

NO:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

DEWAYNE JOSEPH,

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 FOR REVIEW

The First Step Act of 2018, §404, Pub. L. No. 115-391, §404, 132 Stat. 5194, 5222 (2018) (“First Step Act”) was enacted to make sentence reductions available to eligible defendants based on reduced crack penalties originally granted to many defendants in 2010 through the Fair Sentencing Act of 2010, 132 Stat. 5194 (2010). As the lower courts implemented the First Step Act, they differed as to how they viewed the scope of First Step Act proceedings. Some courts viewed the proceedings as very limited in scope -- differentiating them from initial sentencing -- while others viewed the proceedings as more on par with original sentencing, matching both the obligations and discretion traditionally exercised in original sentencing proceedings.

Petitioner sought modification of his crack sentence through the First Step Act. Although he was found to be eligible he was denied relief. Both the district court and the Eleventh Circuit operated through its precedent which held the more limited view of First Step Act proceedings. See e.g., *United States v. Gonzalez*, 9 F.4th 1327 (11th Cir. 2021); *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020). Subsequently, this Court issued its opinion in *Concepcion v. United States*, __ S.Ct. __, 2022 WL 2295029 (June 27, 2022), in which it abrogated such precedent. *Concepcion* at *5, *7 n.2 (abrogating *United States v. Denson*, 963 F.3d 1080, 1089

(11th Cir. 2020)). *Concepcion* affirmed that First Step Act proceedings were not limited by the Constitution or by Congress, and thus, were to be conducted similar to original sentencing.

Accordingly, the question presented for review is whether this case should be reversed and remanded in light of *Concepcion*?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

United States v. Dewayne Joseph, App. No. 11-11097
(11th Cir. 2011).

United States District Court (S.D. Fla.):

United States v. Dewayne Joseph, No. 10-20511-Cr-Lenard
(July 26, 2019)

United States Court of Appeals (11th Cir.):

United States v. Dewayne Joseph, No. 21-12222
(April 4, 2022)

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PETITION FOR WRIT OF CERTIORARI

Dewayne Joseph respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 21-12222 in that court on April 4, 2022, which affirmed the district court's denial of Petitioner's Amended Motion for Sentence Reduction pursuant to the First Step Act of 2018, thereby affirming the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's denial of Petitioner's Amended Motion for Sentence Reduction pursuant to the First Step Act of 2018, thereby affirming the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on April 4, 2022. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory provision:

The First Step Act of 2018, §404, Pub. L. No. 115-391, §404, 132 Stat. 5194, 5222 (2018):

* * *

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

STATEMENT OF THE CASE

The indictment in this action charged Mr. Joseph with committing the following crimes on April 20, 2010: **(1)** count I: possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1); **(2)** count II: possession with intent to distribute (“pwid”) five grams or more of cocaine base (crack) in violation of 21 U.S.C. § 841(b)(1); **(3)** count III: possession of a firearm in furtherance of a drug trafficking offense (i.e., pwid crack in count II) in violation of 18 U.S.C. § 924(c)(1)(A). (See Appendix, A-7).

Before trial, the government filed a notice seeking an enhanced penalty for count II, pursuant to 21 U.S.C. §§ 841, 851. This enhancement was based on two Florida priors for possession with intent to sell, manufacture, or deliver cocaine, in violation of Fla. Stat. § 893.13, case nos. 07-001057 and 07-3014. After trial, Mr. Joseph was found guilty of the charges in the indictment.

Before sentencing, the United States Probation Office prepared a Presentence Investigation Report (“PSI”). The PSI determined that Mr. Joseph’s crack conviction with the § 851 enhancement resulted in a statutory range of 10 years-life for count II. The PSI also held Mr. Joseph responsible for relevant conduct of 30.3 grams of crack.

The PSI grouped count I (possession of firearm) and II (pwid crack) together, and determined that the guideline group was governed by U.S.S.G. § 2K2.1. Under that guideline, the base offense level was 24 (based on Mr. Joseph’s two prior Florida

drug convictions). The PSI added 6 additional points through enhancements. The PSI also found that Mr. Joseph had 6 criminal history points for a criminal history category of III. Based on those findings, the guideline level was 30, and the criminal history category was III, which gave a guidelines range of 121-151 months imprisonment under U.S.S.G. § 2K2.1.

The PSI then recommended that Mr. Joseph be sentenced as a career offender under the guidelines based on his crack conviction in count II. As a result of the PSI's finding that count II had a statutory range of 10 years-life, it determined that the career offender guideline level was 37 and that the criminal history category was VI for a guideline range of 360 months – life.

The sentencing was held on February 25, 2011. After hearing argument, the court found that Mr. Joseph was a career offender with a guideline level of 37. The court varied down 2 points and sentenced Mr. Joseph based on a level 35 and criminal history VI. The court selected the low end of the reduced guideline range, for a sentence of 292 months under the career offender enhancement. With a mandatory 60-month consecutive sentence for the § 924(c) count, Mr. Joseph's total sentence was 352 months apportioned as follows: (1) 120 months as to count I, (2) 292 months as to count II, and (3) a consecutive 60-month sentence as to count III. (See Appendix, A-5). Mr. Joseph appealed his conviction and sentence, and his appeal was denied on October 28, 2011. *United States v. Dewayne Joseph*, App. No. 11-11097 (11th Cir. 2011).

On May 21, 2019, Mr. Joseph filed the instant motion for a reduction of sentence based on the First Step Act. In these proceedings, Mr. Joseph argued that he was entitled to relief under the First Step Act because he was charged with a “covered offense,” i.e., 21 U.S.C. § 841 which had been modified by the Fair Sentencing Act of 2010 §§ 2-3; his offense conduct occurred before August 3, 2010; he had not previously been sentenced under FSA 2010; and this was his first motion under the First Step Act. He further argued that – at a minimum – his sentencing range as a career offender should be reduced from a range of 360 months-life to a reduced range of 210-262 months because the Fair Sentencing Act of 2010 had changed his maximum statutory penalty for his crack offense from life to 30 years, and this change in the statutory maximum penalty, in turn, reduced his career offender penalty. *See* U.S.S.G. § 4B1.1 (if statutory maximum penalty for predicate instant offense is life, career offender base offense level is 37; if statutory maximum penalty for predicate instant offense is 30 years, career offender base offense level is 34).

The district court denied Mr. Joseph’s First Step Act motion, finding that he was not eligible for relief. On appeal, the Eleventh Circuit reversed, finding that Mr. Joseph was eligible. Accordingly, the Eleventh Circuit remanded the case for reconsideration of Mr. Joseph’s First Step Act motion. *United States v. Dewayne Joseph*, 842 Fed. Appx. 471, 477 (11th Cir. 2021) (See Appendix, A-4).

On remand, Mr. Joseph filed an Amended Motion for a sentence reduction as

ordered by the district court. He argued that the controlling drug quantity governing his request for a First Step Act reduction was 5 grams of crack. He based this quantity on the following:

1. His indictment which charged him with an offense that “involved five (5) grams or more of a mixture and substance containing a detectable amount of cocaine base.” (See Appendix, A-7);
2. The jury’s special verdict in his case which found him guilty of a crack offense for “over five grams” (See Appendix, A-6); and
3. The final judgment imposed by the district court which stated that his conviction on count II was a crack conviction involving “five grams or more of cocaine base,” (See Appendix, A-5); *see also United States v. Joseph*, 842 Fed. Appx. 471, 472-73 (11th Cir. 2021) (See Appendix, A-4) (“The jury returned a verdict finding Joseph guilty on all three counts and that the drug offense involved five grams or more of cocaine base.”); *id.* at 477 n. 8 (“the drug quantity found by the jury (5 grams)”); *Id.* at 476 (“the district court’s judgment listed the offense in Count Two as ‘Possession with intent to distribute five grams or more of cocaine base.’ Doc. 67 at 1 This language, [] matched the indictment and jury’s verdict, . . . ”)).

Although Mr. Joseph acknowledged that he had filed a stipulation during trial that a government exhibit containing crack was in the amount of 30.3 grams, he noted that the stipulation did not include an agreement to the *mens rea* with respect to a distribution amount, and the stipulation did not purport to be the governing or

elemental drug quantity in his case. Rather, the offense of conviction which governed his statutory penalties was governed by the indictment, the special jury verdict, and the final judgment issued by the court.

Mr. Joseph argued that based on the statutory quantity of 5 grams, an enhanced statutory penalty under 21 U.S.C. §§841, 851, was 0-30 years. Thus, under the First Step Act, based on 5 grams of crack, his statutory maximum was reduced from life to 30 years. This in turn reduced his career offender enhancement guideline because that guideline is determined based on a defendant's statutory maximum sentence. Thus, his career offender guideline level reduced from a base offense level of 37 down to a base offense level of 34. This resulted in a reduction of the career offender sentencing range for his crack offense (with a 2-point reduction awarded by the court) from 292-365 months down to 210-262 months. He also argued that his supervised release term would be reduced from a minimum of 8 years to a minimum of 6 years.

Acknowledging that he had 11 disciplinary infractions during his approximately 10 years in prison, Mr. Joseph requested relief under the First Step Act based on the fact that he had made progress in rehabilitation through skills and educational classes, and also through productive work as a Compound Orderly where he received good employment reviews from his supervisor. He also informed the court that he had a place to live with his mother and sister, and that his family was willing to help him financially to obtain a commercial truck driver's license so he

could earn a good salary through legitimate means and contribute to society.

The government opposed Mr. Joseph's motion. It stated that the drug quantity for exercising discretion was based on the 30.3-gram quantity in the trial stipulation. The government made this argument even though Mr. Joseph's career offender sentence was based on the statutory penalties of the case, rather than relevant-conduct guideline determinations. The government also argued that the §3553(a) factors militated against exercising discretion to grant Mr. Joseph's request.

Mr. Joseph filed a Reply emphasizing that the career offender sentence that he was subject to was linked to statutory penalties which are governed by the offense of conviction. He further stated that his family members had stable employment and a stable home, and that he had a plan for reintegrating into society as a productive member.

On May 18, 2021, the United States Probation Office also prepared a revised Sentencing Memorandum in light of the First Step Act. It determined that the revised penalty requested through Mr. Joseph's First Step Act motion should be based on the 5-gram quantity of crack that was in the jury verdict and final judgment. (See Appendix, A-3). Probation then recommended that the statutory penalties be found reduced to 0-30 years and 6 years of supervised release. *Id.* at 2. It further found that the reduced statutory penalties led to a reduced career offender guideline. *Id.* at 3. The revised PSI then recommended a revised career offender guideline sentence of 210-262 months. *Id.* With a consecutive 5-year sentence for the §924(c)

conviction, the final sentence recommended was a low-end 270 months. *Id.*

Ultimately, the district court denied Mr. Joseph's motion. (See Appendix, A-2). In its decision, the district court avoided determination of whether the 5-gram quantity of crack in the indictment, jury verdict and judgment, or the 30.3-gram quantity of crack in the trial stipulation governed the First Step Act statutory penalties to reduce the career offender guideline. Further, the district court did not calculate the revised statutory penalties or the new guideline range at all. Instead, it stated: "Regardless of whether the relevant quantity of crack cocaine is five grams or 30.3 grams, after considering the sentencing factors under 18 U.S.C. §3553(a), the Court declines to exercise its discretion to reduce Defendant's sentence." *United States v. Joseph*, D.Ct. No. 10-cr-20511, DE 140 at 13 (Appendix, A-2). It then turned to other §3553(a) sentencing factors regarding Mr. Joseph's original offense, his criminal history, and his prison disciplinary infractions to deny relief. *Id.* at 13-16.

Mr. Joseph appealed this decision, arguing that the district court abused its discretion by failing to calculate the revised sentencing guidelines and statutory penalties under the First Step Act. The Eleventh Circuit affirmed. *United States v. Dewayne Joseph*, App. No. 21-12222, 2022 WL 1008838 (11th Cir. 2022) (See Appendix, A-1). It stated that the district court did not abuse its discretion by failing to calculate the revised guidelines or statutory penalties. It recognized that the district court did "not resolve the issue," but it further stated that under circuit

precedent, *United States v. Gonzalez*, 9 F.4th 1327 (11th Cir. 2021), courts were not required to calculate a movant’s revised guidelines range under the Fair Sentencing Act. *Joseph*, at *3 & n.4 (noting circuit split). Additionally, while acknowledging that, “Joseph is correct that the district court did not definitively decide the drug-quantity or related statutory penalty and guidelines range questions,” the Eleventh Circuit interpreted the district court’s refusal to decide these issues as “assuming” they would be decided in Joseph’s favor. *Joseph* at *4. However, the district court never stated that it was assuming the issue in favor of Joseph, rather, without deciding the issue, the district court skipped over to other §3553(a) factors. Cf., *United States v. Fowler*, 819 F.3d 298, 303 (6th Cir. 2016) (initial sentencing reversed when court failed to resolve disputed loss calculation in healthcare fraud case stating, “in either event, I think that the sentence I impose will comply with the congressional factors in either event being whether I take the higher or the lower guidelines or something in between.”). In affirming the district court, the Eleventh Circuit issued its decision without the benefit of and contrary to this Court’s recent decision in *Concepcion v. United States*, __ S.Ct. __, 2022 WL 2295029 (June 27, 2022). Without *Concepcion*, the courts in Mr. Joseph’s case were also unable to entertain the possible impact of intervening changes in the law that would favor Mr. Joseph. In light of the above, Mr. Joseph requests that this Court grant his instant Petition, vacate the Eleventh Circuit’s decision, and remand his case for further consideration in light of *Concepcion*.

REASON FOR GRANTING THE WRIT

The First Step Act §404(b) was enacted to remedy systemic discrimination and arbitrariness in crack cases. It enabled eligible defendants to receive sentence reductions based on reduced crack penalties originally granted to many defendants in 2010, through the Fair Sentencing Act of 2010, 132 Stat. 5194 (2010). The changes in the crack penalties were wrought after it was widely-acknowledged that the initial crack guidelines embodying a 1-to-100 ratio did not result in sentences that were proportionate to a defendant's culpability, i.e., they resulted in high sentences for low level crack dealers that were commensurate with major drug traffickers. *Dorsey v. United States*, 567 U.S. 260, 266 (2012). And even more significantly, that the higher crack penalties were not based on any actual difference between the severity of crack offenses vis-à-vis regular cocaine offenses, but rather on unjustified presumptions rooted in racial disparities and biases. *Dorsey*, 567 U.S. at 268. These factors ultimately led to a sequence of Congressional efforts to reduce the crack guidelines, most recently culminating in the First Step Act of 2018. *Dorsey*, 567 U.S. at 269.

Mr. Joseph was deemed eligible for relief under the First Step Act §404(b), but the district court, relying on flawed circuit precedent, denied relief and the Eleventh Circuit affirmed. Mr. Joseph asserts that his case was decided before, and contrary to this Court's decision in *Concepcion v. United States*, __ S.Ct. __, 2022 WL 2295029 (June 27, 2022). Thus, Mr. Joseph requests that his Petition be granted, and his

case be vacated and remanded in light of *Concepcion*.

In *Concepcion*, this Court evaluated the degree to which district courts could consider a broad array of factors in exercising their discretion of whether, and to what extent, to award defendants a sentencing reduction under §404(b) of the First Step Act. *Id.* at *8. The *Concepcion* court found that sentencing modification proceedings under §404(b) of the First Step Act were of the same nature and scope as original sentencing because there was no Constitutional or Congressional limitation on them. *Id.* Thus *Concepcion* made clear that the sentencing discretion available in initial sentencing and the “responsibility to sentence the whole person” before the court was applicable to First Step Act proceedings. *Concepcion* at *7, *9. It found this to be true because the broad discretion of initial sentencing, “carrie[d] forward to later proceedings that may modify an original sentence.” *Id.* at *7. Emphasizing the shared nature of both proceedings, the Court stated:

Federal judges exercising sentencing discretion have always considered a wide variety of aggravating and mitigating factors relating to the circumstances of both the offense and the offender. Indeed, it has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. . . . The discretion federal judges hold at initial sentencing also characterizes sentencing modification hearings.

Concepcion at *7-8 (internal citations and quotation marks omitted). Specifically, Congress had “not contravene[d]” the well-established sentencing practices in §404(b) sentencing modification proceedings. *Id.* at *9.

Concepcion reaffirmed as well, that even within this broad discretionary system, there were baseline requirements that needed to be followed for a court to avoid an abuse of discretion. *Id. at *10-12 & n.6.* This Court's well established rule that procedural errors include "failing to calculate (or improperly calculating) the Guidelines' range, . . . , failing to consider the §3553(a) factors, . . . , or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range" – continued in First Step Act proceedings. *Concepcion, at *10-12 & n.6, citing Gall v. United States, 552 U.S. 38, 51 (2007) and Peugh v. United States, 569 U.S. 530, 542, 543 (2013)* (recognizing that federal sentencing rules impose a series of requirements that cabin the exercise of sentencing courts' discretion). Thus, *Concepcion* -- citing *Peugh* and *Gall* -- affirmed the importance of the sentencing guidelines as "the framework" of the sentencing process and the need for the courts to correctly calculate the sentencing guideline range. *Concepcion, at *10-12 & n.6, citing Gall, 552 U.S. at 51 and Peugh, 569 U.S. at 542, 543. Peugh and Gall* make it clear that the courts cannot simply bi-pass this responsibility:

District courts must begin their sentencing analysis with the Guidelines in effect at the time of the offense and use them to calculate the sentencing range correctly; and those Guidelines will anchor both the district court's discretion and the appellate review process
Peugh, 569 U.S. at 541.

District courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.
Gall v. United States, 552 U.S. 38, 50 & n.6 (2007).

In the context of First Step Act §404(b) motions, *Concepcion* applied these

principles as requiring a correct and accurate calculation of the revised Fair Sentencing Act Guidelines:

[T]he First Step Act directs district courts to calculate the Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense. That Guidelines range "anchor[s]" the sentencing proceeding.

* * *

As a general matter, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence *Other than legal errors in recalculating the Guidelines to account for the Fair Sentencing Act's changes*, appellate review should not be overly searching.

Concepcion at *10, *citing Peugh*, 569 U.S. at 541; *Concepcion* at *12, *citing Gall*, 552 U.S. at 51 (emphasis added).

This threshold consideration of the revised guidelines was a function of this Court's precedent acknowledging the systemic importance of the guidelines, and the fulfillment of the statutory requirements to consider the "types of sentences available" as required under 18 U.S.C. §3553(a). So much the more for statutory penalties which are not advisory. *See Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975) (recognizing that the severity of statutory penalties "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability."); *United States v. Nelson*, 2022 WL 2185350, *5 (4th Cir. 2022) (finding duty to calculate statutory penalties at least as strong as duty to calculate guideline range).

Concepcion noted that the other obligation of a sentencing court was to explain

its decision so that it was clear that it had considered all of the parties' non-frivolous arguments. Although the court was not obligated to agree or disagree with policy arguments presented to it, the court was required to show that it had "reasoned through [the parties] arguments." *Concepcion* at *12; see also *United States v. Smith*, 959 F.3d 701 (6th Cir. 2020) (reversing district court because explanation did not evidence a consideration of §3553(a) factors "with reference to the purposes of the First Step Act and the Fair Sentencing Act."). A court's decision to avoid calculating the revised First Step Act guidelines and statutory penalties shows the opposite of what is required. Indeed, it shows that the court's decision was made "untethered from the benchmark of the new sentencing framework, . . ." and the concerns that Congress expected courts to consider. *Blake*, 22 F.4th at 643.

Concepcion made clear that after baseline limitations were met, courts had wide latitude to consider any relevant legal or factual evidence, including non-retroactive intervening changes in the law or intervening changes in the facts. *Id.* at *12. While courts could consider factors such as non-retroactive intervening legal changes, they were not required to do so. *Id.*

The type of process set out by *Concepcion* was demonstrated in the Seventh Circuit's decision of *United States v. Blake*, 22 F.4th 637, 639-40 (7th Cir. 2022), which – like *Concepcion* – also relied heavily on *Gall* and *Peugh*. In *Blake*, the defendant filed a motion for a sentence reduction under the First Step Act which the district court denied. *Blake*, 22 F.4th at 639. The district court, while deciding a spectrum

of possible revised Guideline ranges, decided not to resolve a drug quantity dispute, and thus, it failed to definitively calculate the revised First Step / Fair Sentencing Act Guidelines. *Id.* at 639-41. Instead, it skipped over this step and proceeded directly to assessing whether, as a matter of its discretion, the defendant deserved a reduced sentence. *Id.* at 640.

The Seventh Circuit reversed. It explained that skipping over the revised Guidelines as a threshold determination was reversible procedural error. It explained that “the procedural requirements when deciding a First Step Act motion” were analogous to “the requirements at sentencing, when it is significant procedural error to select a sentence without first calculating the guideline range.” *Id.* at 642, *citing United States v. Corner*, 967 F.3d 662, 665-66 (7th Cir. 2020), *citing Gall*, 552 U.S. at 51. Specifically, the Seventh Circuit found that courts were required to make a correct calculation of the revised guidelines, they were required to consider §3553(a) sentencing factors (including the Guidelines as a §3553(a) factor), and they were required to sufficiently explain their decisions. *Blake*, 22 F.4th at 642. Drawing from the centrality of the Guidelines in the sentencing process, the court determined that a correct calculation of the revised Guidelines was necessary to factor-in the policies and purposes that Congress was attempting to achieve through the First Step Act. *Id.* at 665, *citing Corner*, 967 F.3d at 665. And, “although courts are never obligated to grant such motions, their discretion must be informed by a calculation of the new sentencing parameters and an accurate comparison between the original and

new options. A decision based on erroneous or expired guideline calculations, or a decision to decline resentencing without considering at all the guidelines, would seemingly run afoul of Congressional expectations.” *Blake*, 22 F.4th at 665. (cleaned up); *see also id.* at 641, quoting *Corner* at 666 (“[T]he court’s exercise of discretion was divorced from the concerns underlying the Fair Sentencing Act, specifically redressing the extreme inequity between sentences for crack and powder cocaine offenses deemed irrational and unfair by Congress.”) (cleaned up).

In equating the scope of discretion under the First Step Act proceedings with those of initial sentencing, *Concepcion* abrogated the law of several circuits’, including as relevant here, Eleventh Circuit precedent. *Concepcion* at *5, *7 n.2 (abrogating *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020)). Mr. Joseph’s case was decided under the Eleventh Circuit’s previous flawed precedent, not *Concepcion*. Under such precedent, the errors in Mr. Joseph’s case -- of failing to calculate the revised guideline and statutory penalties, as well as the consequential impact of this error on the court’s reasoning and duty to consider all nonfrivolous arguments – were approved.

The courts below were also prohibited by their precedent from considering intervening changes of law, including as relevant to petitioner’s case, ameliorative changes to 21 U.S.C. §851 and the career offender enhancement, U.S.S.G. §4B1.2. These changes arise from a recent case, *United States v. Jackson*, __ F.4th __, 2022 WL 2080280 (11th Cir. June 10, 2022), which calls into question the viability of Mr.

Joseph's 2007 Florida cocaine convictions as predicates for the 21 U.S.C. §841/851 and career offender enhancements. Under *Jackson* the predicates could fail because at the time that Joseph was convicted of them in 2007, the drug category of cocaine under Florida law included a drug called Ioflupane [123 I]. *Jackson* at *7. Ioflupane was also considered a cocaine-related controlled substance in 2010, for purposes of the "felony drug offense" and "controlled substance offense," definitions undergirding Joseph's §§841/851 and U.S.S.G. §4B1.2 enhancements, respectively. See *Jackson* at *5. However, in 2015, the federal government removed Ioflupane from the schedule of illegal cocaine-related controlled substances because it was determined that Ioflupane had value in potentially diagnosing Parkinson's Disease. *Jackson*, at *5. "As a result, Ioflupane has not been a federally 'controlled substance' as defined in 21 U.S.C. §802, since September 2015.". *Id.* Therefore, by the time of Mr. Joseph's First Step Act motion in 2019, Ioflupane no longer qualified as an illegal substance that would support his enhancements, i.e., the removal of Ioflupane as an illegal substance from federal drug statutes called into question the use of his 2007 Florida cocaine convictions as predicate offenses for his federal enhancements.¹ In

¹ Although the mandate in *Jackson* has been withheld and a petition for rehearing by the government is scheduled to be filed on or before August 1, 2022, the *Jackson* decision has not been vacated, and it continues to call into question the viability of the stringent enhancements imposed in petitioner's case. Regardless of what transpires with *Jackson*, Petitioner submits that his case should be remanded back to the lower court in light of *Concepcion* because, as explained *supra*, the lower courts failed to correctly determine the revised First Step Act guidelines and statutory penalties.

light of the above, Mr. Joseph requests that this Court grant his Petition, and reverse and remand his case for further consideration in light of *Concepcion*.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit, vacate the Eleventh Circuit's decision, and remand Petitioner's case for further consideration in light of *Concepcion*.

Respectfully submitted,

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