No. 22-7794

IN THE

Supreme Court of the United States

LEONCIO PEREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICUS CURIAE SUPPORTING PETITIONER

Michael Holley
Co-chair, Amicus Committee
Joanna Munson Perales
Member, Amicus Committee
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Shelley Fite*
Davina T. Chen
National Sentencing Resource Counsel
FEDERAL PUBLIC AND COMMUNITY DEFENDERS
22 E. Mifflin St., #1000
Madison, WI 53703
(608) 234-0883
Shelley_Fite@fd.org

**Counsel of Record for Amicus Curiae*

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INTEREST OF AMICUS CURIAE[1]

The National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, volunteer organization made up of attorneys who work for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A.

NAFD members have particular expertise and interest in the subject matter of this litigation. After the First Step Act of 2018 became law, Federal Public and Community Defenders handled the overwhelming majority of motions under § 404 of that Act, which provided relief to thousands of individuals sentenced for crack-cocaine offenses under mandatory-minimum sentences that had been lowered (previously, only prospectively) by the Fair Sentencing Act of 2010.

Our membership keenly understands that the Eleventh Circuit's rule at issue here is untenable: it requires a discrete subset of individuals to serve out mandatory life sentences, although individuals within that subset would be permitted to obtain relief in any other circuit. And we immediately perceive the injustice: the characteristics that distinguish this subset are that the individuals within it have been in prison the longest, and had sentencing proceedings with the fewest constitutional protections.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person other than amicus and its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Respondent and Petitioner received timely notice of the filing of this brief.

INTRODUCTION

This case is about § 404 of the First Step Act of 2018, which made the Fair Sentencing Act of 2010 retroactive—creating a remedy for individuals sentenced under the repudiated 100-to-one ratio for penalizing crack- versus powder-cocaine offenses. This Court has addressed § 404 twice before, in *Terry v. United States*, 141 S. Ct. 1858 (2021), and *Concepcion v. United States*, 142 S. Ct. 2389 (2022).

Before this Court decided either *Terry* or *Concepcion*, the Eleventh Circuit adopted a rule that applies differently depending on whether the § 404 movant was originally sentenced before or after this Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). That rule, which categorically disqualifies certain pre-*Apprendi* defendants from relief, contradicts both *Terry* and *Concepcion*. Indeed, the rule is not just wrong under this Court's precedents, it is illogical. Yet on remand from this Court after *Concepcion*, the Eleventh Circuit determined that it would not change course. *United States v. Perez*, 2023 WL 2534713 (11th Cir. Mar. 16, 2023) (relying upon *United States v. Jackson,* 58 F.4th 1331 (11th Cir. 2023)).

The Eleventh Circuit's rule, as applied to pre-*Apprendi* defendants, is offensive to any concept of fairness. This brief attempts to break down the rule to help this Court understand how it operates, how it is wrong, and how it condemns a discrete group of individuals who were sentenced under the old 100-to-one ratio to life imprisonment. Then the brief explains that these same individuals could get relief

in any other circuit, with citation to dozens of cases in which federal courts outside of the Eleventh Circuit have afforded relief to individuals who are situated similarly to the petitioner in this case.

This amicus brief is filed for Leoncio Perez, but we ask the Court to also consider it when taking up the certiorari petitions of five other individuals:

- Warren Lavell Jackson, No. 22-7728 (U.S.)
- Pinkney Clowers, III, No. 22-7783 (U.S.)
- Jamie Williams (submitted, no number yet)[2]
- Michael G. Harper (to be filed)[3]
- Bobby Lee Ingram, No. (to be filed)[4]

The number of individuals who would be impacted by this Court's action in these cases is relatively small but the impact on them is profound.[5] The Eleventh Circuit's notion that a person is categorically excluded from § 404's retroactive relief mechanism based on the fact that they are serving the *longest* sentences, and had the *least fair* sentencing proceedings, cannot be maintained.

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[2] *See United States v. Williams*, 2023 WL 2155039 (11th Cir. Feb. 22, 2023).

[3] *See United States v. Harper*, 2023 WL 3166351 (11th Cir. May 1, 2023).

[4] *See United States v. Ingram*, 2023 WL 3493112 (11th Cir. May 17, 2023).

[5] In addition to the cases with certiorari petitions listed above, NAFD is aware of several related cases that are pending in the Eleventh Circuit and many more cases where the defendant could get relief in the district court when and if this Court reverses in the cases with pending petitions.

ARGUMENT

I. The Eleventh Circuit's exclusion of pre-*Apprendi* defendants from the ordinary § 404 analysis is erroneous and illogical.

Section 404 of the First Step Act presents a two-step process. First, the court determines eligibility: whether the individual is serving a sentence for a "covered offense"—that is, "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." Then, for an individual who meets this eligibility test, the court has discretion 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."

This Court addressed step one in *Terry* and step two in *Concepcion*. Under *Terry*, eligibility is a straightforward, bright-line test that is based on the statute of conviction: if an individual was sentenced under one of the pre-Fair Sentencing Act sentencing ranges applicable to crack offenses—21 U.S.C. § 841(b)(1)(A)(iii) and (b)(1)(B)(iii)—then he is eligible for relief; if not, then he is not. 141 S. Ct. at 1863.[6] In *Concepcion*, the Court held that for individuals who are eligible for relief, the district court enjoys broad discretion in determining

[6] Pre-Fair Sentencing Act, the quantity thresholds were 50 grams for § 841(b)(1)(A)(iii) and 5 grams for § 841(b)(1)(B)(iii). Now the thresholds are, respectively, 280 grams and 28 grams. *Dorsey v. United States*, 567 U.S. 260, 269 (2012)

whether to grant relief and by how much. 142 S. Ct. at 2401–04.

The Eleventh Circuit's § 404 analysis, which was developed in *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), *cert. granted, judgment vacated sub nom. Lavell Jackson v. United States*, 143 S. Ct. 72 (2022), *and opinion reinstated on reconsideration sub nom. United States v. Jackson*, 58 F.4th 1331 (11th Cir. 2023), might at first glance appear to be consistent with these opinions. But on closer inspection, as applied to pre-*Apprendi* defendants, it contradicts both.[7]

The Eleventh Circuit in *Jones* described "covered offense" much as this Court would in *Terry*, holding that it is based solely on statutory elements; "[a]nd the specific elements . . . that matter for eligibility under the First Step Act are the two drug-quantity elements in sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii)"—that is, 50 grams and 5 grams. *Jones*, 962 F.3d at 1301.

Then the Eleventh Circuit explained that before exercising discretion at § 404's second step, the court would have to calculate the post-Fair Sentencing Act statutory penalty range. And the problem arose here because the Eleventh Circuit held that for pre-*Apprendi* defendants—and pre-*Apprendi* defendants only—the statutory range is not based on

[7] The effect of *Apprendi* on § 841 offenses was to require that a quantity allegation that increases the mandatory sentencing range (for crack cocaine, 5 or 50 grams before the Fair Sentencing Act; 28 or 280 grams after) be alleged in the indictment and proven to a jury or admitted by plea.

statutory elements. Instead, it is based on whatever total drug quantity the district court found at sentencing. *Jones*, 962 F.3d at 1303–04. This is true even though only 50 grams of any factual-finding would have related to the statutory range; any finding over 50 grams could only relate to the guideline range, or perhaps the court's sentencing discretion, but not to the statutory range.

Thus for a post-*Apprendi* defendant in the Eleventh Circuit, consistent with *Terry*, elements control: A person convicted of a crack offense under the highest sentencing range, § 841(b)(1)(A)(iii), based on the old 50-gram threshold, is understood to now come within the § 841(b)(1)(B)(iii) range—no matter what quantity of cocaine his offense was found to involve at sentencing. *Jones*, 962 F.3d at 1304–05.[8] But for a pre-*Apprendi* defendant, there's a special rule: factual-findings unrelated to any statutory element control. *Id.* at 1304.

The practical result of this distinction between pre- and post-*Apprendi* defendants is an unwarranted—and as applied to individuals serving mandatory life sentences, a breathtaking—disparity even within the Eleventh Circuit. *See United States v. Jackson*, 995 F.3d 1308, 1316 (11th Cir. 2021) (Martin, J., dissenting from the denial of rehearing en banc). A district court has broad discretion to reduce the sentence of any and all post-*Apprendi* defendants sentenced for crack under the old 100-to-one ratio. For these defendants, the mandatory-

[8] In exercising discretion under § 404, the court can, of course, consider the total quantity, along with other factors.

minimum previously set by § 841(b)(1)(A)(iii) will always be reduced—from 10 years, 20 years, or life (depending on whether the government filed a notice related to prior convictions) to either 5 or 10 years. And all § 404 movants will have already served a sentence longer than 10 years.

But many pre-*Apprendi* defendants are stuck at the pre-Fair Sentencing Act mandatory-minimum—even if that minimum is *life*—based on factual-findings made at sentencing for purposes other than calculation of the statutory range.

As applied to pre-*Apprendi* defendants, *Jones*'s rule is contrary to both *Terry* and *Concepcion*:

Terry. In *Terry*, this Court held that whether a defendant was sentenced for a covered offense is a bright-line test that depends on whether the Fair Sentencing Act changed his crack-based statutory sentencing range. 141 S. Ct. at 1863.[9] And the Court clarified that because 50 grams—the old § 841(b)(1)(A)(iii) threshold—now falls within § 841(b)(1)(B)(iii), the Fair Sentencing Act did in fact change the range for all offenses under

[9] This is based solely on the elements of the offense. As the court-appointed amicus in *Terry* explained, in an analysis that the Court adopted, "[s]ection 2 of the Fair Sentencing Act modified statutory penalties for certain § 841(b)(1) offenses because the elements of the pre-Act violation, after August 3, 2010, establish a conviction under a different subsection with different statutory penalties." Br. of Amicus Curiae by Invitation of the Court, *Terry v. United States*, 2021 WL 2313640, *17 (U.S. Apr. 13, 2021); *see also id.* at *16 ("As any upper-level law student knows, an offense is defined by its elements.").

§ 841(b)(1)(A)(iii). *Id.* ("The statutory penalties thus changed for all subparagraph (A) and (B) offenders."). Thus, under *Terry*, the Eleventh Circuit is plainly wrong in holding that a person can be found to have been sentenced for a "covered offense" based on the pre-Fair Sentencing Act elements of § 841(b)(1)(A)(iii) but then categorically disqualified from relief based on the notion that he *still* falls within § 841(b)(1)(A)(iii).

Concepcion. Because the Eleventh Circuit's special rule for pre-*Apprendi* defendants is ostensibly about the second step of the § 404 process, it also implicates *Concepcion*. In *Concepcion*, this Court held that if an individual was convicted of a "covered offense," the district court enjoys broad discretion to reduce his sentence with "only two limitations" (under § 404(c)) not relevant here. 142 S. Ct. at 2401–02. This leaves no room for the Eleventh Circuit's rule disqualifying many pre-*Apprendi* defendants from relief.

Also, this Court in *Concepcion* explained that § 404's "as if" clause does not limit the application of that provision; it simply overcomes the saving statute at 1 U.S.C. § 109, which would otherwise prohibit retroactive application. 142 S. Ct. at 2402. The Eleventh Circuit's special rule for pre-*Apprendi* defendants conflicts with this aspect of *Concepcion*, too: that court in *Jones* explained that it was § 404's "as if" clause that required its special rule—that "as if" required a court to decide a § 404 motion filed by a pre-*Apprendi* defendant as if it were deciding that motion post-Fair Sentencing Act but somehow still pre-*Apprendi*. *See Jones*, 962 F.3d at 1303–04.

Indeed, not only does *Concepcion*'s discussion of the "as if" clause foreclose this interpretation, *Concepcion* clarifies that caselaw arising after sentencing can be a reason to *grant* relief. At § 404 step two, a court may consider a post-sentencing change in law (like *Apprendi*) in determining whether to grant relief as a matter of discretion, and by how much. 142 S. Ct. at 2404. This is the very opposite of a rule that *bars* relief based on the fact that a person was sentenced before a positive change in law like *Apprendi*.

The Eleventh Circuit's rule for pre-*Apprendi* defendants is not just legally wrong, it is also illogical. Eligibility for § 404 relief draws a clear temporal line, but that line separates those sentenced before the Fair Sentencing Act and those sentenced after; there's nothing related to this Court's decision in *Apprendi*. Indeed, anyone sentenced pre-*Apprendi* is necessarily on the "eligible" side of the temporal line that § 404 does draw, since *Apprendi* was decided a decade before Congress passed the Fair Sentencing Act.

The Eleventh Circuit's explanation for its rule was that, before *Apprendi*, unlike now, it was the judge's quantity finding at sentencing that decided the statutory range. *Jones*, 962 F.3d at 1304. But although before *Apprendi* a judge's quantity finding decided the statutory range, for crack offenses, that was only true *for five or 50 grams*. Before the Fair Sentencing Act became law, any finding beyond five or 50 grams was irrelevant to the statutory range; it

was relevant only to the guideline range and/or the judge's exercise of sentencing discretion.[10]

The Eleventh Circuit also expressed concern that treating a judge's pre-*Apprendi* fact-finding as non-binding would require applying *Apprendi* to the case, although *Apprendi* is not retroactively applicable. *Jones*, 962 F.3d at 1302. But *Apprendi*'s non-retroactivity is irrelevant: whether before or after *Apprendi*, until 2010, the statutory threshold for a crack offense punishable under § 841(b)(1)(A) was 50 grams. So both before and after *Apprendi*, until 2010, a fact-finding of crack beyond 50 grams was not related to the statutory sentencing range.[11]

Finally, beyond being wrong and illogical, the Eleventh Circuit's special rule for pre-*Apprendi* defendants is unjust. Individuals who were sentenced under § 841(b)(1)(A)(iii) pre-*Apprendi*

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[10] The Eleventh Circuit has recognized this fact but disregarded it. *United States v. Clowers*, 62 F.4th 1377, 1383 n.3 (11th Cir. 2023) ("We note that the sentencing court's drug-quantity finding was not needed to determine Jackson's statutory penalties. . . . But according to the prevailing understanding of the law at the time, the court's finding that Jackson's offense involved 287 grams of crack cocaine 'could have been used' to determine his statutory penalties at sentencing.") (quoting *Jones*, 962 F.3d at 1303). It is unknown what it means to say that quantity over 50 grams "could have been used" to determine statutory penalties, although quantity over 50 grams was irrelevant to statutory penalties.

[11] *Apprendi* is relevant to § 404's step-two analysis in that a court may consider that decision in determining whether, and how much, to reduce a sentence. *See* Petition at 28–29, *Perez v. United States*, 22-7794 (U.S. June 12, 2023) (discussing *Concepcion*, 142 S. Ct. at 2402, and related circuit cases).

have been in prison the longest, and they were sentenced under the least constitutional procedures. In other circuits, these longest-serving individuals got many of the most consequential reductions (life-in-prison to time served). There is no justification for excluding them altogether from the relief mechanism that Congress created.

II. Outside the Eleventh Circuit, no § 404 distinction has been drawn between those convicted before or after *Apprendi*, and individuals in Mr. Perez's situation were able to obtain relief—and mostly *did obtain* relief—long ago.

The Eleventh Circuit's erroneous, irrational special rule for § 404 motions filed by pre-*Apprendi* defendants is anomalous. If he had been convicted in any other circuit, Mr. Perez could obtain relief.

When the First Step Act became law, out of the gate, the most essential legal question was who was eligible for relief—in § 404 parlance, who was sentenced for a "covered offense." This question arose in various contexts, but perhaps the most impactful context was what federal defenders colloquially called the "quantity issue." The Eleventh Circuit adopted its special rule for pre-*Apprendi* § 404 movants in a case that centered on the quantity issue, so this brief backs up a bit to provide this Court with some context before sharing citations from other circuits that illustrate how anomalous the Eleventh Circuit's rule is.

As this Court is well aware, drug quantity plays a critical role in federal drug-trafficking cases—in two ways. First, for certain drug types, specified quantities trigger elevated statutory penalty ranges. *See* § 841(b)(1)(A) & (b)(1)(B). Second, regardless of the statutory range, drug quantity usually drives the guideline range. *See* USSG §2D1.1(a)(5) & (c). Presentence reports (PSRs) filed in drug-trafficking cases endeavor to approximate the total drug quantities involved, using any evidence available. *See Edwards v. United States*, 523 U.S. 511, 513–14 (1998) (the court at sentencing calculates the guideline range based on its own assessment of the type and quantity of drugs involved, regardless of jury findings); *cf. United States v. Watts*, 519 U.S. 148, 157 (1997) (in calculating the guideline range, a court may consider even conduct of which the defendant has been acquitted).

The Fair Sentencing Act amended statutory ranges, not guideline ranges.[12] Previously, the highest range, § 841(b)(1)(A), applied to offenses involving at least 50 grams of crack. Under the Fair Sentencing Act, § 841(b)(1)(A) applies only to offenses involving at least 280 grams of crack. *Dorsey*, 567 U.S. at 269.

The quantity issue asked whether § 404 eligibility turned on the statutory quantity (for § 841(b)(1)(A) offenses, 50 grams) or on the PSR

[12] In response to the Act, the Sentencing Commission adjusted guideline ranges. But because the Act's amendments to statutory ranges were not retroactive, even when sentences were reduced under the guideline changes, they could not go below the statutory floor. *See Terry*, 141 S. Ct. at 1861.

quantity (that is, whatever quantity the court found at sentencing), which can be orders of magnitude greater. The government argued for the latter: that a person who was convicted under § 841(b)(1)(A) for an offense involving at least 50 grams of crack should be treated *as if he had been convicted* of a 280-gram offense, if the court at sentencing found that the drug quantity was at least 280 grams. The government was not arguing that there was any temporal distinction, with *Apprendi* requiring some § 404 motions to be evaluated based on the PSR quantity, while others would be based on the statutory quantity. The government simply argued that PSR quantity controlled statutory ranges. *See, e.g., United States v. Boulding*, 960 F.3d 774, 778–79 (6th Cir. 2020) ("The Government asserts that the case record as a whole should be used to determine the quantity of drugs involved—including specific findings made by the original sentencing court, or those contained within a plea agreement, the trial record, or presentencing report. And if, tallied together, that quantity is sufficient to trigger the statutory penalty under the increased thresholds imposed by the Fair Sentencing Act, the defendant would be ineligible for relief under the First Step Act.").

Section 404 movants countered that the government's position was inconsistent with § 404's text, which focuses on whether the penalty for the statute of conviction was modified by the Fair Sentencing Act. *See, e.g., United States v. Shaw*, 957 F.3d 734, 738 (7th Cir. 2020) (describing the defendants' "straightforward theory").

Movants decisively won the quantity issue: every circuit court to consider the issue agreed that eligibility under § 404 turned only on the statute of conviction.[13] Indeed, the government in late 2020

[13] *United States v. Davis*, 961 F.3d 181, 190 (2d Cir. 2020) ("[I]t is a defendant's statutory offense, not his or her 'actual' conduct, that determines whether he has been sentenced for a 'covered offense' within the meaning of Section 404(a), and is consequently eligible for relief under Section 404(b)."); *United States v. Jackson*, 964 F.3d 197, 206 (3d Cir. 2020) ("Although Harris and Jackson each possessed more than twenty-eight grams of crack, Harris pleaded guilty to and Jackson was convicted of possession of five grams or more under § 841(a)(1), (b)(1)(B)(iii). We determine if a defendant is § 404 eligible by looking to his statute of conviction. Here, five grams or more is less than the current threshold of twenty-eight grams. . . . Thus, Harris and Jackson can seek discretionary reductions of their sentences."); *United States v. Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019) ("Defendant's view leads to a simple interpretation of the statute: he is eligible to seek relief under the First Step Act because, 'before August 3, 2010,' he 'committed' a 'violation' of 21 U.S.C. § 841(a) and (b)(1)(B)(iii), and 'the statutory penalties' for that statute 'were modified by' Section 2 of the Fair Sentencing Act. . . . We agree and adopt this understanding."); *United States v. Jackson*, 945 F.3d 315, 319 (5th Cir. 2019) (explaining that the government's approach—if a defendant is convicted "on a count requiring a showing of fifty or more grams, but the PSR later finds that, say, 500 grams were involved, then the defendant doesn't have a 'covered offense,' since the drug quantity as stated in the PSR exceeds even the new 280-gram threshold"—"doesn't comport with the ordinary meaning of the statute."); *United States v. Boulding*, 960 F.3d 774, 781 (6th Cir. 2020) ("To the extent it remains an open question in this circuit, we hold that eligibility 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) ("[W]e hold that the statute of conviction alone determines eligibility for First Step Act relief."); *United States*

abandoned its earlier position.[14] And *Terry*, as discussed above, cemented that the circuit courts were correct: elements, not conduct, controls the § 404 eligibility analysis.

Movants mostly won the quantity fight in the Eleventh Circuit, too—but as discussed, with a carve-out for individuals sentenced before *Apprendi*. The Eleventh Circuit's determination that pre-*Apprendi* defendants are subject to a special rule, which relies on PSR quantity rather than statutory quantity, is entirely inconsistent with the circuit

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v. McDonald, 944 F.3d 769, 772 (8th Cir. 2019) ("The First Step Act applies to offenses, not conduct, *see* First Step Act § 404(a), and it is McDonald's statute of conviction that determines his eligibility for relief[.]") (citations omitted); *United States v. Broadway*, 1 F.4th 1206, 1213–14 (10th Cir. 2021) ("[T]he district court should look to the minimum quantity of drugs associated with an eligible defendant's offense of conviction, rather than his underlying conduct, to determine whether the Fair Sentencing Act would have affected his sentence had it been in effect at the time of the defendant's crime. After the district court does so, it may exercise its discretion to determine whether to reduce a sentence, which may include consideration of the § 3553(a) sentencing factors and the defendant's underlying conduct."); *United States v. White*, 984 F.3d 76, 86 (D.C. Cir. 2020) ("[W]hether an offense is 'covered' does not depend on the actual drug amounts attributed to a defendant, whether by a judge or a jury. Rather, it depends only on whether the defendant was convicted of an offense with a statutory penalty range that the Fair Sentencing Act altered.").

[14] The first circuit court in which the government noted its change in position was *United States v. White*, 984 F.3d 76, 85 (D.C. Cir. Dec. 29, 2020) (describing the government's 28(j) letter); *see also id.* at 86 (explaining the government's agreement with the defendant's approach).

opinions cited in footnote 13. Most of those cases did not involve pre-*Apprendi* defendants—there aren't many such defendants still in prison—but two did: *United States v. White*, 984 F.3d 76 (D.C. Cir. 2020), and *United States v. Robinson*, 9 F.4th 954 (8th Cir. 2021). And other circuits have applied their elements-only eligibility rule in pre-*Apprendi* cases without suggesting *Apprendi* as a point of distinction.[15] Indeed, as far as NAFD members are aware, the government has never claimed outside of the Eleventh Circuit (not even after *Jones*) that the fact that a § 404 movant was originally sentenced pre-*Apprendi* is a basis for *denying* relief.[16]

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[15] *See, e.g., United States v. Coleman*, 66 F.4th 108, 111 (3d Cir. 2023) (explaining that in a pre-*Apprendi* case it may be necessary to consult the entire record to determine the statute of conviction (*e.g.*, § 841(b)(1)(A)(iii) versus (b)(1)(A)(ii)), and only for that purpose); *United States v. Bullock*, No. 20-3003, 2021 WL 4145233 (3d Cir. Sept. 13, 2021) (in a pre-*Apprendi* case, remanding for consideration of the movant's request for reduced supervised release (below the § 841(b)(1)(A) minimum) where the district court had already reduced the prison sentence under circuit law holding that "the statute of conviction, rather than the quantity of crack cocaine involved, governed eligibility for a reduction of sentence under the First Step Act"); Order, *United States v. Young*, 19-2520 (7th Cir. Apr. 28, 2020) (remanding a pre-*Apprendi* case under *Shaw*).

[16] *See United States v. White*, 807 F. App'x 375, 376–77 (5th Cir. 2020) (pre-*Apprendi* case, explaining that the "government's only attempt to distinguish this case from *Jackson* is to note that here, unlike in *Jackson*, this court affirmed the district court's drug quantity calculation on direct appeal. But 'whether a defendant has a 'covered offense' under section 404(a) depends only on the statute under which he was convicted.'"). In a filing in the Seventh Circuit in 2020, the government conceded that remand was appropriate for § 404

Outside the Eleventh Circuit, district courts have granted relief to dozens of individuals whose offenses were found at sentencing, pre-*Apprendi*, to involve a quantity of crack that exceeds the current statutory threshold of 280 grams, under analyses that are incompatible with *Jones*'s rule for pre-*Apprendi* cases. Examples of such grants, identified by NAFD members, are provided in footnotes accompanying this sentence: first, reductions from life sentences[17]; then, from term-of-years

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movants who had been sentenced pre-*Apprendi*, explaining that the Seventh Circuit's quantity-issue opinion, *Shaw*, "forecloses the government's position that defendants in this consolidated appeal are ineligible for discretionary relief under § 404 because their offenses were found to have involved quantities of crack cocaine that exceeded 280 grams." Gov. Stat't of Position, *United States v. Tidwell*, et al., 19-2235, dkt. 27 (7th Cir. May 12, 2020) (appeals from the denial of § 404 relief in Northern District of Illinois case no. 93-cr-20024).

[17] Opinion and Order, *Kemper v. United States*, 92-cr-13, dkt. 132 (W.D. Tex. July 24, 2019) (reducing the mandatory life sentence to 360 months, with the opening statement: "This case calls out for justice to be tempered with mercy."); Order, *United States v. Coakley*, 96-cr-26, dkt. 178 (E.D.N.C. Aug. 29, 2019) (reducing the sentence from 360 months—after commutation from a mandatory life sentence—to 240 months and reducing the term of supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Gov. Response at dkt. 172); Order, *United States v. Hodge*, 96-cr-54, dkt. 194 (E.D.N.C. Sept. 12, 2019) (reducing the sentence from 360 months—after commutation from a mandatory life sentence—to 316 months and reducing supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Gov. Response at dkt. 188); Order, *United States v. Jones*, 96-cr-111, dkt. 384 (W.D. Tex. Sept. 26, 2019) (reducing the mandatory life sentence to time served); Order, *United States v. Felton*, 93-cr-123, dkt. 286 (E.D.N.C. Nov. 19, 2019)

(reducing the sentence from life to 360 months) (for more on the case, see Gov. Response at dkt. 281); Order, *United States v. Angulo-Lopez*, 91-cr-220, dkt. 1359 (W.D. Okla. Dec. 24, 2019) (reducing the sentence from life to time served); Order, *United States v. Herrera*, 92-cr-209, dkt. 209 (W.D. Okla. Jan. 10, 2020) (reducing the sentence from life to time served); *United States v. Bowman*, 92-cr-392, 2020 WL 470284 (S.D.N.Y. Jan. 29, 2020) (reducing the sentence from life to time served plus two weeks); Order, *United States v. Cook*, 95-cr-89, dkt. 405 (E.D. Tenn. Jan. 31, 2020) (reducing the sentence from mandatory life to 360 months and reducing supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Gov. Response at dkt. 391); Am. Judg't, *United States v. Robinson*, 98-cr-60, dkt. 620 (E.D. Wis. Feb. 13, 2020) (after a hearing, reducing the sentence to time served plus three months, following Decision and Order, *United States v. Robinson*, 98-cr-60, dkt. 606 (E.D. Wis. Sept. 27, 2019) (finding Robinson eligible for a reduction from his mandatory life sentence)); Order, *United States v. Rooks*, 95-cr-89, dkt. 407 (E.D. Tenn. Apr. 29, 2020) (reducing the sentence from life to time served) (for more on the case, see Gov. Response at dkt. 397); Memorandum, *United States v. Hill*, 96-cr-399, dkt. 635 (D. Md. Apr. 30, 2020) (reducing the sentence from life to 330 months, following Memorandum, *United States v. Hill*, 96-cr-399, dkt. 621 (D. Md. Feb. 24, 2020) (finding Hill eligible for a reduction from his mandatory life sentence)); Memorandum, *United States v. Jones*, 96-cr-399, dkt. 634 (D. Md. Apr. 30, 2020) (reducing the sentence from life to 330 months, following Memorandum, *United States v. Jones*, 96-cr-399, dkt. 623 (D. Md. Feb. 24, 2020) (finding Jones eligible for a reduction from his mandatory life sentence)); Order, *United States v. Daniels*, 93-cr-130, dkt. 159 (E.D.N.C. June 26, 2020) (reducing the sentence from life to 272 months and reducing supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Gov. Response at dkt. 121); Order, *United States v. Williams*, 97-cr-142, dkt. 688 (E.D.N.C. Aug. 28, 2020) (reducing the sentence from life to 360 months); Order, *United States v. Pone*, 93-cr-40, dkt. 802 (E.D. Penn. Oct. 22, 2020) (reducing the sentence from life to time served

sentences.[18] This collection of cases is undoubtedly incomplete.

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and reducing supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Gov. Response at dkt. 798); Order, *United States v. Smith*, 88-cr-519, dkt. 178 (E.D. Penn. Nov. 18, 2020) (reducing the sentence from life to time served plus six months) (for more on the case, see Gov. Response at dkt. 177); Order, *United States v. Novene*, 91-cr-115, dkt. 168 (E.D. Tenn. Jan. 11, 2021) (reducing the sentence from life to 420 months); Opinion, *United States v. Knight*, 98-cr-3, dkt. 288 (W.D. Penn. Jan. 27, 2021) (reducing the sentence from life to time served); *United States v. Robinson*, 95-cr-79, 2021 WL 5958356 (D. Neb. Dec. 16, 2021) (reducing the sentence from mandatory life to time served and the term of supervised release to less than the § 841(b)(1)(A) minimum, on remand from the Eighth Circuit); *United States v. White*, et al., 93-cr-97, 2022 WL 3646614 (D.D.C. Aug. 24, 2022) (reducing the sentence of one co-defendant from life to 420 months and the other from life to 396 months, on remand from the D.C. Circuit); *United States v. Fairly*, 95-cr-5193, 2022 WL 3999885 (E.D. Cal. Sept. 1, 2022) (reducing the sentence from mandatory life to time served); *United States v. Wyche*, 89-cr-36, 2023 WL 130825 (D.D.C. Jan. 9, 2023) (reducing the sentence from life to 336 months); *United States v. Palmer*, 89-cr-36, 2023 WL 2265255 (D.D.C. Feb. 28, 2023) (reducing the sentence from life to time served).

[18] Order, *United States v. Slaughter*, 97-cr-13, dkt. 110 (E.D.N.C. June 6, 2019) (reducing the sentence from 360 to 262 months) (for more on the case, see Gov. Response at dkt. 106); Order, *United States v. Morton*, 96-cr-51, dkt. 245 (E.D.N.C. Aug. 1, 2019) (reducing the sentence from 324 months to time served and reducing supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Gov. Response at dkt. 240); Decision and Order, *United States v. Sallis*, 98-cr-60, dkt. 603 (E.D. Wis. Sept. 17, 2019) (reducing the sentence from 360 to 288 months); *United States v. Baxter*, 99-cr-215, 2019 WL 5681189 (S.D.W.V. Oct. 31, 2019) (reducing the sentence from 360 to 240 months and reducing

supervised release to less than the § 841(b)(1)(A) minimum); Order, *United States v. Brown*, 95-cr-144, dkt. 119 (E.D.N.C. Oct. 31, 2019) (reducing the sentence from 360 to 240 months and reducing supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Gov. Response at dkt. 112); Decision and Order, *United States v. Brough*, 98-cr-222, dkt. 176 (E.D. Wis. Dec. 11, 2019) (reducing the sentence from 360 months to time served); *United States v. Miller*, 96-cr-365, 2019 WL 7811312 (E.D. Mo. Dec. 17, 2019) (reducing the sentence from 240 to 188 months and reducing supervised release to less than the § 841(b)(1)(A) minimum); *United States v. Richardson*, 94-cr-50068, 2020 WL 1942433 (W.D. La. Apr. 22, 2020) (reducing the sentence from 405 to 360 months); Order, *United States v. Logan*, dkt. 87 (C.D. Ill. June 22, 2020) (reducing the term of supervised release to less than the § 841(b)(1)(A) minimum of five years) (for more on the case, see Joint Motion for Reduced Sentence at dkt. 86); *United States v. Jackson*, 94-cr-30131, 2020 WL 3639904 (S.D. Ill. July 6, 2020) (reducing the sentence from 360 months to time served) (related to this case, see also Gov. Supp'l Resp. at 7–8, dkt. 187, explaining that under circuit law, the statutory range at § 841(b)(1)(A) no longer applied)); Order, *United States v. Williams*, 98-cr-30080, dkt. 81 (C.D. Ill. July 31, 2020) (reducing the sentence from the § 841(b)(1)(A) minimum of 240 to 211 months and reducing supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case, see Motion at dkt. 77); *United States v. Reed*, 93-cr-40050, 2020 WL 5790430 (S.D. Ill. Sept. 28, 2020) (reducing the sentence from 420 months to time served and reducing supervised release to less than the § 841(b)(1)(A) minimum); Order, *United States v. Fells*, 94-cr-46, dkt. 724 (E.D.N.C. Dec. 17, 2020) (reducing the crack sentences from 327 to 262 months) (for more on the case, see Gov. Response at dkt. 653); Order, *United States v. Henderson*, 97-cr-74, dkt. 707 (W.D. Wis. Jan. 11, 2021) (reducing the term of supervised release to less than the § 841(b)(1)(A) minimum) (for more on the case see Motion at dkt. 706); Order, *United States v. Johnson*, 94-cr-64, dkt. 808 (W.D. Okla. Mar. 29, 2021) (reducing the sentence from 410 months to time served) (for more on the case, see Motion at dkt.

The individuals who were the subject of these sentence reductions are mostly home with their families now. One NAFD member who shared the name of a client with undersigned counsel so that his case could be included in this brief noted that her client—who was previously serving a mandatory life sentence based on facts that were for all relevant purposes identical to the facts of Mr. Perez's case, except that her client's offense involved a much larger quantity of crack cocaine—is currently attending college. Mr. Perez, in contrast, is slated to remain in prison for the rest of his natural life, and the district court is barred from even considering a lower sentence. This is untenable.

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807); Order, *United States v. Bullock*, 95-cr-296, dkt. 946 (E.D. Penn. Nov. 29, 2021) (on remand from the Third Circuit, reducing supervised release to less than the § 841(b)(1)(A) minimum, after previously (at dkt. 934) reducing the sentence from 360 months to time served); Order, *United States v. Hunter*, 97-cr-20027, dkt. 106 (C.D. Ill. July 20, 2022) (reducing the term of supervised release to less than the § 841(b)(1)(A) minimum).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or alternatively the opinion under review should be summarily reversed.

Respectfully submitted,

Michael Holley
Co-Chair, Amicus Committee
Joanna Munson Perales
Member, Amicus Committee
NATIONAL ASSOCIATION OF FEDERAL DEFENDERS

Shelley Fite (Counsel of Record)
Davina T. Chen
National Sentencing Resource Counsel
FEDERAL PUBLIC AND COMMUNITY DEFENDERS

22 E. Mifflin St., Ste. 1000
Madison, WI 53704
(608) 234-0883
Shelley_Fite@fd.org

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