NO: 22-7794

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

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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REPLY BRIEF IN SUPPORT OF CERTIORARI

Introduction

The government agrees that the decision below is wrong, and it offers no reason why the Court should not grant summary reversal. Instead, the government simply suggests that this case is not "important" enough to warrant review. But Mr. Perez is serving a *life* sentence—and was wrongfully denied the opportunity to seek a reduced sentence, due to the decision below. Additionally, Mr. Perez has identified more than a dozen other individuals who were similarly harmed by the Eleventh Circuit's wrong interpretation of the First Step Act. These defendants would have been eligible for relief in any other circuit. Surely, such injustice is sufficiently important to warrant the Court's attention. Because even the government agrees the decision below is wrong, the Court should summarily reverse.

I. The government concedes that the decision below is wrong and that the Eleventh Circuit is on the wrong side of a circuit split.

The government agrees that the decision below is wrong. *See* Memorandum for the United States in Opposition (hereafter "Mem. Opp.") at 1-2; Brief for the United States in Opposition, *Harper v. United States*, No. 23-27 (hereafter "*Harper* Opp.") at 9. The government further concedes that there is a circuit conflict on this issue. Mem. Opp. at 2. The government nonetheless contends that review is unwarranted because the conflict is "shallow and lopsided." *Harper* Opp. at 9. But the split is not as shallow as the government suggests. It is entrenched. And the fact that the Eleventh Circuit stands alone in its error is no reason to let the disparity stand.

1. The government acknowledges "three published decisions ... in which courts of appeals have squarely resolved the issue differently from the Eleventh Circuit." *Harper* Opp. at 12 (citing *United States v. Robinson*, 9 F.4th 954, 959 (8th Cir. 2021) (per curiam); *United States v. White*, 984 F.3d 76, 87-88 (D.C. Cir. 2020); *United States v. Ware*, 964 F.3d 482, 488-489 (6th Cir. 2020)). But the conflict is deeper than this. As Mr. Perez has shown, *see* Petition for Writ of Certiorari ("Pet.") at 15, 21-25, the Eleventh Circuit's opinion in this case "cannot be reconciled with" decisions from the Second, Third, Fourth, Fourth, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, all of which "have held that the availability of § 404 relief turns *only* on the statute of conviction." *See United States v. Jackson*, 995 F.3d 1308, 1315 (11th Cir. 2021) (Martin, J., dissenting from the denial of rehearing en banc) (emphasis added); *see also id.* at 1314 n.4 (collecting cases).

The government points out that, like these other circuits, "the Eleventh Circuit has similarly stated that the Section 404(a) covered-offense determination turns on 'the offense for which the district court imposed a sentence,' without 'considering the specific quantity of crack cocaine involved in the movant's violation." *Harper* Opp. at 12 (citing *United States v. Jones*, 962 F.3d 1290, 1300-1301 (11th Cir. 2020), *reh'g denied*, *United States v. Jackson*, 995 F.3d 1308 (11th Cir. 2021), *and 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)). But *unlike* these other circuits, the Eleventh Circuit then created a special rule—which applies only to defendants sentenced prior to *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—in which the district

court is "bound" to use any "previous finding of drug quantity," to determine the revised statutory penalties for the offense. *See Jones*, 962 F.3d at 1304; Pet. at 6. No other circuit has done this. Instead, "other circuits have applied their elements-only eligibility rule in pre-*Apprendi* cases without suggesting *Apprendi* as a point of distinction." Brief of National Ass'n of Fed. Defenders as Amicus Curiae Supporting Petitioner ("NAFD Br.") at 16 & n.15 (citing, *e.g.*, *United States v. Chapman*, 66 F.4th 108, 111 (3d Cir. 2023), and *United States v. Young*, No. 19-2520 (7th Cir. 2020)).

The conflict is entrenched. The Eleventh Circuit has twice declined to correct its mistake—first, when it denied rehearing en banc in *Jones*, and second when it reinstated the *Jones* opinion after a prior remand from this Court in light of *Concepcion*. *See United States v. Jackson*, 995 F.3d 1308, 1311-1316 (11th Cir. 2021) (Martin, J. respecting the denial of rehearing en banc); *United States v. Jackson*, 58 F.4th 1331, 1336 (11th Cir. 2023) (holding, on remand, that "*Concepcion* does not alter our decision in *Jones*"). The Eleventh Circuit will not reverse course, and the split will not resolve on its own.

2. The fact that the Eleventh Circuit stands alone is not a reason to deny review. This Court regularly grants certiorari to resolve circuit conflicts even when there is only a single circuit in the minority. *See*, *e.g.*, *Dahda v. United States*, 138 S. Ct. 1491, 1496 (2018) (2-1 split); *Nichols v. United States*, 578 U.S. 104, 108 (2016) (1-1); *Peugh v. United States*, 569 U.S. 530, 535 n.1 (2013) (5-1).

The Eleventh Circuit's *Jones* opinion, on which the decision below was based, "prohibits an entire class of prisoners in Alabama, Florida, and Georgia from getting

relief Congress meant for them to have. And relief would be 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). Even the government now concedes that the decision below is wrong. "To know this much is to know what should be done" in this case. *Hicks v. United States*, 137 S. Ct. 2000, 2000 (2017) (Gorsuch, J., concurring).

II. The question presented is important and warrants review.

1. The government contends that the question presented is of "declining prospective importance, in light of the diminishing set of potential Section 404 movants whose motions would implicate it." Mem. Opp. at 2. But the government made the same argument in *Terry v. United States*, 141 S. Ct. 1858 (2021). *See* Brief for the United States in Opposition, *Terry v. United States*, No. 20-5904, 2020 WL 9909508 at *27-28 (U.S. Dec. 4, 2020). The Court correctly rejected the argument in *Terry*–and implicitly did so again when it granted certiorari in *Concepcion v. United States*, 597 U.S. 481 (2022). The Court should do the same here.

It should not be forgotten, furthermore, that Mr. Perez is serving a *life* sentence—and was denied the chance to seek a reduced sentence based on a decision the government agrees is wrong. The suggestion that righting this wrong lacks sufficient "importance" to warrant review is disconcerting, to say the least. *See Hicks*, 137. S. Ct. at 2001 (Gorsuch, J., concurring) ("For who wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?").

Moreover, Mr. Perez has identified fourteen cases raising this issue, in addition to his own, that are currently under review. All but one of the defendants in these cases are serving life sentences similar to the one imposed in Mr. Perez' case.

Five of the fourteen cases are pending in this Court at this time. *See Jackson v. United States*, No. 22-7728 (filed June 5, 2023); *Clowers v. United States*, No. 22-7783 (filed June 12, 2023); *Williams v. United States*, No. 23-5014 (filed June 20, 2023); *Harper v. United States*, No. 23-27 (filed July 6, 2023); *Ingram v. United States*, No. 23-341 (filed July 7, 2023). Another four cases remain pending in the Eleventh Circuit, or are within the timeframe for filing a petition to this Court. *See United States v. Williams*, No. 23-11088 (11th Cir. June 14, 2023) (initial brief); *United States v. Duenas*, No. 22-14027 (11th Cir. Apr. 21, 2023) (initial brief); *United States v. McCoy*, No. 21-13838 (11th Cir. Feb. 25, 2022) (initial brief); *United States v. Solomon*, No. 23-10480, 2023 WL 6568132 (11th Cir. Oct. 10, 2023) (opinion affirming the denial of relief).

The other five cases remain pending in the district courts. *See*, *e.g.*, *United States v. Rostan*, 0:97-cr-06002-JEM Doc. 361 (S.D. Fla. Mar. 13, 2019) (still pending as of Nov. 27, 2023). In some cases, the defendants have voluntarily withdrawn or stayed their claims in light of *Jones*, in order to avoid the limitation on successive claims in § 404(c). *See United States v Kemmye Parson et. al,* 95-8089-cr-CMA Doc. 1790 (S. D. Fla. Feb. 23, 2021) ("The only relief [four] Defendants seek is an order holding the Court's decision in abeyance while *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), is reheard *en banc* and thereafter possibly by the Supreme Court.").

This Court's immediate review is needed to remedy the grave injustice in all of these cases.

2. There are additionally an unknown number of cases in which defendants have already been wrongly denied relief under *Jones*. The government assumes that the bar on successive petitions in § 404(c)(2) of the First Step Act would prevent a defendant who was previously denied relief from presenting a renewed claim in light of a change in law. But the courts have not yet decided whether § 404(c) would apply in this situation, and there is a strong argument that it would not.[1]

In any event, the Eleventh Circuit has interpreted § 404(c)(2) as a claims-processing rule which may be waived by the government, and not as a jurisdictional bar. *See United States v. Deruise*, 2023 WL 3668929, *1 (11th Cir. May 26, 2023). In light of the government's concession that *Jones* was wrongly decided, the government would presumably waive its objection to a renewed motion for a defendant who was previously harmed by *Jones*. *See id*. at *1 ("Because the First Step Act's bar on a district court considering a successive motion for a sentence reduction under § 404 is a claim-processing rule, not a jurisdictional bar, and the government has waived any

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[1] Section 404(c) provides that district courts may not "entertain a motion made under this section to reduce a sentence" in two scenario: (1) "if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010"; or (2) "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." Because *Jones* erroneously precluded district courts from exercising their discretion, it can be argued that the district courts failed to conduct a "complete review of the motion on the merits," as required to trigger the bar in § 404(c)(2).

argument based on this bar, we vacate and remand so that the district court may consider whether to exercise its discretion to reduce Deruise's sentence.").

3. The government hypothesizes that that "[t]he fact that all courts of appeals allow at least *consideration* of judge-found drug quantities means that in many Section 404 cases, district courts in those circuits will reach similar outcomes as district courts in the Eleventh Circuit would." *Harper* Opp. at 13 (emphasis in original). But both anecdotal and empirical evidence suggests that this will be the rare exception, rather than the rule.

The NAFD Brief identifies "dozens" of cases outside the Eleventh Circuit where relief was granted to "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." NAFD Brief at 17-21 & nn. 17-18. Many of these cases involved drug quantities far exceeding 280 grams of crack cocaine; and the district courts imposed reduced sentences, even after considering these large drug quantities. *See*, *e.g.*, *United States v. Coakley*, 96-cr-26, dkt. 172 & 178 (E.D.N.C. Aug. 29, 2019) (3.1 kilograms of crack cocaine); *United States v. Jones*, 96-cr-111, dkt. 384 (W.D. Tex. Sept. 26, 2019) (13.76 kilograms); *United States v. Angulo-Lopez*, 91-cr-220, dkt. 1359 (W.D. Okla. Dec. 24, 2019) (42.82 kilograms); *United States v. Bowman*, 92-cr-392, 2020 WL 470284 (S.D.N.Y. Jan. 29, 2020) (26.1 kilograms); *United States v. Palmer*, 89-cr-36, 2023 WL 226522 at *6 (D.D.C. Feb. 28, 2023) (150 kilograms).

This is hardly surprising. Federal judges have long decried mandatory drug sentencing laws. *See* Sarah French Russel, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1168-69 (April 2010) ("Indeed, federal judges have spoken out against mandatory minimum sentences, and several prominent judges have even stepped down from the bench citing their opposition to mandatory minimum sentences in drug cases.") (footnotes omitted). "A 2004 survey found that 73.7% of district court judges and 82.7 of circuit court judges believe that 'drug punishments are greater than appropriate to reflect the seriousness of drug trafficking offenses.'" *Id.* (footnote omitted).

The government's speculation about the potential harmlessness of the Eleventh Circuit's error is further belied by empirical research about the impact of the Sentencing Guidelines. "The [United States Sentencing] Commission's statistics demonstrate the real and pervasive effect the Guidelines have on sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016). "In most cases district courts continue to impose 'either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion.'" *Id.* (citation omitted). Thus, it can be presumed that in "most cases," where a defendant is no longer subject to a higher mandatory minimum sentence—*i.e.*, *life*—the district court will impose a reduced sentence in accordance with the Guidelines.

III. This case is an ideal vehicle to resolve the conflict.

This case presents an ideal vehicle through which to resolve the circuit conflict. The issue is clearly and cleanly presented, and there are no collateral issues that might render Mr. Perez ineligible for relief.

The government strains to find a single sentence from Mr. Perez' 1998 sentencing hearing to suggest a possibility that the district court might decline to reduce Mr. Perez' sentence on remand. *See* Mem. Opp. at 3. But the district court had no discretion, at that hearing, to impose anything other than a life sentence. The court's statement that Mr. Perez bore "a large portion of the blame" for his situation was not intended to suggest that the court would have imposed the same sentence if it had the discretion to do otherwise. (DE 72:18). Rather, the court recognized that under then-prevailing law, "[w]hether that is too harsh under the circumstances or not, is not for me to decide because I have to follow the law." (DE 72:16). And both the statutory minimum and the Guidelines range, at the time of Mr. Perez' offense, was "life." (DE 72:16; PSI ¶ 72).

The government points out that Mr. Perez qualified for a "career offender" enhancement which, absent the statutory sentencing enhancement, would have yielded a range of 360 months' to life imprisonment. Mem. Opp. at 3. But this is sufficient to show a "reasonable probability of a different outcome absent the error," under this Court's precedents. *See Molina-Martinez*, 578 U.S. at 198 ("When a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error can, and most

often will, be sufficient to show a reasonable probability of a different outcome absent the error.").

In denying Mr. Perez' motion for a reduced sentence under the First Step Act, the district court focused exclusively on the quantity of cocaine involved in his offense and the mandatory sentence that was required by virtue of Mr. Perez' prior convictions. See DE 72:4 (finding Mr. Perez' arguments "foreclosed" by *United States v. Means*, 787 F. App'x 999 (11th Cir. 2019)). The district court gave no indication that it would have declined to impose a reduced sentence, if it believed it had the discretion to do so. There is simply no basis to find that the error was harmless in this case.

IV. This case warrants summary reversal.

Finally, the government has failed to address Mr. Perez' request for summary reversal. *See* Pet. at 32-33. The Eleventh Circuit, alone among the courts of appeals, has interpreted a federal statute in a way that all agree is wrong. And the Eleventh Circuit refused to correct its error, even after a remand from this Court in light of *Concecpion*. "Such 'plain and repetitive error' deserves summary reversal." *Shoop v. Cunningham*, 598 U.S. ---, 143 S. Ct. 37 (Thomas, J., dissenting from the denial of certiorari) (citing *Parker v. Matthews*, 567 U.S. 37, 49 (2012) (per curiam) ("It was plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief."). *See also Cavazos v. Smith*, 561 U.S. 1, 7-8 (2011) ("This Court vacated and remanded this judgment twice before. ... Each time the panel persisted in its course, reinstating its judgment without seriously confronting

the significance of the cases called to its attention. ... Its refusal to do so necessitates this Court's action today."); Pet. at 31-32 (citing three cases where summary reversal was granted after a prior remand: *CNH Indus. N.V. v. Reese*, 138 S. Ct. 761 (2018) (per curiam); *Spears v. United States*, 555 U.S. 261 (2009) (per curiam); *Nelson v. United States*, 555 U.S. 350 (2009) (per curiam)).

Because the law is clear, and the government agrees that the decision below is wrong, the Court should grant review or, in the alternative, summarily reverse.

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.

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