v. Comm'r of Soc. Sec. Admin.*, 496 F.3d 1253, 1265 (11th Cir. 2007) (emphasis added); *accord, e.g., Dantzler v. U.S. IRS*, 183 F.3d 1247, 1251 (11th Cir. 1999) ("[J]udicial opinions do not make binding precedents; judicial decisions do.").

Second, and by contrast, the mere fact that the *Denson* panel's key statement was delivered as part of

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[2] For what it's worth—not much—our unpublished decisions have divided over that question. *Compare United States v. Gee*, 843 F. App'x 215, 217–18 (11th Cir. 2021) (holding that *Denson*'s statement is a holding), *with United States v. Hunt*, 2022 WL 4115308, at *4–5 (11th Cir. Sept. 9, 2022) (two-judge majority holding that it's dictum over a single-judge concurrence arguing that it's a holding).

an alternative holding doesn't *disqualify* it from holding status. It is well-established in this Circuit that alternative holdings "are as binding as solitary holdings." *Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008) (citations omitted). And under our precedent about precedent, the sort of reasoning employed in *Denson*—that a particular test doesn't apply but that, even if it does, it isn't satisfied—constitutes a prototypical alternative holding. Indeed, we have said—albeit (ironically) in dicta—that the alternative-holding rule applies in precisely these circumstances. *See Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 484 & n.3 (11th Cir. 2014) (issuing "dual holding[s]" that a habeas petitioner's claim failed under AEDPA deference and, even if AEDPA were inapplicable, on de novo review).[3] Because each of *Denson*'s four alternative holdings is "as binding" as if it were a "solitary holding[]," *Bravo*, 532 F.3d at 1162, we can focus exclusively on the one most relevant to us—namely, the panel's conclusion that *Denson* had no due-process right to an in-person hearing because the court deciding his First Step Act motion hadn't exercised "significant discretion."

2

Remember, the question that we must decide is whether the *Denson* panel's key statement—again, that § 404(b) permits a district court to reduce a defendant's sentence "only on a 'covered offense'" and not "on counts that are not 'covered offenses'"—is *itself* a holding. Files insists that it isn't, and for support he points to the oft-invoked maxim that portions of a

[3] Judge Wilson disagreed that the latter ground constituted a holding. *See Hitchcock*, 745 F.3d at 490 & n.6 (Wilson, J., concurring).

court's opinion that aren't "necessary" to its judgment are dicta, *see, e.g.*, *United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019), and contends that the *Denson* panel's statement wasn't strictly *necessary* to its conclusion that the district court didn't exercise "significant discretion" in ruling on Denson's First Step Act motion. Even if that statement were absent, the argument goes—even if that particular limitation didn't exist—the panel might *still* have concluded that the adjudication of Denson's motion didn't entail "significant discretion." Because nothing in *Denson* itself indicates that the statement on which we're now focused was necessary to its no-significant-discretion conclusion, Files reasons, that statement wasn't a holding.

With respect to the application of the necessary-to-the-judgment criterion, we'll just come right out and say it: We're in something of a grey area here. We know for certain—and Files would admit—that if all four of the characteristics that the *Denson* panel identified as features of First Step Act adjudications, *see supra* at 10–11, were *necessary* to its no-significant-discretion determination, then all four would constitute holdings. *See United States v. Caraballo-Martinez*, 866 F.3d 1233, 1244 (11th Cir. 2017).[4] But as

[4] That the four characteristics pertain to what might be called "legal facts" about the First Step Act—rather than legal conclusions relevant specifically to the issue on appeal in *Denson*—doesn't change matters. To take just one example from our own precedent, in discerning the elements of federal crimes, we have routinely looked to enumerations of those elements embedded in earlier double-jeopardy decisions applying the *Blockburger* analysis, which entails a comparison of legal facts—namely, the elements of two different offenses. *See, e.g.*, *United States v. Feldman*, 931 F.3d 1245, 1257 (11th Cir. 2019) (applying, as binding, the elements of a healthcare-fraud conspiracy—18 U.S.C.

Files points out, the *Denson* panel seemed to cite the four characteristics as illustrative or exemplary features, not as strictly necessary conditions. It never suggested, for instance, that the absence of any single characteristic—let alone the first, in particular—would have changed its decision.

But—and it's a big but—our own precedent and common sense both reveal that "necessary" doesn't mean *strictly* necessary. The proof? Consider, for example, two common types of determinations—neither of which is strictly necessary to a court's judgment, but *both* of which are traditionally accorded holding status. First, one we've already explored in some detail: alternative holdings. By definition, an alternative holding isn't necessary to the court's judgment—any of two or more *alternatives* suffices. And yet, as we've already explained, our precedent treats alternative holdings "as binding as solitary holdings." *Bravo*, 532 F.3d at 1162; *see also* Garner, *supra*, at 122–23 ("[A]lternative holdings are still holdings, even though they aren't logically necessary to the case's disposition.").

Second, what we'll call "non-supportive" holdings. Cases often present multiple issues, and courts will more than occasionally decide one question in one party's favor but then proceed to decide another question—and enter judgment—for the *other* party. Qualified-immunity cases are illustrative. In those, a court

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§§ 1347, 1349—as specified in the *Blockburger* analysis conducted in *United States v. Gonzalez*, 834 F.3d 1206, 1220 (11th Cir. 2016). *But cf.* Garner, *supra*, at 84–86 (suggesting—without citation to authority—that some statements regarding legal facts might be mere "[a]ssumptions underlying court decisions" that are not precedential even if necessary).

will often conclude, at step one of the familiar two-step analysis, that a government official violated the Constitution but then go on to determine, at step two, that the law wasn't "clearly established"—and, therefore, that the official is entitled to immunity. *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 699–700 (2011). Both conclusions are holdings. Indeed, the Supreme Court has explicitly said that, in that circumstance, a court's step-one conclusion that the official violated the Constitution is "[n]o mere dictum" but, rather, "creates law that governs the official's behavior," even if he prevails at step two. *Id*. at 708 (allowing an official who prevailed at the second step, and thereby obtained a favorable judgment, to appeal a lower court's adverse determination that he violated the law). It goes without saying that a non-supportive holding of this sort isn't necessary to the court's judgment—because it actually *contradicts* the court's judgment. And yet, it is a binding holding nonetheless. *See also, e.g.*, *United States v. Steed*, 548 F.3d 961, 977 (11th Cir. 2008) (treating as a binding holding an earlier court's determination that a jury instruction was unlawful despite the earlier court's ultimate conclusion that the error was harmless).

And to be clear, there are still other circumstances in which we depart from a strict-necessity criterion. When, for instance, one of our opinions chooses between two competing legal "tests" in the course of resolving a case, we have characterized our choice of one of them as a holding even when it's not clear that the case would have turned out differently under the

other.[5] For that matter, statements of a legal rule—whether or not the result of a choice among competing alternatives—are often technically unnecessary to a case's resolution. In many (if not most) cases, we could simply decide the dispute narrowly on its own particular facts, without separately articulating a test or standard. But no one thinks that when we *do* state a governing rule—as we typically do—we do so gratuitously and unnecessarily. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 984–86 (2005). Given the many exceptions and caveats, it's easy to see why theories of precedent inextricably tied to strict, logical "necessity"—while "frequently cited" and easy to apply—are "problematic

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[5] *United States v. Kaley*, 579 F.3d 1246 (11th Cir. 2009), is illustrative. There, we had to determine the holding of our earlier decision in *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989). In *Bissell*, the government had restrained several indicted drug dealers' bank accounts in order to preserve the funds for eventual seizure under 21 U.S.C. § 853(a). *Id.* at 1347. The defendants couldn't access the money, including for their legal defense, and weren't given a pre-trial hearing to challenge the restraint. *Id.* at 1349–50. In determining that the failure to conduct a hearing didn't violate the defendants' due-process rights, the *Bissell* panel applied a test that the Supreme Court had adopted for speedy-trial purposes in *Barker v. Wingo*, 407 U.S. 514 (1972). *See* 866 F.2d at 1353–54. Faced with the same issue in *Kaley*, we concluded—over a concurring judge's objection—that the *Bissell* panel's adoption of the *Barker* test was controlling. 579 F.3d at 1264 n.10. We said so because the choice "form[ed] a critical part of the [*Bissell*] case's holding" and because the *Bissell* panel's conclusion "was driven by, and [could not] be understood apart from[,] [its] application" of the *Barker* test—and, notably, despite the fact that *Bissell* "could have [been] decided . . . on other grounds," and seemingly without respect to whether that case would come out the same way had the panel adopted a different standard. *See id.*

in profound ways" and, among competing theories, "prove[] the easiest to falsify." *Id.* at 959, 1056.

But if, as our own precedent reveals, "necessary" doesn't really mean necessary, what *is* the true measure of a holding? Does holding status attach, as the Ninth Circuit has posited, to any "issue germane to the eventual resolution of the case [that the court] . . . resolves . . . after reasoned consideration in a published opinion," *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (plurality opinion), "regardless of whether it was in some technical sense 'necessary'"? *Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc). *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. Chi. L. Rev. 1551, 1567–72 (2020) (describing the Ninth Circuit's view). That approach, we think—while also neat and clean—sweeps too broadly. To be sure, it would comport with some of our caselaw. For example, we've treated as dicta—as we think even the Ninth Circuit's broad rule would—legal conclusions predicated on facts that aren't actually at issue,[6] as well as aside-like statements about irrelevant legal matters.[7] But

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[6] *E.g.*, *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) (holding that legal conclusions about hypothetical facts are dicta); *Caraballo-Martinez*, 866 F.3d at 1244 (similar).

[7] Consider, for instance, our decision in *United States v. Pickett*, 916 F.3d 960, 966 (11th Cir. 2019), that a statement in *United States v. Glover*, 431 F.3d 744, 749 (11th Cir. 2005), was dictum. In *Glover*, a panel had considered whether a judge impermissibly found a fact that triggered enhanced penalties. *Id.* at 749. After concluding that the relevant determination was a question of law rather than fact, the panel had appended an observation that the legal determination was correct. *Id.* Because that statement wasn't relevant to the question presented in *Glover*, we concluded in *Pickett* that it was dictum. 916 F.3d at 966; *see also, e.g.*, *Georgia Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty.*

the Ninth Circuit's far-reaching germane-and-considered criterion would contradict our precedent in other respects, in that we have relegated to dicta status statements of law that our sister circuit would treat as holdings—for instance, statements regarding a legal framework that the court initially engages but ends up abandoning in favor of an alternative.[8]

So far as we can tell, the four relevant-but-not-decisive characteristics of First Step Act proceedings that the *Denson* panel identified as features of a First Step Act adjudication don't fit neatly into any of our existing "holding" or "dicta" categories. Without a ready-made, easy-to-apply metric, we are left to determine whether the *Denson* panel's statements are more like those that we've treated as holdings or those that we've deemed dicta. On balance, we think that they are more like the sorts of conclusions that we have accorded holding status.

Here's why: As already noted, if the *Denson* panel had said that a defendant had to prove all four characteristics in order to demonstrate that the sentencing

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Bd. of Registration & Elections, 36 F.4th 1100, 1119–20 (11th Cir. 2022) (holding that a previous decision's statement in an introductory paragraph about a statutory provision's operation was dictum because it wasn't applicable to the previous case's resolution); *Fresh Results, LLC v. ASF Holland, B.V.*, 921 F.3d 1043, 1050 (11th Cir. 2019) (characterizing as dictum a previous decision's description of a legal standard applicable to a question that it didn't reach).

[8] *See, e.g.*, *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 764 (11th Cir. 2010) (treating as dicta a previous decision's statements about common law where the case was ultimately resolved on statutory grounds); *Welch v. United States*, 958 F.3d 1093, 1098 (11th Cir. 2020) (treating as dictum a previous decision's discussion of ACCA's elements clause where the case was ultimately resolved under the residual clause).

court hadn't exercised "significant discretion," then its conclusions about each would have constituted traditional, necessary-to-the-result holdings. If, at the other end of the spectrum, the panel had said that any one of the four characteristics was sufficient to show an absence of "significant discretion," then each of its conclusions would, in effect, have constituted a binding alternative holding. Between those two extremes, the same would be true if the panel had said, for instance, that any two were sufficient: In that circumstance, each would be part of an alternative holding—*e.g.*, the first two are present or, in the alternative, the last two are; the first and third are present or, in the alternative, the second and fourth are; etc. (So too if the panel had said that any *three* would suffice.[9]) Accordingly, the *only* thing separating the *Denson* panel's actual statements regarding the four characteristics from binding traditional holdings (on the one hand) or binding alternative holdings (on the other) is that it didn't specify precisely how many characteristics it took to cross the sufficiency threshold—or precisely which ones. That seems like a pretty thin basis on which to deny them holding status.

Bottom line: Our precedent about precedent makes clear that strict necessary-ness is not essential to a statement's holdingness. And the *Denson* panel's statements regarding First Step Act adjudications were clearly significant to its no-significant-discretion conclusion—and are thus fundamentally similar to

[9] All of this assumes, of course, that the several characteristics of First Step Act adjudications that the *Denson* panel identified carry equal weight. They seem equally weighty to us, and nothing in *Denson* suggests otherwise.

the other sorts of determinations that we have traditionally accorded holding status. Accordingly, we treat the *Denson* panel's statements regarding the scope of sentencing courts' authority under § 404(b) as holdings.[10]

In sum, then, we conclude that *Denson*'s determination that a district court "is permitted to reduce a defendant's sentence" under § 404(b) "only on a 'covered offense'" and "is not free . . . to change the defendant's sentences on counts that are not 'covered offenses,'" 963 F.3d at 1089, is indeed a holding. And under our prior-panel-precedent rule, that means it binds us unless it has been overruled or "undermined to the point of abrogation" either by the Supreme

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[10] One last thing: Files also asserts that the *Denson* panel's statement about the permissibility of reducing sentences for non-covered offenses can't constitute a holding because it outstripped the facts of the case—because, he says, Denson didn't have a non-covered offense. Files is right about the law: A "decision can hold nothing beyond the facts of that case." *Edwards*, 602 F.3d at 1298 (collecting cases). But he's wrong about the facts—or at least about the relevant facts as the courts in *Denson* understood them. Files emphasizes that Denson had completed the sentence on his non-covered offense before this Court issued its decision. But because Denson's *Brown*-based claim addressed a procedural issue—whether he was entitled to a hearing in the district court—what mattered, as the panel there understood and explained matters, was the fact that Denson had a non-covered offense at the time the district court ruled. *See* 963 F.3d at 1085; *see also Denson*, No. 19-11696, Doc. 141 at 5 (district court stating that "[t]he prison sentence on [the noncovered offense] remains 120 months, still to be served concurrently"). *See generally United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) ("The holdings of a prior decision can reach only as far as *the facts and circumstances presented to the Court* in the case which produced that decision." (emphasis added) (quoting parenthetically *United States v. Hunter*, 172 F.3d 1307, 1309 (11th Cir. 1999) (Carnes, J., concurring))).

Court or by one of our own en banc decisions. *Archer*, 531 F.3d at 1352. It is to that issue that we turn next.

B

Files contends that to the extent that *Denson* held that a district court lacks the authority to reduce a sentence for a non-covered offense, the Supreme Court's decision in *Concepcion* abrogated it. We disagree.

To be sure, *Concepcion* abrogated aspects of *Denson*. In particular, the Supreme Court expressly rejected the fourth of the four considerations that the *Denson* panel highlighted in its no-significant-discretion analysis: The Court held, contra *Denson*, that a district court adjudicating a First Step Act motion *can* consider changes in law unrelated to those specified in the Fair Sentencing Act. *Compare Concepcion*, 142 S. Ct. at 2396, *with Denson*, 963 F.3d at 1089. But *Concepcion* certainly didn't repudiate *Denson* in toto; indeed, it expressly affirmed the third of the *Denson* panel's four considerations—namely, that a court can't recalculate a defendant's guidelines ranges for non-Fair-Sentencing-Act reasons. *Compare Concepcion*, 142 S. Ct. at 2402 n.6, *with Denson*, 963 F.3d at 1089.

Most importantly here, *Concepcion* didn't address a sentencing court's authority to deal with non-covered offenses one way or the other—presumably because the defendant there didn't have one; he had only a single conviction for a *covered* crack-related offense. 142 S. Ct. at 2396. Accordingly, we cannot say that *Concepcion* "abrogated" *Denson*'s determination that district courts may not reduce defendants' sentences for non-covered offenses.

In arguing otherwise, Files focuses on the Supreme Court's statements that Congress didn't "hide any limitations on district courts' discretion outside of § 404(c)" and that § "404(b) does not erect any additional such limitations." *Id.* at 2402. But Files misunderstands the Court's comments. The Court was referring there only to limits on how district courts exercise their "discretion" in reducing defendants' sentences—not to their power to do so in the first place. The latter is an issue of authority, not discretion. And with respect to authority, both the Act and the Supreme Court's opinion contemplate limits outside § 404(c). Take, for example, the very first clause of § 404(b): It clearly states that only the "court that imposed a sentence for a covered offense"—not just *any* court—can entertain a sentence-reduction motion under the Act. So too, as just explained, *Concepcion* itself observed that district courts can't recalculate defendants' guidelines ranges based on changes unrelated to those specified in the Fair Sentencing Act. *See* 142 S. Ct. at 2402 n.6. Those "limitations" remain effective, despite being "outside of § 404(c)," *id.* at 2402, because they pertain to a court's ex ante authority to act, not the manner in which it exercises its discretion. The limitation that *Denson* recognized—*i.e.*, that a court "is permitted to reduce a defendant's sentence only on a 'covered offense,'" 963 F.3d at 1089—is similar: It speaks to the whether, not the how.

There is thus no fatal inconsistency. A district court adjudicating a First Step Act motion can—without fear of contradiction—apply both *Denson*'s holding limiting the categories of sentences that can be reduced and *Concepcion*'s holding empowering courts to exercise broad discretion in imposing reduced sentences for those qualifying offenses. Accordingly, we

hold that *Concepcion* did not abrogate *Denson*'s holding that a sentencing court "is permitted to reduce a defendant's sentence" under the First Step Act "only on a 'covered offense'" and not "on counts that are not 'covered offenses.'" 963 F.3d at 1089.

III

For all these reasons, we hold (1) that this Court's statement in *Denson* that a district court "is permitted to reduce a defendant's sentence" under the First Step Act "only on a 'covered offense'" and "is not free . . . to change the defendant's sentences on counts that are not 'covered offenses,'" 963 F.3d at 1089, was a holding; (2) that *Concepcion* did not abrogate that holding; and (3) that our prior-panel-precedent rule obliges us to follow it.

AFFIRMED.

NEWSOM, Circuit Judge, joined by TJOFLAT, Circuit Judge, concurring:

Reasonable minds can differ, of course, but my own view—fortified by my experience with this case—is that federal appellate courts should issue fewer alternative holdings.

I'll detail my reasons in due course. Let me begin, though, with our decision here. As the majority opinion explains, this appeal tees up an interesting question of statutory interpretation. Section 404(b) of the First Step Act states that "[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: For

what offenses may a court "impose a reduced sentence" within the meaning of § 404(b)? Only for "covered offense[s]"? Or, at the other end of the spectrum, perhaps for *any* offense, even if non-"covered"—and, for that matter, even if wholly unrelated to the conduct that underlies a covered offense? Or might there be some middle ground, in which courts can reduce sentences for offenses that are (my term) "inextricably intertwined" with a covered offense?

The question regarding § 404(b)'s proper scope isn't just interesting, it's important. Thousands of federal prisoners were eligible for sentence reductions under the First Step Act, and so determining the extent of courts' authority under the Act has practical, real-world significance. And, as it turns out, that issue—the meaning of § 404(b)'s "may impose a reduced sentence" clause—is squarely presented in this case. The parties thoroughly briefed it. *See* Br. of Appellant at 23–44; Br. of Appellee at 27–33; Reply Br. of Appellant at 2–9. It was fully vetted at oral argument. *See* Oral Arg. at 14:18–23:00, 32:18–38:43. And I, for one, think that the answer is pretty clear: Understood in context, and particularly in the light of § 404(b)'s indisputable focus on "covered offense[s]," § 404(b) should be interpreted to empower courts to modify sentences *only* for those offenses, such that the provision reads, in effect, as follows: "A court that imposed a sentence for a covered offense may . . . impose a reduced sentence <u>for a covered offense</u> as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." That's the only reading, I submit, that makes any legal or practical sense.

The obvious question, then: Why didn't we say so? Because, as the majority opinion explains, we concluded that we didn't *need* to. Having determined that this Court's earlier decision in *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020), had already resolved the issue in a way that binds us, we found no cause to forge ahead to interpret the statute afresh. *See* Maj. Op. at 2–3. Even so, one might respond, why not strap on both belt and suspenders? Especially given the difficulty and closeness of the *Denson* issue—whether its statement regarding § 404(b)'s scope constitutes a binding holding, *see* Maj. Op. at 14–23—why not do exactly what the *Denson* panel itself did and issue an "[a]lternative[] . . . independent holding" that simply "assum[es] arguendo" that *Denson* doesn't control, 963 F.3d at 1089, and goes on to conclude, in any event, that § 404(b) only narrowly authorizes reviewing courts to modify sentences for covered offenses? What's the harm?

Speaking only for myself, I think the harm can be very real.[1] Let me explain.

Some have gone so far as to suggest that alternative holdings are unconstitutional—the premise being, in essence, that once a court has provided a single sufficient basis for resolving the dispute before it, the constitutional "Case[]" has concluded and the "judicial power" has been fully discharged. *See* U.S. Const. art. III, § 2. Any further statement of law, the argument

[1] And real harm aside, let not the irony be lost that *Denson*'s cascade of alternative holdings is one of the very things that made it so difficult to determine whether its statement regarding § 404(b)'s scope constituted a holding. *See* Maj. Op. at 7–12.

goes, "present[s] potential advisory-opinion problems." *Phelps v. Alameda*, 366 F.3d 722, 729 (9th Cir. 2004) (O'Scannlain, J.).

My contention is more modest: At least in appellate courts, issuing alternative holdings is often just a bad idea. I say so for three reasons: (1) my own sense of the judicial role, (2) my desire to facilitate sound judicial decisionmaking, and (3) my concern for impartiality and collegiality on multimember courts.

1. The Judicial Role. Some have a very muscular view of federal-court authority. They, to use Hart and Wechsler's well-worn terminology, see federal courts as principally engaged in the "law declaration" business. Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and The Federal System* 73–74 (7th ed. 2015). Courts "have a special function," they say, "of enforcing the rule of law" by articulating clear, precedential rulings that, taken together, create binding legal doctrine—or, as Hart and Wechsler more soaringly summarize it, "to declare and explicate norms that transcend individual controversies." *Id*. at 74. As should be clear, this law-declaration role exists "independent[ly] of" the courts' "task of resolving concrete disputes." *Id.*

Not me. I'm in what Hart and Wechsler would call the "dispute resolution" camp. *Id.* at 73. Federal courts are tasked by the Constitution—and tasked only—with adjudicating the "Cases" and "Controversies" that real parties bring before them. *See* U.S. Const. art. III, § 2. Without respect to whether the Constitution actually requires it to do so, once a court has fulfilled its obligation—that is, has said enough to resolve the parties' dispute—it *should* just stop. It

shouldn't forge ahead, reach out, and declare more law.

I realize that mine is a quaint perspective, out of step with the more robust conception of judicial power that has taken hold during the "past half century" or so. *Hart & Wechsler*, *supra*, at 74. If that makes me a throwback, so be it. I'll happily cling to my view—which I've expressed elsewhere in lamenting courts' modern tendency to decide issues unnecessarily—that federal judges should be "reactive, not proactive; passive, not aggressive; modest, not bold." *United States v. Campbell*, 26 F.4th 860, 895 (11th Cir. 2022) (en banc) (Newsom & Jordan, JJ., dissenting).

Alternative holdings—A; and if not A, then B; and if not A or B, then C—rarely reflect "reactive," "passive," or "modest" decisionmaking. They're almost always the opposite—"proactive," "aggressive," and "bold." By "decid[ing] questions that do not matter to the disposition of a case," courts are "separat[ing] Lady Justice's scales from her sword." *Friends of Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009). And wielding this sword verges dangerously close, I fear, to judicial legislation. And that should give us pause.[2]

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[2] Let me anticipate and attempt to respond here to an objection: "Aren't your separate concurring opinions—like, oh, say, this one—'proactive,' 'aggressive,' and 'bold' in exactly the same way as the alternative holdings you criticize?" No, actually. A judge's solo concurrence doesn't even *purport* to declare law—it aims only to advance the conversation about a particular topic. In fact, it is my antipathy for alternative holdings that *causes* me to write separate concurrences in cases where I think they might be of some use. Rather than attempt to wedge my thoughts into a controlling opinion, I offer them, on behalf of myself only, for whatever they may (or may not) be worth.

2. Sound Decisonmaking. Of course, in discharging their dispute-resolution function, federal courts will declare some law along the way. "[I]ncidental to [their] responsibility to decide concrete disputes," that is, courts will necessarily create precedent and doctrine. *Hart & Wechsler*, *supra*, at 73. Needless to say, in doing so, they should strive to declare the law as accurately as possible.[3] My worry is that there's likely an inverse relationship between the number of holdings a court purports to issue and the correctness of each. That's not rocket science—or, to be fair, *any* kind of science. It's just a common-sense observation that the more a court bites off, the less time and attention it has to savor and digest each constituent morsel.

I'm hardly the first person to express this concern. Judge Leval has observed, for instance, that in his experience, "[c]ourts often give less careful attention to propositions uttered in support of unnecessary alternative holdings." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1258 n.23 (2006). In particular, he worries that judges joining another's opinion are "likely to look primarily at whether the opinion fulfills their expectations as to the judgment and the reasoning given in support of it"—and, correlatively, that there is a "high likelihood that . . . alternative explanations[] and dicta will receive scant attention." *Id.* at 1262. Judge Kethledge's warning about dicta applies to alternative

[3] They should also strive to declare it as *clearly* as possible. For advocates of the law-declaration model, this should be particularly important. Cluttering up opinions with cascading alternative holdings makes each holding harder to find and discern, *see* Maj. Op. at 7–12, undermining the very notice and rule-of-law values that the law-declaration model purports to advance.

holdings, as well: "[J]udges think differently—more carefully, more focused, more likely to think things through—when our words bring real consequences to the parties before us." *United States v. Burris*, 912 F.3d 386, 410 (6th Cir. 2019) (en banc) (Kethledge, J., concurring). Judge Posner has said similar things: Passages that are not an "integral part of the earlier opinion . . . may not have been fully considered." *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988).

The unremarkable bottom line: When everyone in the decisionmaking process focuses on a single, necessary ground for resolving a case—when our attention is trained, rather than divided—we're more likely to arrive at an answer that is well-considered, well-explained, and, most importantly, correct. Let's go deep, not broad.

3. Impartiality and Collegiality. Two final—and related—problems, both of which are illustrated by a story relayed to a scholar who was investigating different appellate courts' approaches to precedent. An anonymous Ninth Circuit judge shared the following vignette: "People would ask me, 'What's wrong with [the Ninth Circuit's] assignment system—Judge Reinhardt is on all the big cases?' [And] I . . . say, . . . 'There is nothing wrong with [our] assignment system—Judge Reinhardt *makes* big cases!'" Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. Chi. L. Rev. 1551, 1589–90 (2020) (alterations in original) (emphasis added). That story, I think, contains important lessons about both impartiality and collegiality.

First, impartiality. Impartiality is a (perhaps *the*) cornerstone of our judicial system. As I've said before,

when a court reaches out to address and decide an issue—here, one unnecessary to the resolution of the dispute before it—it increases the risk that outside observers will perceive it (even if mistakenly) to be engaged in "political action" and, accordingly, view its conduct with suspicion and cynicism. *See Campbell*, 26 F.4th at 896 (Newsom & Jordan, JJ., dissenting). Put simply, when a court decides more than necessary—and even more so when it ranges into tertiary and quaternary holdings—it gives the impression that it wants to *make* law rather than impartially apply it.

Second, collegiality. In their day-to-day work, federal appellate courts sit in panels of three, comprising judges drawn on a random rotational basis to "ensure that all of the [active] judges sit on a representative cross section of the cases heard." 28 U.S.C. § 46(b). Our prior-panel-precedent rule is designed to afford equal respect to each panel, in that no one collection of three judges can overrule the decision of any other. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). But that rule alone can't ensure that panels—and the judges who serve on them—share equally in determining circuit precedent. If some judges write narrow, constrained opinions while others reach out to decide as many issues as possible in successive alternative holdings, then our rule systematically preferences the views of the most aggressive. I don't think anyone wants that.

* * *

For all of these reasons, I hope that we will all think, and then think, and then think again before embedding alternative holdings in our opinions.[4]

[4] As I said at the outset, I confine my critique to alternative holdings issued by appellate courts. Although any constitutional objection would apply equally to district courts, I'm willing to concede that the practical calculus there is different. First, because their opinions aren't precedential, *see Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011), district courts don't declare law in the same way that appellate courts do, and thus don't face the same tension between the dispute-resolution and law-declaration adjudicative models. Second, because district judges don't sit on multi-member panels, they don't face the same collegiality issues that can arise from aggressive decisionmaking in the appellate courts. And finally, for a district court, providing redundant decisional grounds can meaningfully increase judicial efficiency by (1) minimizing the risk that a case ping-pongs between it and the appellate court and (2) facilitating the resolution of the entire case in a single appeal. *See United States v. Caporale*, 701 F.3d 128, 142 n.8 (4th Cir. 2012).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL NO. 97-0009-WS
v.	)	
MICHAEL JEROME FILES, Defendant.	)	

ORDER

This matter comes before the Court on defendant Michael Jerome Files' motion for reduction of sentence pursuant to § 404 of the First Step Act of 2018 (docs. 2408, 2411). On February 8, 2019 and March 7, 2019, this Court denied the motion (both as originally filed and as renewed) based on a finding that Files is ineligible for relief under the retroactive provisions of the Act. On appeal, the Eleventh Circuit Court of Appeals found, based on its intervening decision in *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), that Files is eligible for a sentence reduction under the Act. On that basis, the Eleventh Circuit "vacate[d] the district court's orders denying a sentence reduction, and remand[ed] for further proceedings so that the district court may decide whether to exercise its discretion under § 404 to award Files a sentence reduction." (Doc. 2455, PageID.9261.) On remand, this Court entered a

briefing schedule on June 22, 2021, setting forth the applicable legal standard governing the exercise of its discretion under the First Step Act, and directing the parties to submit memoranda of law. (Doc. 2458.) They have now done so. (Docs. 2459, 2460, 2461.)[1]

A. Reduction of Files' Total Sentence of Imprisonment is Not Authorized.

In his briefing, Files advances an array of arguments in support of his position that this Court should reduce his "total sentence of imprisonment to 'time served.' " (Doc. 2459, PageID.9272.) The reference to "total sentence of imprisonment" implicates a critical threshold issue. Here is why: At trial back in August 1997, Files was convicted of 18 counts, including Counts 1, 2, 3, 9, 11, 12, 13, 24, 25, 26, 27, 28, 29, 30, 32, 33, 65 and 73 of the Superseding Indictment. (Doc. 2024-5, PageID.259-61.) The sentences imposed on Files for each of these counts were concurrent to the sentences imposed for all other counts of conviction. Everyone agrees that Files has fully discharged the terms of imprisonment to which he was sentenced on Counts 3, 24, 32 and 73. At this time, Files continues to serve 30-year terms of imprisonment, imposed concurrently as to each of the other 14 counts of conviction (specifically, Counts 1, 2, 9, 11-13, 25-30, 33 and 65).[2] This fact is critically important at this time because only some – not all – of those counts involved

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[1] The June 22 Order did not specifically provide for Files to submit a reply brief before the matter would be taken under submission. Nonetheless, Files having elected to submit a reply (doc. 2461) prior to any ruling on the underlying issues, the Court in its discretion allows and has considered that submission on an equal footing with the parties' other filings.

[2] The relevant order governing Files' terms of imprisonment at present is dated April 5, 2017, and is styled an Order Regarding

crack-cocaine offenses. In particular, Count 1 charged Files with conspiracy to possess with intent to distribute powder cocaine only. (Doc. 324, PageID.5933.) Count 11 charged Files with attempting to possess with intent to distribute powder cocaine only. (*Id.*, PageID.5942.) And Count 65 charged Files with possessing with intent to distribute powder cocaine only. (*Id.*, PageID.5989.) As noted, Files is currently serving a 30-year term of imprisonment on each of these powder-cocaine offenses, just as he is for the other 11 counts of conviction involving crack cocaine.

The reason these facts and circumstances matter is that the relief available to Files varies greatly depending on whether the First Step Act authorizes this Court to reduce his "total sentence" for all offenses of conviction, or whether it only authorizes sentence reduction for the crack-cocaine offenses. If it is the latter, then Files' request for discretionary reduction of his "total sentence of imprisonment" must be denied, as the Court's statutory discretion would be limited to reducing Files' sentence for the crack-cocaine offenses only, leaving the 30-year sentences intact on Counts 1, 11 and 65 in any event. Given the paramount importance of this issue to resolution of Files' motion for

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Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2). (Doc. 2398.) In that Order, this Court reduced Files' previously imposed sentence of life imprisonment to 360 months. The April 5 Order took pains to explain that "[t]he reduced term of imprisonment applies to each of Counts 1, 2, 9, 11-13, 25-30, and 65, said terms to run concurrently." (*Id.*, PageID.8412.) Accordingly, the record is pellucidly clear that Files' current 360-month term of imprisonment runs concurrently for each of those 14 enumerated counts of conviction, which include both crack-cocaine offenses and separate powder-cocaine offenses.

sentence reduction, the Court begins the analysis here.

As a general proposition, "[t]he law is clear that the district court has no inherent authority to modify a sentence; it may do so only when authorized by a statute or rule." *United States v. Puentes*, 803 F.3d 597, 605-06 (11th Cir. 2015). "When Congress enacted the First Step Act of 2018, it granted district courts discretion to ***reduce the sentences of crack-cocaine offenders*** in accordance with the amended penalties in the Fair Sentencing Act [of 2010]." *United States v. Jones*, 962 F.3d 1290, 1297 (11th Cir. 2020) (emphasis added). Under § 404 of the First Step Act, a district court may reduce a sentence for a "covered offense … 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).[3] A "covered offense" is statutorily defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act … that was committed before August 3, 2010." *Id.* § 404(a). Thus, "[t]o be eligible for a reduction, the district court must have 'imposed a sentence' on the movant for a 'covered offense.'" *Jones*, 962 F.3d at 1298 (citation omitted). To make the "covered offense" determination, "the district court should consider only whether the quantity of crack cocaine satisfied the specific drug quantity elements in § 841 – in other words, whether his offense involved fifty grams

[3] "Section 2 of the Fair Sentencing Act raised the quantity of crack cocaine necessary to trigger a 10-year mandatory minimum from 50 grams to 280 grams and the quantity necessary to trigger a 5-year mandatory minimum from 5 grams to 28 grams." *United States v. Stevens*, 997 F.3d 1307, 1312 n.2 (11th Cir. 2021).

or more of crack cocaine, therefore triggering § 841(b)(1)(A)(iii), or between five and fifty grams, therefore triggering § 841(b)(1)(B)(iii). … A 'covered offense' is therefore one where the offense triggers the higher penalties in § 841(b)(1)(A)(iii) or (B)(iii)." *United States v. Stevens*, 997 F.3d 1307, 1313 (11th Cir. 2021); *see also Jones*, 962 F.3d at 1300-01 (only "crack-cocaine offenses for which sections 841(b)(1)(A)(iii) and (B)(iii) provide the penalties" qualify as "covered offenses" under § 404).

Without question, at least some of the crack-cocaine offenses of which Files was convicted qualify as "covered offenses" under the *Jones* / *Stevens* framework. And the Government acknowledges the possibility that all of Files' crack-cocaine convictions in this matter may meet the definition of "covered offenses" for purposes of First Step Act eligibility. (Doc. 2460, PageID.9341 n.3.) Even if we assume that all 11 of Files' offenses of conviction involving crack cocaine and for which he is serving concurrent 30-year prison sentences (Counts 2, 9, 12-13, 25-30, and 33) are "covered offenses" for First Step Act purposes, it is clear that the three offenses of conviction involving only powder cocaine for which Files is also serving concurrent 30-year prison sentences (Counts 1, 11, 65) are <u>not</u> "covered offenses" under § 404(a) of the First Step Act. Files does not – and cannot reasonably – argue otherwise. Instead, he asserts that nothing in the First Step Act prohibits a district court from reducing a sentence for a non-covered offense that relates to a covered offense, such that (in his view) "this Court may reduce Mr. Files' overall sentence." (Doc. 2459, PageID.9292.)

The most obvious impediment to Files' request for a reduction in his "total sentence" or "overall sentence" – as opposed to his sentences for "covered offenses" – is the Eleventh Circuit's published decision in *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020). The *Denson* court explained that "in ruling on a defendant's First Step Act motion, the district court (1) is permitted to reduce a defendant's sentence only on a 'covered offense' and … (2) is not free … to change the defendant's sentences on counts that are not 'covered offenses.' " *Id.* at 1089. More recently, another Eleventh Circuit panel has considered and squarely rejected a defendant's "come one, come all reading of § 404(b)" that "if any one of a defendant's convictions was for a 'covered offense,' then all of his convictions are eligible for resentencing." *United States v. Gee*, 843 Fed.Appx. 215, 217 (11th Cir. Feb. 8, 2021). The *Gee* court relied on the above-quoted language from *Denson* to conclude that "Gee's § 924(c) convictions are not 'covered offenses' under § 404(b), so that section does not allow him to be resentenced on them" in conjunction with the reduction of his sentences for crack-cocaine convictions that could be reduced under § 404(b) of the First Step Act. *Id.* In response to Gee's argument that the *Denson* language should be discarded as *dicta*, the *Gee* panel countered, "It isn't. It is an alternative holding, and in this circuit additional or alternative holdings are not *dicta*, but instead are as binding as solitary holdings." *Id.* (citations and internal quotation marks omitted). At any rate, *Gee* hastened to add that "even if that alternative holding of *Denson* were only *dicta*, it is obviously correct and the

only permissible reading of the First Step Act and 18 U.S.C. § 3582(c)(1)(B), and we would follow it." *Id.*[4]

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[4] *See also United States v. Kirksey*, --- Fed.Appx. ----, 2021 WL 2909733, *3 (11th Cir. July 12, 2021) ("We've made clear that the First Step Act does not authorize a district court to conduct a plenary or *de novo* resentencing in which it reconsiders sentencing guideline calculations unaffected by §§ 2 and 3 of the Fair Sentencing Act or to change the defendant's sentences on counts that are not covered offenses."); *United States v. Collins*, --- Fed.Appx. ----, 2021 WL 2530194, *5 (11th Cir. June 21, 2021) (citing *Denson* for the proposition that a district court "is not free to change the defendant's original guidelines calculations that are unaffected by sections 2 and 3 [of the Fair Sentencing Act]"); *United States v. Thompson*, 846 Fed.Appx. 816, 818 (11th Cir. Feb. 17, 2021) (following *Denson* to conclude that district court properly concluded it lacked authority to reduce defendant's sentence on a non-covered offense, even where sentence reductions were being made for that defendant's covered offenses); *United States v. Moore*, 839 Fed.Appx. 401, 403-04 (11th Cir. Jan. 4, 2021) (remanding under First Step Act for resentencing on defendant's covered offenses, but clarifying that "[o]n remand, the district court may not … change the defendant's sentences on counts that are not covered offenses" pursuant to *Denson*); *United States v. Baptiste*, 834 Fed.Appx. 547, 550 (11th Cir. Nov. 10, 2020) ("Counts 1, 23, 24, and 26 are powder-cocaine offenses. Neither §§ 2 nor 3 of the Fair Sentencing Act modified statutory penalties for offenses involving powder cocaine. Therefore, Counts 1, 23, 24, and 26 do not constitute 'covered offenses' under the First Step Act, and the district court properly concluded that it lacked authority to modify the sentences for those powder-cocaine counts," even though Count 3 was unquestionably a covered offense under the First Step Act as to which the district court did have discretion to grant a sentence reduction); *United States v. Smith*, 828 Fed.Appx. 523, 525 (11th Cir. Sept. 17, 2020) ("because the sentence on Count 6 was unaffected by §§ 2 and 3 of the Fair Sentencing Act and was not a 'covered offense,' the district court correctly concluded that it could not conduct a plenary resentencing in which it reduced the sentence on Count 6").

Although Files struggles mightily to extricate himself from *Denson* and its progeny, his efforts are unavailing. It is beyond reasonable debate that Files' 30-year sentences for each of Counts 1, 11 and 65 are for non-covered offenses. And *Denson* leaves no room for ambiguity that, even where covered offenses exist, § 404(b) of the First Step Act does not authorize reduction of sentence for any non-covered offenses. The Eleventh Circuit has repeated this fundamental principle numerous times in the 13 months since *Denson* was decided, and has neither suggested nor hinted at limiting or retreating from it. Files' insistence that the relevant passage in *Denson* is mere *dicta* that may be ignored by this Court is unpersuasive for the reasons set forth in *Gee*. And as *Gee* noted, even if the language in question were *dicta*, "it is obviously correct." *Gee*, 843 Fed.Appx. at 217. Files' reliance on contrary authorities from other jurisdictions and unpublished district-court authorities from this Circuit that predate *Denson* is misplaced because the Eleventh Circuit has addressed this issue unequivocally beginning with *Denson*. Files' attempts to massage *Jones* to find an implicit determination that the Eleventh Circuit somehow authorized the district court to resentence defendant Johnson on a powder-cocaine conviction as well as a crack-cocaine conviction reads into the decison concepts, findings and directives that simply are not there.[5]

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[5] As to *Jones*, Files' position is that "[i]f the First Step Act could not have affected the punishment for Mr. Johnson's powder-cocaine offense – that is, if he had to serve 20 years no matter what – there would have been little point in deciding whether he was eligible for relief." (Doc. 2459, PageID.9294.) But *Jones* did not say anything about whether defendant Johnson was or was not eligible for a sentence reduction on his powder-cocaine offense. It

Insofar as Files would take refuge in *United States v. Taylor*, 982 F.3d 1295 (11th Cir. 2020), that case is distinguishable on its face. In *Taylor*, the defendant was convicted of a single controlled substance conspiracy that involved large quantities of both crack cocaine and powder cocaine. The only issue on appeal in *Taylor* was "whether the First Step Act's definition of a 'covered offense' covers a multidrug conspiracy offense that includes *both* a crack-cocaine element *and* another drug-quantity element." *Id.* at 1300. Although the Eleventh Circuit answered that question in the affirmative, nowhere in *Taylor* did the appellate court indicate or imply that First Step Act eligibility would have existed for any additional offense that involved only controlled substances other than crack cocaine, had Taylor been charged with one. Indeed, the *Taylor* panel reasoned only that "[b]y effectively reducing the penalties triggered by the crack-cocaine element of Taylor's offense, the Fair Sentencing Act modified the statutory penalties for his offense as a whole. His offense is therefore a 'covered offense' as that term is defined in § 404 of the First Step Act." *Id.* at 1302. By contrast, there is no crack-cocaine element to the powder-cocaine offenses charged against Files in Counts 1, 11 and 65; therefore, *Taylor* lends no support to his position here.

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was simply silent on that matter, just as the Eleventh Circuit was silent in this case as to whether Files was eligible for sentence reduction on the powder-cocaine offenses found at Counts 1, 11 and 65. There was no reason for the appeals court to address that issue because, either way, Files (like Johnson) was entitled to have the district court consider whether to reduce his sentence on the covered offenses, irrespective of whether he was eligible for reduction of sentence on the non-covered offenses or not.

In his quest for reduction in his overall sentence, Files also invokes the sentencing-package doctrine. The Eleventh Circuit has explained that "especially in the guidelines era, sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence – the 'sentence package' – that reflects the guidelines and the relevant § 3553(a) factors." *United States v. Fowler*, 749 F.3d 1010, 1015 (11th Cir. 2014). "The thinking is that when a conviction on one or more of the component counts is vacated for good, the district court should be free to reconstruct the sentencing package … to ensure that the overall sentence remains consistent with the guidelines, the § 3553(a) factors, and the court's view concerning the proper sentence in light of all the circumstances." *Id.* The fundamental problem with this line of argument as applied to Files' case is that, as previously noted, "the district court has no inherent authority to modify a sentence; it may do so only when authorized by a statute or rule." *Puentes*, 803 F.3d at 605-06; *see also Jones*, 962 F.3d at 1297 (district courts "lack[] the inherent authority to modify a term of imprisonment" except "to the extent that a statute expressly permits"). Section 404 of the First Step Act authorizes sentence modification only for "covered offenses." Powder-cocaine offenses that lack a crack-cocaine element are unquestionably not "covered offenses"; therefore, the First Step Act does not authorize this Court to modify the sentences imposed for Counts 1, 11 and 65. There being no express statutory permission for this Court to modify Files' sentences for non-covered offenses, the sentencing-package doctrine has no application here because there is no judicial authority to do what Files requests. *See United States v.*

Baptiste, 834 Fed.Appx. 547, 550 (11th Cir. Nov. 10, 2020) (rejecting defendant's "sentencing-package doctrine" argument in First Step Act context as to non-covered offenses, and concluding that absent express statutory authority, "the sentencing-package doctrine is of no use to Baptiste"); *United States v. Shuford*, 2020 WL 8106573, *1-2 (N.D. Ala. Dec. 22, 2020) (following *Baptiste* and *United States v. Pubien*, 805 Fed.Appx. 727, 730-31 (11th Cir. Feb. 25, 2020) to reject defendant's argument that sentencing-package doctrine allowed resentencing on both covered offenses involving crack cocaine and non-covered offenses involving powder cocaine, because "this court lacks the authority to modify the sentence for the powder cocaine offense").

For all of the foregoing reasons, Files' request for reduction in his total sentence of imprisonment is **DENIED**. This Court concludes that it lacks authority to reduce Files' 30-year sentences of imprisonment imposed for the powder-cocaine offenses found at Count 1 (conspiracy to possess with intent to distribute more than 150 kilograms of powder cocaine), Count 11 (attempt to possess with intent to distribute approximately 4 kilograms of powder cocaine) and Count 65 (possession with intent to distribute approximately 8 kilograms of powder cocaine), all of which are non-covered offenses under § 404 of the First Step Act.

B. Reduction of Files' Sentences for Crack-Cocaine Offenses is Appropriate.

Notwithstanding the determination that this Court is not empowered to grant Files' request for a reduction in his total sentence of imprisonment, it remains appropriate to consider whether a reduction in

sentence on Files' covered offenses of conviction is warranted here.[6]

The Eleventh Circuit indicated that Files is eligible for a sentence reduction under the First Step Act as to his covered offenses. To say that he is eligible for relief, however, is not to say that he is entitled to relief. After all, even when a court has authority to reduce a sentence under § 404, "it [is] not required to do so." *Jones*, 962 F.3d at 1304; *see also* First Step Act § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."). "District courts have wide latitude to determine whether and how to exercise their discretion in this context. In exercising their discretion, they may consider all the relevant factors, including the statutory sentencing factors …." *Jones*, 962 F.3d at

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[6] The Government maintains that the analysis need not reach this step because "Files does not ask the Court to reduce his sentences for 'covered' offenses on an individualized basis and instead asks that his aggregate sentence be reduced." (Doc. 2460, PageID.9341 n.3.) But Files takes pains to clarify that he is requesting any sentencing relief this Court in its discretion may be inclined to grant, whether or not it applies to his total sentence. (Doc. 2461, PageID.9451 ("if this Court … finds that Mr. Files should receive *any* type of relief, it should exercise its discretion and grant that relief – even if it disagrees with Mr. Files about whether the First Step Act permits an across-the-board reduction here").) This approach makes sense. Even though this Court has determined that it cannot reduce Files' 30-year sentences on Counts 1, 11 and 65, a reduction in his concurrent sentences for the covered offenses may be beneficial to him in the event of future changes in the legal landscape. At a minimum, it is a worthwhile and important exercise to fix the appropriate sentences (including any reductions) for the 11 covered offenses so that Files does not serve any more time in prison for those offenses than he should, irrespective of the existence of other, noncovered offenses for which he is serving lengthier concurrent sentences.

1304. Recently, the Eleventh Circuit clarified that "the First Step Act does not mandate consideration of the statutory sentencing factors set forth in § 3553(a)." *Stevens*, 997 F.3d at 1316. What is required in exercising discretion in this context is that the district court must "make clear that [it] had a 'reasoned basis' for choosing to reduce or to not reduce a defendant's sentence under the First Step Act." *Id.* at 1317 (citations and internal quotation marks omitted). "In doing so, the district court may consider the § 3553(a) factors, as well as the probation office's submissions, post-sentence rehabilitation, … or any other relevant facts and circumstances." *Id.* at 1318.

In his supporting Memorandum (doc. 2459), Files has laid out a compelling case for reduction of his concurrent sentences on the crack-cocaine offenses. Among the relevant facts and circumstances that Files has marshaled in support of his request are the following: (i) Files' youthful age (late teens and early 20s) at the time of the offense conduct; (ii) his laudable record of rehabilitation and personal growth in prison; (iii) his stated intention to give back to his community via education and outreach programs; (iv) the 24 years that Files has already served in federal prison for the subject convictions; and (v) the fact that every single one of his co-conspirators, including those classified as upper-level managers, has already been released from prison, most of them at least several years ago. (Doc. 2459, PageID.9278-86.) Many of these arguments resonate with the Court. Although the Government correctly highlights the seriousness of Files' offense conduct (both in absolute terms and relative to that of his co-defendants), the Court finds that reducing Files' sentences on the covered offenses (*i.e.*, Counts 2, 9, 12-

13, 25-30, and 33) to time served is an appropriate exercise of its discretion, taking into consideration the § 3553(a) factors, the probation office's submissions, post-sentence rehabilitation, the need for his sentence to reflect the seriousness of his offense and provide just punishment, and all other relevant facts and circumstances.

Accordingly, the Court exercises its discretion under § 404 of the First Step Act to reduce Files' term of imprisonment for each of the crack-cocaine offenses of which he was convicted (Counts 2, 9, 12-13, 25-30 and 33) to **TIME SERVED**.

C. Conclusion.

For all of the foregoing reasons, Files' Motion for Reduced Sentence under § 404 of the First Step Act (docs. 2408, 2411) is **GRANTED in part**, and **DENIED in part**. The Motion is **GRANTED** as to Files' crack-cocaine offenses (Counts 2, 9, 12-13, 25-30 and 33). In the Court's discretion, Files' sentence as to each of those counts is reduced to **TIME SERVED**. The Motion is **DENIED** insofar as Files requests a reduction in his total sentence; thus, the 30-year concurrent sentences of imprisonment that Files received for non-covered offenses (Counts 1, 11 & 65) involving powder cocaine remain unchanged.

DONE and ORDERED this 5th day of August, 2021.

s/ WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE