NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

LEONCIO PEREZ,

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

MICHAEL CARUSO
Federal Public Defender
TRACY DREISPUL*
TA'RONCE STOWES
Assistant Federal Public Defenders
150 W. Flagler Street, Suite 1500
Miami, FL 33130
305-536-6900

June 12, 2023
******Counsel of Record*

QUESTION PRESENTED

Section 404 of the First Step Act of 2018 sets out two steps to determine whether the imposition of a reduced sentence is warranted for a defendant previously sentenced under unjust crack cocaine sentencing laws.

First, Section 404(a) of the Act predicates a defendant's eligibility to receive a reduced sentence on having a "covered offense." In *Terry v. United States*, 141 S. Ct. 1858 (2021), this Court held: (a) whether a defendant has a "covered offense" is determined by the elements of the offense of conviction; and (b) any defendant sentenced for a crack cocaine offense under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), prior to August 3, 2010, has a "covered offense."

Second, in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), the Court held that, at the second, discretionary step, under Section 404(b), district courts may consider intervening changes in fact or law, without limitation.

The question presented is: Do this Court's First Step Act precedents admit of the uniquely Eleventh Circuit's intermediate step whereby, for the discrete group of individuals still serving sentences imposed before *Apprendi v. New Jersey*, 530 U.S. 446 (2000), the facts found by the judge at sentencing control the imprisonment range and thus render an individual who is "eligible" at step one, nevertheless ineligible for relief at the discretionary step two?

INTERESTED PARTIES

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

RELATED PROCEEDINGS

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

United States v. Perez, 859 F. App'x 356 (11th Cir. 2002), *vacated and remanded*, *Perez v. United States*, No. 21-6179, 143 S. Ct. 72 (2022) (mem.).

United States v. Perez, No. 97-cr-00509-FAM, 2020 WL 804267 (S.D. Fla. Feb. 18, 2020).

United States v. Perez, No. 97-cr-00509-FAM (S.D. Fla. Apr. 7, 1998), *aff'd*, No. 98-4623 (11th Cir. July 23, 1999).

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PETITION FOR WRIT OF CERTIORARI

Leoncio Perez 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 20-10806, in that court on March 16, 2023. *United States v. Perez*, 2023 WL 2534713 (11th Cir. Mar. 16, 2023).

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Perez*, 2023 WL 2534713 (11th Cir. Mar. 16, 2023), 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 United States Court of Appeals had jurisdiction over this cause pursuant to 28 U.S.C. § 1291. The decision of the court of appeals was entered on Mar 16, 2023. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY PROVISIONS INVOLVED

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

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Section 2(a) of the Fair Sentencing Act of 2010. Pub. L. No. 111-220, 124 Stat. 2372, provides, in relevant part:

> (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
>
> (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and
>
> (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

Section 841 of Title 21, United States Code, as amended by the Fair Sentencing Act of 2010, is included in the Appendix (A-5).

INTRODUCTION

Sections 404(a) and (b) of the First Step Act of 2018 establish a two-step procedure for district courts to follow in determining whether to impose reduced sentences for defendants previously sentenced under the unjust "100-to-1" crack-to-powder cocaine sentencing ratio.[1]

In the first step, the court must determine whether the defendant has a "covered offense" under § 404(a). In *Terry v. United States*, 141 S. Ct. 1858 (2021), this Court held that whether a defendant has a "covered offense" depends on the elements of the offense. *Terry* further held that any defendant sentenced for a crack cocaine offense under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), prior to August 3, 2010, has a "covered offense."

The second, discretionary, step is governed by § 404(b). In *Concepcion v. United States*, 142 S. Ct. 2389 (2022), this Court held that, at this step, district courts may consider intervening changes in fact or law, without limitation. Importantly, *Concepcion* both considered, and rejected, the premise that the "as if" language in § 404(b) imposes substantive limitations on a court's discretion.[2]

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[1] The remaining subsection of Section 404, § 404(c) clarifies the discretionary nature of the remedy and includes two express limitations on a court's ability to impose a reduced sentence, which are inapplicable here.

[2] *See* Pub L. No. 115-391, 132 Stat. 5194 § 404(b) ("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.").

In this case, Eleventh Circuit correctly found that Mr. Perez had a "covered offense" because he had been sentenced under 21 U.S.C. § 841(b)(1)(A), which, at the time of his offense, was triggered by a finding that the offense involved 50 grams or more of crack cocaine. Under *Terry*, this should have been the end of the inquiry into Mr. Perez' eligibility for relief under § 404(a).

The Eleventh Circuit, however, went on to infer restrictions on the district court's authority to reduce Mr. Perez' sentence. In the Eleventh Circuit's view, the "as if" language in § 404(b) means, *inter alia*, that "in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *United States v. Jones*, 962 F.3d 1290, 1304 (2020). Because this rule involves a drug quantity finding that "could have been used to determine the movant's statutory penalty at the time of sentencing," *id.*, it impacts defendants differently, based on whether they were sentenced before or after *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See United States v. Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021) ("Applying this standard, whether a court can look at a drug-quantity finding made at sentencing to determine what a movant's statutory penalty range would have been under the Fair Sentencing Act generally depends on whether the movant was sentenced before or after the Supreme Court's decision in [*Apprendi*].").

Because Mr. Perez was sentenced prior to *Apprendi*, the Eleventh Circuit held that the 616.4 gram quantity of crack cocaine identified in the Pre-Sentence

Investigation Report ("PSI"), rather than the 50 gram quantity that triggered his original statutory life sentence, governed. And that meant that—notwithstanding his covered offense—Mr. Perez could not receive a reduced sentence because the 616.4 gram quantity of crack cocaine identified in his PSI would still have triggered a mandatory life sentence after the passage of the Fair Sentencing Act.

The opinion below conflicts with *Terry's* holding that the "statutory penalties ... changed for all subparagraph (A) and (B) offenders," *Terry*, 141 S. Ct. at 1863, by relying on relevant conduct that was included in the PSI to push Mr. Perez' statutory penalties back into those mandated by subparagraph (A). It further conflicts with this Court's unambiguous holding in *Concepcion*, that the "as if" language in § 404(b) imposes no limitations on a district court's discretion. And it creates egregious disparity among similarly situated defendants, based on the happenstances not only of geography, but also of whether they were originally sentenced before or after *Apprendi*.

The Eleventh Circuit has thus interpreted the First Step Act of 2018 in a manner that contravenes *Terry* and *Concepcion*, conflicts with decisions of every other circuit, and unjustifiably prejudices a discrete class of individuals. For the reasons that follow, Mr. Perez asks this Court to grant review. Alternatively, because the court of appeals' holding is directly contrary to recent precedents of this Court, and because he would have been eligible for relief in any other circuit, Mr. Perez respectfully asks this Court to summarily reverse the decision of the Eleventh Circuit.

STATEMENT OF THE CASE

1. The underlying offense and sentencing hearing.

In July 1997, Petitioner Leoncio Perez was charged by indictment with one count of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and one count of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). (DE 1). Mr. Perez proceeded to trial and was convicted by a jury on both counts. (DE 55). Consistent with then-prevailing law, the jury made no finding as to drug quantity. (DE 55). A Pre-Sentence Investigation Report ("PSI") found that the relevant conduct involved 616.4 grams of crack cocaine, 8.8 grams of powder cocaine, and 0.9 grams of cannabis. (PSI ¶ 8).

At the time of Mr. Perez' offense, 50 grams of cocaine base was sufficient to trigger a 10-year mandatory minimum sentence of imprisonment, and 5-year term of supervised release, under 21 U.S.C. § 841(b)(1)(A)(iii). In the case of a defendant with a prior drug felony, if the government invoked the recidivist penalties provided by 21 U.S.C. §§ 841 and 851, the sentence would double to a mandatory prison term of 20 years, followed a supervised release term of at least 10 years. In the case of a defendant like Mr. Perez, with two or more qualifying prior offenses, the statute mandated life imprisonment. *See* 21 U.S.C. § 841 (1999 ed.).

On April 7, 1998, the district court sentenced Mr. Perez to concurrent terms of life imprisonment, followed by concurrent ten-year terms of supervised release, on each count of the indictment. (DE 63). Mr. Perez remains incarcerated pursuant to this sentence.

2. The First Step Act of 2018.

At the time of Mr. Perez' offense, federal law "imposed upon an offender who dealt in powder cocaine the same sentence it imposed upon an offender who dealt in one one-hundredth that amount of crack cocaine." *Dorsey v. United States*, 567 U.S. 260, 263 (2012). In 2010, in light of the longstanding recognition that penalties for crack cocaine were far too harsh, and were widely perceived to create unwarranted disparities based on race, Congress enacted the Fair Sentencing Act. *Id*. at 264. *See also Kimbrough v. United States,* 552 U.S. 85, 94-100 (2007) (discussing the history of different treatment of crack and powder cocaine offenses, as well as criticism of the 100-to-1 ratio). The Fair Sentencing Act of 2010 "reduc[ed] the crack-to-powder cocaine disparity from 100–to–1 to 18–to–1." *Dorsey*, 567 U.S. at 263. Specifically, Section 2 of the Fair Sentencing Act modified the statutory penalties for crack cocaine offenses by increasing the amount of crack necessary to support the statutory ranges for convictions under § 841(b)(1)(A) from 50 to 280 grams, and for convictions under § 841(b)(1)(B) from 5 to 28 grams. *See* Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010). Additionally, Section 3 of the Fair Sentencing Act eliminated any mandatory-minimum penalty for simple possession of crack cocaine. *See id.*

Congress did not, however, make the Fair Sentencing Act retroactive at that time. Instead, the Fair Sentencing Act's remedial amendments to 21 U.S.C. § 841 applied only to defendants sentenced on or after August 3, 2010. *See Dorsey*, 567 U.S. at 280. That changed on December 21, 2018, when the First Step Act of 2018 went into effect. Section 404 of the First Step Act, at issue herein, authorizes sentencing

courts to impose new sentences, retroactively applying Sections 2 and 3 of the Fair Sentencing Act to defendants who were sentenced before August 3, 2010. Section 404(a) of the First Step Act defines a "covered offense" under the Act 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 of 2010 ... that was committed before August 3, 2010." Pub L. No. 115-391, 132 Stat. 5194, § 404(a). Section 404(b) states: "[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." *Id.*, § 404(b).

On April 16, 2019, Mr. Perez moved the district court to reduce his sentence pursuant to the First Step Act of 2018. (DE 99). As previously discussed, Mr. Perez had been sentenced under the pre-Fair Sentencing Act version of 21 U.S.C. § 841(b)(1)(A), which, again, applied to an offense involving 50 grams or more of crack cocaine. However, the jury had made no finding regarding drug quantity at the time of Mr. Perez' trial. Thus, Mr. Perez argued that he should be sentenced under the penalties in 21 U.S.C. § (b)(1)(C), which applies to an offense involving an unspecified quantity of crack cocaine. (DE 107:3).[3] The government maintained that the district court should focus not on the statutory drug quantity (*i.e.,* the 50 grams required by § 841(b)(1)(A)) but instead on the total quantity that the judge found, for guideline

[3] Mr. Perez filed his initial motion *pro se*. (DE 99). The district court subsequently appointed the Federal Public Defender to represent Mr. Perez and file a counseled reply. *See* DE 102, 107.

purposes, at the original sentencing hearing—616.4 grams, of crack cocaine. *See* DE 101:6. The district court agreed with the government and denied the motion, reasoning that, "[h]ad the Fair Sentencing Act been in effect at the time of the Defendant's sentencing in 1998, the Court would still have imposed a mandatory minimum sentence of life given the crack cocaine attributable to Defendant, as well as his prior felony drug convictions." (DE 109:6).

3. The impact of *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020).

Mr. Perez appealed the district court's ruling to the United States Court of Appeals for the Eleventh Circuit. By that time, the Eleventh Circuit had decided *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), *vacated sub nom, Jackson v. United States,* 143 S. Ct. 72 (2022), *and reinstated by United States v. Jackson,* 58 F.4th 1331 (11th Cir. 2023). *Jones* required the Eleventh Circuit to affirm the denial of Mr. Perez' motion.

The threshold question in *Jones* was whether each of the appellants before the court had been sentenced for a "covered offense." Section 404(a) of the First Step Act defines "covered offense" to mean: "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 ... that was committed before August 3, 2010." Pub L. No. 115-391, 132 Stat. 5194, § 404(a). The Eleventh Circuit correctly found that the four appellants before the court in *Jones* had each been sentenced for a "covered offense," because each had been convicted of an offense involving crack cocaine and sentenced under 21 U.S.C. § (b)(1)(A) or (b)(1)(B). *See Jones*, 962 F.3d at 1303.

The *Jones* Court found that appellant Warren Jackson—who, like Mr. Perez, had been tried and sentenced before *Apprendi*—had a "covered offense," because "although the jury did not make a drug quantity finding, the district court found at sentencing a drug quantity of at least 50 grams of crack cocaine." *Jones*, 962 F.3d at 1303. The original statutory penalty for Mr. Jackson's offense was also life imprisonment based on his drug quantity and his prior felony convictions. *See id.* (citing 21 U.S.C. § 841(b)(1)(A)(iii) (1994)). "The Fair Sentencing Act modified the penalties for his offense,"—even after application of the recidivism enhancement—"to be 10 years to life imprisonment." *Id.* (citing 21 U.S.C. § 841(b)(1)(B)(iii) (2012)).

The Eleventh Circuit nonetheless held that the district court lacked authority to reduce Mr. Jackson's sentence, based on § 404(b)'s "as if" clause. *See Jones*, 962 F.3d at 1303. That section provides, in pertinent part: "[a] court that imposed a sentence for a covered offense may ... impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed." Pub L. No. 115-391, 132 Stat. 5194, § 404(b). The Eleventh Circuit interpreted the "*as if*" language in § 404(b) to establish "two limits" on a district court's authority: "First, it does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Jones,* 962 F.3d at 1303. "Second, in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Id.*

The way the Eleventh Circuit decided it, this second limitation affects defendants differently, depending on whether they were sentenced before or after *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See United States v. Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021) ("Applying this standard [from *Jones*], whether a court can look at a drug-quantity finding made at sentencing to determine what a movant's statutory penalty range would have been under the Fair Sentencing Act generally depends on whether the movant was sentenced before or after the Supreme Court's decision in [*Apprendi*].").

For defendants who were sentenced after *Apprendi*, the Eleventh Circuit correctly found that their eligibility for a reduced sentence depends solely on the statutory elements of the offense. For example, Alfonso Allen, another of the four appellants before the court in *Jones*, was found eligible for a reduced sentence, notwithstanding the district court's finding that his offense involved many times the amount of crack cocaine in Mr. Jackson's offense. Mr. Allen had been convicted after *Apprendi*, by a jury that found him responsible for 50 grams or more of crack cocaine. *See Jones*, 962 F.3d at 1294. As in Mr. Jackson's case, "the statutory penalty for that offense was originally life imprisonment because of Allen's two prior felony drug convictions." *Jones*, 962 F.3d at 1302 (citation omitted). Also like Mr. Jackson's case, "[u]nder the Fair Sentencing Act, that same offense would lead to a statutory range of 10 years to life imprisonment." *Id.* at 1302-03 (citation omitted). Unlike Mr. Jackson's case, however, the Eleventh Circuit recognized that "[t]he larger quantity of crack cocaine that the district court found—'between 420 and 784 grams of crack

cocaine per week'—did not trigger the statutory penalties for Allen's offense." *Id*. at 1303. Hence, Mr. Allen had a covered offense and was able to receive a reduced sentence under the First Step Act.

Mr. Jackson was treated differently. Because he was sentenced before *Apprendi*, the Eleventh Circuit held that the total drug quantity that the sentencing court found for guideline purposes—that is, 287 grams—rather than the statutory quantity of 50 grams, governed. As such, the Eleventh Circuit found that "[t]he district court correctly concluded that it could not reduce Jackson's sentence because his drug-quantity finding meant that he would face the same statutory penalty of life imprisonment under the Fair Sentencing Act. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2012)." *Jones*, 962 F.3d at 1304. Hence, because Mr. Jackson was sentenced before *Apprendi*, he lost.

Mr. Perez' appeal was resolved the same way as Mr. Jackson's. *United States v. Perez*, 859 F. App'x 356 (May 27, 2021). The court correctly found that Mr. Perez' "convictions qualify as covered offenses because he was sentenced for crack cocaine offenses that triggered the higher penalties in § 841(b)(1)(A)(iii) or (B)(iii)." *Perez*, 859 F. App'x at 359. However, under *Jones*, "[t]hat Perez satisfied the covered offense requirement is not the end of the inquiry." *Id*. (citing *Jones*, 962 F.3d at 1303). "In *Jones*, [the court] concluded that for movants who were sentenced prior to *Apprendi*, courts should use the drug-quantity finding made at sentencing to determine what the movant's penalty range would have been under the Fair Sentencing Act because this finding was used to set the movant's statutory penalty range." *Id*. at 358-359

(citations omitted). And, "[b]ecause Perez was convicted and sentenced before [this] Court's decision in *Apprendi*," the Eleventh Circuit "look[ed] to the drug quantity finding made at sentencing to determine what Perez' statutory penalty would be under the Fair Sentencing Act." *Id*. at 359 (citations omitted). "Given the district court's finding that the offenses involved 616.4 grams of crack cocaine and Perez's prior convictions for felony drug offenses," the Eleventh Circuit reasoned that "he would have been subject to mandatory life sentences if the Fair Sentencing Act had been in effect at the time he committed the offenses." *Id* at 359.

The court recognized in a footnote that "[s]ome members of the Eleventh Circuit" disagreed with the analysis applied in *Jones*. *See id*. at 359 n.1 (citing *United States v. Jackson*, 995 F.3d 1308, 1315-16 (11th Cir. 2021) (Martin, J., dissenting from denial of rehearing en banc)). Indeed, Judge Martin had lamented that "*Jones*'s holding that the drug quantity taken from [a] PSR disentitles [a pre-*Apprendi* defendant] to First Step Act relief has no basis in the text of the Act," "drastically curtails the reach of the First Step Act in [the Eleventh] Circuit," and "cannot be reconciled with" decisions from the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, all of which had "held that the availability of § 404 relief turns only on the statute of conviction." *See Jackson*, 995 F.3d at 1311–12, 1314 (Martin, J., dissenting from the denial of rehearing en banc).[4] Indeed, "[i]n almost

[4] The only case Judge Martin cited as "agreeing with *Jones*," was *United States v. Winters*, 979 F.3d 942, 951 (5th Cir. 2021). But *Winters* was about a dual-object conspiracy, where the defendant faced a mandatory minimum based on conduct

any other circuit," similarly-situated defendants "can have a district court consider their motions." *Id.* at 1314 & n.4 (collecting cases).

Judge Martin recognized that "*Jones*'s erroneous reading of § 404 is especially harmful for defendants like [Mr. Perez] who were sentenced before *Apprendi* and its progeny stopped the use of judge-found facts to boost statutory penalties." *Id.* at 1315 (footnote omitted). Judge Martin called this a "random injustice" and illustrated the injustice by comparing appellant Warren Jackson's situation to that of a post-*Apprendi* defendant named Bell, whose PSR found him responsible for 1.5 kilograms of crack, but who was nonetheless held eligible for relief. *See id*. at 1316. "The only difference between Mr. Bell and Mr. Jackson—other than Bell having been found responsible for a far higher drug quantity—is that Bell was sentenced after *Apprendi*." *Id*. (citation omitted).

Nonetheless, under the Eleventh Circuit's "prior panel-precedent rule," the court was bound to apply *Jones* to Mr. Perez' case. *Perez*, 859 F. App'x at 359. And, because Mr. Perez was sentenced prior to *Apprendi*, the 616.4 gram quantity of crack

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unaffected by the Fair Sentencing Act (*i.e.*, the distribution of powder cocaine). *See Winters*, 979 F.3d at 951. What's more, the Fifth Circuit would later decide the statutory-versus-relevant-conduct quantity issue, and side with the majority on the issue. *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019) ("[W]hether a defendant has a 'covered offense' under section 404(a) depends only on the statute under which he was convicted."). Indeed, it has even applied this rule to a defendant who was sentenced in the pre-*Apprendi* era. *See United States v. White*, 807 F. App'x 375 (5th Cir. 2020) (summarily affirming section 404 reduction for defendant sentenced prior to *Apprendi*).

cocaine from the PSI, rather than the 50-gram quantity under the statute of conviction, controlled. *See id*.

4. The GVR and the opinion below.

Mr. Perez petitioned this Court for a writ of certiorari. *See Perez v. United States* No. 21-6179 (U.S. Oct. 19, 2021). At the time, this Court had recently held, in *Terry v. United States*, 141 S. Ct. 1858, 1863 (2021), that the Fair Sentencing Act "plainly" modified the statutory penalties for all crack cocaine offenses committed prior to August 3, 2010 and sentenced under 21 U.S.C. § (b)(1)(A) or (b)(1)(B).

The Court had also recently granted certiorari in *Concepcion v. United States*, 142 S. Ct. 2389 (2022). In *Concepcion*, the Court would hold that nothing in the First Step Act limits the information that a district court may consider when deciding whether to impose a reduced sentence under the Act, and that the statute "allows district courts to consider intervening changes in law or fact in exercising their discretion to reduce a sentence." 142 S. Ct. at 2402. On October 3, 2023, the Court granted Mr. Perez' petition for certiorari, vacated the judgment of the Eleventh Circuit, and remanded the case for further consideration in light of *Concepcion*. *See Perez v. United States*, No. 21-6179, 143 S. Ct. 72 (U.S. Oct. 3, 2022) (mem.).

After the case was remanded, Mr. Perez successfully moved the Eleventh Circuit to delay resolving his case until the court issued a ruling in *United States v. Jackson*, 58 F.4th 1331, 1333 (11th Cir. 2003), which also had been remanded by this Court after a GVR based on *Concepcion*. On February 2, 2023, the Eleventh Circuit issued a published decision concluding that *Concepcion* did not "abrogate the

reasoning" of *Jones*. *United States v. Jackson,* 58 F.4th 1331, 1333 (11th Cir. 2023). The court reasoned that *Jones* "was concerned with an issue that arises before the sentencing court's discretion comes into play: determining how much of a drug the defendant possessed." *Jackson*, 58 F.4th at 1336. "*Concepcion*, by contrast, addressed an issue that arises only after drug quantity and the corresponding penalties [for the defendant's offense] have been established: which factors the district court may consider in deciding an appropriate sentence." *Id*.

Accordingly, on March 16, 2023, the court of appeals entered an opinion reinstating its original holding in Mr. Perez' case. *See United States v. Perez*, 2023 WL 2534713 (11th Cir. Mar. 16, 2023) ("Because the binding law in our circuit has not changed, we reinstate our prior decision and affirm the district court's order denying Mr. Perez' motion.").

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The opinion below conflicts with *Terry v. United States*, 141 S. Ct. 1858 (2021), as well as the decisions of every other circuit to have addressed the issue.

Section 404(a) of the First Step Act of 2018 conditions a defendant's eligibility for a reduced sentence on having previously been sentenced for a "covered offense," which is 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 of 2010 ... that was committed before August 3, 2010." Pub L. No. 115-391, 132 Stat. 5194, § 404(a). In *Terry v. United States*, 141 S. Ct. 1858 (2021), this Court held the term "statutory penalties," in this definition "references the entire, integrated phrase, 'a violation of a Federal criminal statute.'" *Terry,* 141 S. Ct. at 1862 (citation omitted). "And that phrase means 'offense.'" *Id.* (citation omitted). *Terry* thus held that the relevant question, for determining a defendant's eligibility for discretionary relief under the First Step Act, is "whether the Fair Sentencing Act modified the statutory penalties for petitioner's offense." *Id.*

Applying this test, the Court concluded that Terry—who had been sentenced under 21 U.S.C. § 841(b)(1)(C), which does not require a mandatory minimum sentence and was not directly altered by the Fair Sentencing Act—had not been sentenced for a covered offense, because the statutory range for § 841(b)(1)(C) had not changed. *Terry*, 141 S. Ct. at 1860. Only defendants sentenced under 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B) had been sentenced for "covered offenses" and were eligible for relief. *See Terry*, 141 S. Ct. at 1863.

The Court explained:

> Before 2010, a person charged with the original elements of subparagraph (A)—knowing or intentional possession with intent to distribute at least 50 grams of crack—faced a prison range of between 10 years and life. But because the Act increased the trigger quantity under subparagraph (A) to 280 grams, a person charged with those original elements after 2010 is now subject to the more lenient prison range for subparagraph (B): 5-to-40 years. Similarly, the elements of an offense under subparagraph (B) before 2010 were knowing or intentional possession with intent to distribute at least 5 grams of crack. Originally punishable by 5-to-40-years, the offense defined by those elements ... is now publishable by 0-to-20 years.... The statutory penalties thus changed for all subparagraph (A) and (B) offenders.

Terry, 141 S. Ct. at 1863 (internal footnote omitted).

The opinion below conflicts with *Terry* because it uses the drug quantity found at sentencing to set the statutory sentencing range. That's wrong. Offenses are determined by statutory elements, not an individual's underlying conduct. *See Terry*, 141 S. Ct. at 1862 ("Here, 'statutory penalties' references the entire, integrated phrase, 'a violation of a Federal criminal statute.' ... And that phrase means 'offense.'") (citations omitted). *See also* Brief Amicus Curiae By Invitation of the Court p. 6, *Terry v. United States*, No. 20-5904 (U.S. Apr. 13, 2021) ("It is therefore the elements of the offense of conviction, rather than the defendant's underlying conduct, that determine the 'statutory penalties' a court may impose ..."). If it were otherwise, an individual convicted of § 841(b)(1)(C) who had been found at sentencing to possess more than five grams of crack would have been convicted of a "covered offense." But this Court flatly rejected that construction. *See Terry*, 141 S. Ct. at 1864.

The elements of Mr. Perez' crime were possession with intent to distribute 50 grams or more of crack cocaine. As *Terry* says, that crime is "now subject to the more lenient prison range for subparagraph (B): 5-to-40 years." 141 S. Ct. at 1863. In the case of someone, like Mr. Perez, subject to the statutory recidivism enhancement, the penalties under subparagraph (B) become 10 years to life. *See* 21 U.S.C. § 841(b)(1)(B)(2011). But subparagraph (B) does *not* require the mandatory life sentence, which the Eleventh Circuit found still applied to Mr. Perez' offense.[5]

The decision below thus conflicts with *Terry's* clear holding that the "statutory penalties ... changed for all subparagraph (A) and (B) offenders," *Terry*, 141 S. Ct. at 1863, by relying on relevant conduct that was included in the PSI (primarily for guideline purposes) to push Mr. Perez' statutory penalties *back* into those mandated by subparagraph (A). Whether found by a judge before *Apprendi* or a jury after, the 5 and 50-gram quantities were always the quantities that set the statutory range. The fact that a judge made the finding required by the statute, and not a jury, was a constitutional error—but it does not change the fact that 50 grams was the relevant drug quantity under § 841(b)(1)(A).

No other circuit has followed the Eleventh Circuit's lead in using the specific quantity of crack cocaine involved in a covered offense to foreclose relief under the

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[5] Section 401 of the First Step Act amended the recidivism penalties under 21 U.S.C. § 841(b)(1)(A) by, *inter alia*, establishing only a 25-year mandatory minimum penalty (instead of life imprisonment) for a defendant with two qualifying prior offenses. This change to § 841(b)(1)(A) was not made retroactive.

First Step Act—not for defendants sentenced before *Apprendi*, and not for those sentenced after *Apprendi*. Instead, every other circuit to have addressed the issue has correctly held that "[i]t is the statute under which a defendant was convicted, not the defendant's actual conduct, that determines whether a defendant was sentenced for a 'covered offense' within the meaning of Section 404(a)." *See United States v. Davis*, 961 F.3d 181, 182 (2d Cir. 2020).[6] In these circuits, even defendants subject to mandatory life sentences under the recidivism enhancement in 21 U.S.C. §§ 841(b)(1)(A) and § 851 have been found to be fully eligible for discretionary relief under the First Step Act, without respect to the drug quantity involved in their

[6] *See also*, *e.g.*, *United States v. Coleman*, 66 F.4th 108, 110 (3d Cir. 2023) ("We therefore determine eligibility for § 404(b) relief by looking only to the statutory elements of the crime of conviction."); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019) ("[W]hether a defendant has a 'covered offense' under section 404(a) depends only on the statute under which he was convicted."); *United States v. Boulding*, 960 F.3d 774, 781 (6th Cir. 2020) ("[E]ligibility for resentencing under the First Step Act turns on the statute of conviction alone"); *United States v. Shaw*, 957 F.3d 734, 739 (7th Cir. 2020) ("[T]he statute of conviction alone determines eligibility for First Step Act relief."); *United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021) ("a district court should look to the minimum drug quantity associated with an eligible defendant's offense of conviction, rather than his underlying conduct"); *United States v. White*, 984 F.3d 756 87 (D.C. Cir. 2020) ("The court may consider both judge-found and jury-found drug quantities as part of its exercise of discretion. ... But the court may not deem relief categorically unavailable due to defendant-specific drug quantities.").

offenses.[7] Again, this is true both with respect to defendants sentenced before *Apprendi*, and with respect to those sentenced after *Apprendi.*[8]

The facts of *United States v. Robinson* are materially indistinguishable, and the Eighth Circuit's opinion is directly in conflict with this case. Mr. Robinson had been convicted in 1995 of possessing with intent to distribute crack cocaine, with two prior convictions for "felony drug offenses." *Robinson*, 9 F.4th at 956. Because this was pre-*Apprendi*, the jury did not make any quantity finding, but, at sentencing, Mr. Robinson was held responsible for 2.35 kilograms of crack cocaine and—just like Mr. Perez—he was sentenced to mandatory life under 21 U.S.C. § 841(b)(1)(A)(iii). *Robinson,* 9 F.4th at 956 (citing 21 U.S.C. § 841(b)(1)(A) (1994)) (footnote omitted).

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[7] *See Jackson*, 945 F.3d at 320 (5th Cir.) (agreeing that defendant sentenced to statutory life sentence was eligible for a reduced sentence, even though PSI found him responsible for more than 280 grams of crack cocaine); *Boulding*, 960 F.3d at 776 (6th Cir.) (finding defendant sentenced to mandatory life sentence under 21 U.S.C. §§ 841(b)(1)(A) and 851 eligible for a reduced sentence, even though PSI found him responsible for 650.4 grams of crack cocaine); *United States v. Moore*, 50 F.4th 597, 599 (7th Cir. 2022) (affirming partial reduction in sentence for defendant sentenced to mandatory life based on prior drug convictions); *United States v. Cooper*, 803 F. App'x 33 (7th Cir. 2020) (same); *United States v. Birdine*, 962 F.3d 1032 (8th Cir. 2020) ("Thus, while Birdine is still subject to a possible life sentence on Count 1, it is no longer mandatory."); *United States v. Bagby*, 835 F. App'x 375, 378 (10th Cir. 2020) ("[T]he government now agrees with Mr. Bagby that eligibility for First Step Act relief is based on the statute under which a defendant was convicted, not the defendant's actual conduct.").

[8] *See United States v. Robinson*, 9 F.4th 954 (8th Cir. 2021) ("[T]he district court erred as a matter of law when it relied on the sentencing court's drug quantity finding of 2.35 kilograms of crack cocaine to determine Robinson's applicable statutory sentencing range under the Fair Sentencing Act and the First Step Act.").

Just as in Mr. Perez' case, the district court denied relief based on the quantity of crack found at sentencing. As in Mr. Perez' case, the district court in *Robinson* was "of the view... that it could not reduce Robinson's sentence" because the original sentencing judge had found Robinson responsible for 2.35 kilograms of crack cocaine, which is more than the post-Fair Sentencing Act threshold amount of 280 grams. *See id.* at 958 ("That is, because the revised version of § 841(b)(1)(A)(iii) provided for a mandatory life sentence if the defendant was convicted of 280 grams or more of crack cocaine and had two or more prior felony drug offense convictions, the [district] court reasoned that the sentencing court's drug quantity finding satisfied that threshold, depriving it of the discretion to reduce Robinson's sentence under the First Step Act.").

But unlike here, the circuit court reversed. *Robinson*, 9 F.4th at 958. The Eighth Circuit explained that "[b]ecause the statutory penalties of [§ 841(b)(1)(A)] were modified by § 2 of the Fair Sentencing Act—raising the requisite threshold quantity from 50 to 280 grams—Robinson's offense is a covered offense, and he is consequently eligible for a sentence reduction." *Id.* (citations omitted); *see also id.* (citing *Terry*, 141 S. Ct. at 1863, as "noting that the Fair Sentencing Act plainly 'modified' the 'statutory penalties' of 21 U.S.C. § 841(b)(1)(A)(iii), (b)(1)(B)(iii))") (internal quotation marks omitted). The Eighth Circuit recognized that "[a] movant's statutory sentencing range under the First Step Act is dictated by the movant's offense of conviction, not his relevant conduct." *Robinson*, 9 F.4th at 858 (citing *United States v. White*, 984 F.3d 76, 86) (D.C. Cir. 2020)). Therefore, while noting the

Eleventh Circuit's contrary holding in *Jones*, the Eighth Circuit held that "the district court erred as a matter of law when it relied on the sentencing court's drug quantity finding ... to determine Robinson's applicable statutory sentencing range under the Fair Sentencing Act and the First Step Act." *Id*. at 959.[9]

Mr. Perez would have been eligible to receive a reduced sentence in any other circuit. In some cases, even the government would likely have agreed. *See United States v. Bagby*, 835 F. App'x 375, 377 (10th Cir. 2020) (accepting the government's concession that defendant was eligible for a reduced sentence, notwithstanding special jury finding that he possessed more than 280 grams of cocaine base); *White*, 984 F.3d at 82–83 ("The government agrees that relief cannot be made 'unavailable to appellants under [s]ection 404(b) because of the actual quantity of crack cocaine involved in their offenses.'").

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[9] In *White*, the D.C. Circuit rejected an "availability" test, similar to the one applied by the district court in *Robinson*, and the Eleventh Circuit here, in a case involving defendants sentenced to life imprisonment under the Guidelines. *See White*, 984 F.3d at 81. The appellants in *White* had been convicted, prior to *Apprendi*, of offenses involving 50 grams or more of crack cocaine. They had each been sentenced to life imprisonment based on findings in their respective PSIs, that their offenses actually involved more than 21 kilograms of crack. 984 F.3d at 83. Although the district court found that they were sentenced for "covered offense[s]," it thought that relief was not "available" to them because "the Fair Sentencing Act would have had no effect on [their] sentences ... based on the judge-found drug quantities." *Id*. at 84. The D.C. Circuit reversed, holding that "[t]his was error because ... there is no additional 'availability' requirement in section 404 beyond the covered offense requirement in section 404(a) and the limitations set forth in section 404(c). *Id*. at 81 (internal citation omitted).

II. The opinion below conflicts with *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

The opinion below also conflicts with *Concepcion v. United States*, 142 S. Ct. 2389 (2022), which held that, at the second, discretionary stage of a First Step Act motion, a district court may consider other intervening changes of law in adjudicating the motion. *Concepcion*, 142 S. Ct. at 2396. This Court granted certiorari in *Concepcion* to resolve a split among the circuits regarding whether a district court may, may not, or must consider intervening changes of law and fact, when ruling on a motion under the First Step Act. The Court held that district courts may consider such changes, without limitation: "It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's obligation to consider information is restrained." *Id.* And "[n]othing in the text and structure of the First Step Act expressly, or even implicitly," contains such a limitation. *Id.* at 2401.

Significantly, the Court *expressly* rejected the premise—central to the Eleventh Circuit's holding—that the "as if" language in § 404(b) imposes a substantive limit on a district court's discretion under the Act. The First Circuit in *Concepcion* had done the same thing that the Eleventh Circuit did here: interpreted the "as if"" clause to erect a categorical bar to relief, for those who were sentenced for a 'covered offense' under § 404(a), but for whom a change in sentencing exposure relied on a change in law "external to the Fair Sentencing Act." *United States v.*

Concepcion, 991 F.3d 279, 286 (1st Cir. 2021). This Court rejected that analysis. *See Concepcion*, 142 S. Ct. at 2405.

The Court explained that "[t]he term 'as if" simply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act." *Concepcion*, 142 S. Ct. at 2402. "That language is necessary to overcome 1 U.S.C. § 109, which creates a presumption that Congress does not repeal federal criminal penalties unless it says so 'expressly,'" and "to make clear that the Fair Sentencing Act applied retroactively." *Concepcion*, 142 S. Ct. at 2402. "The 'as if' clause does not, however, limit the information a district court may use to inform its decision whether and how much to reduce a sentence." *Id.* at 2403. Instead, the *only* limitations on a district court's authority to impose a reduced sentence for a covered offense are the limitations on successive requests for relief, expressly found in § 404(c) of the Act, which are inapplicable here.

In *Jackson*, 58 F.4th at 1335, the Eleventh Circuit acknowledged *Concepcion*'s holdings "that the 'as if' clause did not limit the information a district court may use to inform its decision whether and how much to reduce a sentence," and that district courts "may consider other intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison) in adjudicating a First Step Motion." *Id.* (citing *Concepcion*, 142 S. Ct. at 2396, 2402). But, the Eleventh Circuit found that these holdings did not apply when determining an applicable statutory penalty, because "*Jones* ... was concerned with an issue that arises before the sentencing court's discretion comes into play: determining how much

of a drug the defendant possessed" and "[t]his finding must occur before the district court can define the substantive offense." *Jackson*, 58 F.4th at 1331 (citing *Jones*, 962 F.3d at 1302–03).

But, under this Court's precedents, the only issue that arises before the sentencing court's discretion comes into play is the determination whether the defendant was sentenced for a covered offense. And that issue was resolved by *Terry*– which held that all §§ 841(b)(1)(A) and (B) crack offenses were covered offenses because the penalties changed for *all* of them. *Terry*, 141 S. Ct. at 1863. *Terry* and *Concepcion,* together, make clear that § 404(a)'s definition of "covered offense" is the statute's *only* categorical eligibility hurdle. The Eleventh Circuit nonetheless continues to impose additional limitations based on the "as if" language in § 404(b)—even after this Court expressly and unequivocally held that these limitations *do not exist*. *See Concepcion*, 142 S. Ct. at 2403.

Furthermore, *Apprendi* is, of course, a legal change; so under *Concepcion,* a district court deciding a § 404 motion may consider the impact of *Apprendi* on the case. *See United States v. Andrews*, 2023 WL 2136784, *2 n.1 (3d Cir. Feb. 21, 2023) ("[T]he District Court recognized here that it could 'consider the impact *Apprendi* would have had on his statutory range in determining whether to grant relief under Section 404'") (citing, *e.g.*, *Concepcion*, 142 S. Ct. at 2402). *See also United States v. Ware*, 964 F.3d 482, 489 (6th Cir. 2020) (holding that "the impact that *Apprendi* would have had on [the] statutory sentencing range is a factor that the district court may

consider when deciding whether, in its discretion, to grant relief to a defendant whom Congress has made eligible for relief").

Indeed, in its brief to this Court in *Concepcion*, the government wrote that, "because the Fair Sentencing Act postdated" *Apprendi*, "Congress would not have expected a district court adjudicating a Section 404 motion to be bound by prior judicial findings inconsistent with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny." *See* Brief for the United States at 40 n.*, *Concepcion v. United States*, No. 20-1650 (Dec. 15, 2021).

Concepcion's "language is both broad and clear." *United States v. Reed*, 58 F.4th 816, 824 (4th Cir. 2023) (holding that *Concepcion* abrogated its earlier holding in *United States v. Collington*, 995 F.3d 347, 358-59 (4th Cir. 2021), that a district court abused its discretion by refusing to reduce a defendant's sentence under the Act). "A district court's 'discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence,' and 'nothing in the First Step Act contains such a limitation.'" *Reed*, 58 F.4th at 821–22 (quoting *Concepcion*, 142 S. Ct. at 2397, 2398). The Eleventh Circuit was wrong to read such a limitation into the Act.

III. The Eleventh Circuit's anomalous rule has no basis in the text and prejudices a class of defendants who have already been doubly harmed by decades of unjust laws and unconstitutional procedures.

The Eleventh Circuit's ruling has no basis in the text of the First Step Act, is not required by restrictions on retroactivity, and impacts a class of defendants who were already doubly harmed: by unjust sentencing laws *and* unconstitutional procedures. It is indefensibly wrong, and should be reversed—either through a traditional grant of certiorari or through summary reversal.

Mr. Perez was clearly sentenced for a "covered offense," satisfying the only criteria for eligibility under § 404(a) of the First Step Act. *See Perez,* 859 F. App'x at 359; *Terry*, 141 S. Ct. at 1863. Furthermore, it is undisputed that the textual limitations in § 404(c) (regarding successive § 404 motions) do not apply to Mr. Perez' case. Under the plain text of the statute—and this Court's unambiguous holdings in *Terry* and *Concepcion*—there are no further limitations on either Mr. Perez' eligibility under the Act, or the district court's discretion to decide whether to reduce his sentence.

As Judge Martin recognized, the Eleventh Circuit's "tortured interpretation of the First Step Act" ... "prohibits an entire class of prisoners in Alabama, Florida, and Georgia from getting relief Congress meant for them to have." *Jackson*, 995 F.3d at 1316. This class of prisoners is the class of defendants who were subject to the some of the most unjust laws in the modern criminal legal system (the 100-to-1 crack-to-powder cocaine ratio), without some of the most important procedural protections our

system has to offer (*i.e.*, the jury trial protections recognized by *Apprendi* and its progeny).

The Eleventh Circuit justified this disparity based on the fact that *Apprendi* itself is not retroactively applicable to cases on collateral review. The court reasoned that, "just as a movant may not use *Apprendi* to collaterally attack his sentence, he cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion." *Jackson,* 58 F.4th at 1335 (citations omitted). But the fact that *Apprendi* is not retroactive is irrelevant. As the Sixth Circuit correctly recognized, "[c]onsideration of *Apprendi* in deciding whether to grant an eligible defendant's First Step Act motion is ... consistent with [the] holding that Courts cannot apply *Apprendi* retroactively as an independent basis for disturbing a defendant's finalized sentence." *Ware*, 964 F.3d at 488–89; *see also Jackson,* 995 F.3d at 1316 n.6 (Martin, J., dissenting from the denial of rehearing en banc) ("My argument today is not that Mr. Jackson's March 2000 sentence should be revisited on account of the Supreme Court's June 2000 decision in *Apprendi*. I say Mr. Jackson is entitled to be resentenced under the First Step Act passed in 2018. Nothing retroactive about that."). Indeed, considering intervening changes in constitutional law in identifying the defendant's "covered offense" is no different than considering any of the myriad other non-retroactive changes in law that district courts are expressly authorized to consider by *Concepcion*. *See Andrews*, 2023 WL 2136784 at *2 n.1; *Ware*, 964 F.3d at 489.

The defendants harmed by *Jackson* include many individuals like Mr. Perez, who are serving mandatory life sentences, based on unproven—and, at the time

superfluous for purposes of the statutory range—allegations of drug quantity included in a PSI.[10] Because "relief would have been available to them almost anywhere else in our country," *Jackson*, 995 F.3d at 1316 (Martin, J., dissenting from the denial of rehearing en banc), Mr. Perez respectfully asks this Court to grant review.

Alternatively, in view of the conflict between the opinion below and this Court's holdings in *Terry* and *Concepcion*, as well as the decisions of every other circuit to have considered the matter, and the government's agreement that Congress "would not have expected" this result, *see infra at* 32, this case may be appropriate for summary reversal. *See, e.g., CNH Indus. N.V. v. Reese,* 138 S. Ct. 761 (2018) (per curiam) (reversing a Sixth Circuit decision holding that a series of circuit-specific inferences, known as the "*Yard-man* inferences," could be relied upon to render a collective-bargaining agreement ambiguous, after a 2015 decision of the Court rejected those same inferences as "inconsistent with ordinary principles of contract law": "Because the Sixth Circuit's analysis is '*Yard-Man* re-born, re-built, and re-purposed for new adventures,' ... we reverse.") (quotation omitted); *Spears v. United*

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[10] *See, e.g., United States v. Clowers,* 62 F.4th 1377 (11th Cir. 2023); *United States v. Ingram*, 2023 WL 3493112 (11th Cir. May 17, 2023); *United States v. Perez*, 2023 WL 2534713 (11th Cir. Mar. 16, 2023); *United States v. Lee,* 2023 WL 2230268 (11th Cir. Feb. 27, 2023); *United States v. Williams*, 2023 WL 2155039 (11th Cir. Feb. 22, 2023); *United States v. Taylor*, 2021 WL 5321846 (11th Cir. Nov. 16, 2021); *United States v. Ford*, 855 F. App'x 542 (11th Cir. 2021); *United States v. Williams*, 2023 WL 2605025 (S.D. Ga. Mar, 22, 2023); *United States v. McCoy*, 2021 WL 5040402 (M.D. Fla. Oct. 29, 2021); *United States v. Malone*, 2020 WL 4721244 (S.D. Ala. Aug. 13 2020).

States, 555 U.S. 261, 263 (2009) (per curiam) ("Because the Eighth Circuit's decision on remand conflicts with our decision in [*Kimbrough v. United States*, 552 U.S. 85 (2007)], we grant the petition for certiorari and reverse."); *Nelson v. United States*, 555 U.S. 350, 351-352 (2009) (per curiam) ("Nelson has again filed a petition for a writ of certiorari, reasserting, *inter alia*, essentially the same argument he made before us the first time: that the District Court's statements clearly indicate that it impermissibly applied a presumption of reasonableness to his Guidelines range. The United States admits that the Fourth Circuit erred in rejecting that argument following our remand [in light of *Rita v. United States,* 127 S. Ct. 2456 (2008)]; we agree.").

CONCLUSION

Based upon the foregoing, the petition should be granted. Mr. Perez asks this Court to grant certiorari and review the decision of the United States Court of Appeals for the Eleventh Circuit. Alternatively, he asks the Court to grant this petition, and summarily reverse the decision of the court of appeals.

Respectfully submitted,

MICHAEL CARUSO
Federal Public Defender

/s/ Tracy Dreispul
TRACY DREISPUL*
TA'RONCE STOWES
Assistant Federal Public Defenders
150 W. Flagler Street, Suite 1500
Miami, FL 33130
305-536-6900

Miami, Florida
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**Counsel of Record*