No. 23-____

IN THE
Supreme Court of the United States

BOBBY LEE INGRAM,
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

PETITION FOR A WRIT OF CERTIORARI

CATHERINE E. STETSON
Counsel of Record
JO-ANN TAMILA SAGAR
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

QUESTIONS PRESENTED

Under the First Step Act of 2018, courts may reduce certain previously imposed sentences to match the penalties in the Fair Sentencing Act of 2010. The First Step Act describes a two-step process. *First*, the court determines whether the defendant is eligible for relief by considering whether he was sentenced for an offense whose "elements" now result in a "statutory penalt[y]" that was "modified" by the Fair Sentencing Act. *Terry* v. *United States*, 141 S. Ct. 1858, 1862-63 (2021). *Second*, if a defendant is eligible, then the court can exercise its discretion to impose a reduced sentence, "consider[ing] intervening changes of law or fact." *Concepcion* v. *United States*, 142 S. Ct. 2389, 2404 (2022).

The Eleventh Circuit—alone among its sister circuits—nevertheless categorically denies relief to certain defendants sentenced before *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). For pre-*Apprendi* defendants, the Eleventh Circuit creates a hypothetical element of the offense based on the drug quantity found by the judge at sentencing. If that hypothetical element would have resulted in a statutory penalty that was not modified by the Fair Sentencing Act, then the District Court cannot reduce the defendant's sentence. *See United States* v. *Jackson*, 58 F.4th 1331 (11th Cir. 2023).

The questions presented are:

1. Whether the Eleventh Circuit has violated *Terry* in holding that, at step one, district courts should disregard the "elements" of a defendant's offense, and

deny relief based on the drug quantity found by a judge at sentencing?

2. Whether the Eleventh Circuit has violated *Concepcion* in holding that, at step two, district courts cannot consider an "intervening change[ ] of law": *Apprendi*'s effect on a pre-*Apprendi* defendant's sentence?

PARTIES TO THE PROCEEDING

Bobby Lee Ingram, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

Supreme Court of the United States:

- *Ingram* v. *United States*, No. 21-1274 (U.S. Oct. 3, 2022) (reported at 143 S. Ct. 70 (2022) (mem.))

U.S. Court of Appeals for the Eleventh Circuit:

- *United States* v. *Ingram*, No. 19-11257 (11th Cir. May 17, 2023) (not reported, available at 2023 WL 3493112 (per curiam))
- *United States* v. *Ingram*, No. 19-11257 (11th Cir. Oct. 14, 2021) (reported at 831 F. App'x 454 (per curiam))
- *United States* v. *Ingram*, No. 95-9582 (11th Cir. Oct. 25, 1996) (not reported, available at 100 F.3d 971 (table))

U.S. District Court for the Southern District of Georgia:

- *United States* v. *Ingram*, No. 5:94-cr-000002-2 (S.D. Ga. Mar. 28, 2019)
- *United States* v. *Ingram*, No. 5:94-cr-000002-2 (S.D. Ga. Jan. 12, 2022)
- *United States* v. *Ingram*, No. 5:94-cr-000002-WTM-BWC-2 (S.D. Ga. Dec. 14, 1995)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES:

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 23-

BOBBY LEE INGRAM,
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

PETITION FOR A WRIT OF CERTIORARI

Bobby Lee Ingram respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion on remand is not reported but is available at 2023 WL 3493112. Pet. App. 1a-3a. The Eleventh Circuit's original opinion is not reported but is available at 831 F. App'x 454. Pet. App. 5a-13a. The Southern District of Georgia's order denying relief under the First Step Act is not reported. Pet. App. 14a-15a, 26a-27a.

JURISDICTION

The Eleventh Circuit entered judgment on May 17, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant portions of Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222, codified at 21 U.S.C. § 841 note, provide:

> (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.

INTRODUCTION

This case concerns a defendant whose mandatory life sentence could have been reduced under the First Step Act of 2018 if his case had arisen in any jurisdiction other than the Eleventh Circuit. But because current Eleventh Circuit precedent does not comport with this Court's precedents, the district court denied him relief.

Bobby Lee Ingram was convicted in 1995 of conspiracy to possess with intent to distribute more than 50 grams of crack, in violation of 21 U.S.C. §§ 846 and 841. Although no drug quantity was charged by the government or found beyond a reasonable doubt by the jury, the sentencing judge found Ingram responsible for more than four kilograms of crack. Because Ingram had two prior felony drug offenses, this drug quantity required a sentence of life imprisonment under 21 U.S.C. § 841(b)(1)(A) (1994). And that is the sentence he received.

Congress later enacted the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222, which authorizes courts to reduce certain sentences imposed under the former "100-to-1" crack-to-powder-cocaine sentencing ratio. The Act dictates a two-step review process. *First*, the district court must determine whether the defendant is eligible for relief by considering "if he previously received 'a sentence for a covered offense,' " that is, an offense whose "elements" now result in a "statutory penalt[y]" that was "modified" by the Fair Sentencing Act. *Terry* v. *United States*, 141 S. Ct. 1858, 1862-63 (2021) (quoting First Step Act § 404(b)). *Second*, if a defendant is eligible for relief, the district court can exercise its discretion to impose a reduced sentence, "consider[ing] intervening changes of law or fact." *Concepcion* v. *United States*, 142 S. Ct. 2389, 2404 (2022).

In 2019, Ingram sought a reduced sentence under the First Step Act. Ingram has a "covered offense" because he is serving a sentence for a pre-2010 offense involving more than 50 grams of crack. Under *Terry*, this should have been the end of the eligibility inquiry at step one. *Terry*, 141 S. Ct. at 1862-63. And under

Concepcion, the district court should have been permitted to consider the effect the intervening case *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), has on the applicable sentencing range in exercising its discretion at step two. *Concepcion*, 142 S. Ct. at 2404. Under *Apprendi*, a statutory drug quantity that "increases the penalty for a crime beyond the prescribed statutory maximum" is an element that must be found by a jury "beyond a reasonable doubt." 530 U.S. at 490.

However, the Eleventh Circuit held that the district court could not consider Ingram's request. Pet. App. 11a. Making an error that infected both steps of the First Step Act's review process, the Eleventh Circuit held that the drug quantity found by a judge in 1995—if it had been part of Ingram's offense of conviction—would have triggered the same mandatory life sentence even after the Fair Sentencing Act, and so the district court "lack[ed] authority to reduce Ingram's sentence." *Id.* The way the Eleventh Circuit sees it, a pre-*Apprendi* defendant's "substantive offense," and his corresponding statutory penalty, is defined by "how much of a drug [he] possessed" *according to the sentencing judge*—not the drug-quantity element in his statute of conviction, endorsed by a jury. *See United States* v. *Jackson*, 58 F.4th 1331, 1336 (11th Cir. 2023). Indeed, a district court considering a pre-*Apprendi* defendant's First Step Act motion is "bound by" that judge-found drug quantity, *United States* v. *Jones*, 962 F.3d 1290, 1303 (11th Cir. 2020), and thus cannot even consider what the defendant's statutory penalty would be based on the facts found by the jury beyond a reasonable doubt

The Eleventh Circuit is either misinterpreting this Court's First Step Act precedents or defying them. This Court holds that a defendant's "offense" is based on the "elements." *Terry*, 141 S. Ct. 1862-63. The Eleventh Circuit disagrees: A defendant's "offense" is based on "how much of a drug [he] possessed." *Jackson*, 58 F.4th at 1336. This Court also holds that the First Step Act "does not * * * limit the information a district court may use to inform its decision whether and how much to reduce a sentence," meaning that "the First Step Act allows district courts to consider intervening changes of law or fact." *Concepcion*, 142 S. Ct. at 2402, 2404. The Eleventh Circuit disagrees: The statute "limits" the information a district court can consider so that it cannot "rely on *Apprendi*" in exercising its discretion to reduce a sentence. *Jones*, 962 F.3d at 1302-03. The conflict between this Court's decisions and the Eleventh Circuit's is clear and indisputable.

The Eleventh Circuit's interpretation of the First Step Act also splits—in two ways, no less—with every other circuit that has considered these issues. In all those other courts, "eligibility for resentencing under the First Step Act turns on the statute of conviction alone"—"not a defendant's specific conduct." *United States* v. *Boulding*, 960 F.3d 774, 779, 781 (6th Cir. 2020). In these courts, a defendant's statutory penalty is determined by the drug-quantity element in the defendant's statute of conviction—not how much of a drug the defendant actually possessed. *See, e.g.*, *United States* v. *Robinson*, 9 F.4th 954, 959 (8th Cir. 2021) (per curiam); *United States* v. *White*, 984 F.3d 76, 86 (D.C. Cir. 2020).

The Eleventh Circuit's limits on discretion at step two also create a circuit split. Every other circuit to have considered the issue holds that "the impact that *Apprendi* would have had on [the] statutory sentencing range is a factor that the district court may consider." *United States* v. *Ware*, 964 F.3d 482, 488 (6th Cir. 2020); *see also United States* v. *Andrews*, No. 22-2826, 2023 WL 2136784 (3d Cir. Feb. 21, 2023) (per curiam) (similar); *United States* v. *Mason*, 855 F. App'x 298 (7th Cir. 2021) (similar).

The questions presented are recurring and important. The Eleventh Circuit's interpretation of the First Step Act sharply limits relief for defendants sentenced before June 26, 2000—the date this Court issued *Apprendi*. The Eleventh Circuit thus perpetuates the same arbitrary date-based limitation on relief Congress passed the First Step Act to remove. Indeed, it adds yet another arbitrary factor: geography. Nationwide, only defendants sentenced in Florida, Georgia, and Alabama face anything like the Eleventh Circuit's hurdles to relief.

This Court should grant the petition and reverse.

STATEMENT

A. Legal Background

The First Step Act of 2018 authorizes courts to reduce certain previously imposed sentences to match the penalties in the Fair Sentencing Act of 2010. In *Terry*, this Court held that, because eligibility for First Step Act relief turns on the elements of the statute the defendant was convicted of violating, all defendants with pre-2010 convictions for "crack offenses" under 21 U.S.C. § 841(b)(1)(A) and (B) are eligible for relief. 141 S. Ct. at 1862-63. In *Concepcion*,

this Court held that, when a court considers whether to reduce a defendant's sentence, it can consider intervening changes of law. 142 S. Ct. at 2404.

1. The criminal penalty scheme for certain drug offenses is codified at 21 U.S.C. § 841(b)(1). At the time Ingram was convicted and sentenced, this scheme imposed penalties on crack offenses that were "far more serious" than those imposed on the same offenses involving powder cocaine. *Dorsey* v. *United States*, 567 U.S. 260, 266 (2012). Over time, "the public had come to understand" this disparity "as reflecting unjustified race-based differences." *Id.* at 268.

Congress passed the Fair Sentencing Act of 2010 to address these concerns. In Section 2 of that Act, Congress reduced the disparate treatment between crack and powder-cocaine offenses by significantly raising the amount of crack required to trigger each escalating sentencing range in § 841(b)(1)'s subparagraphs—but only for defendants who committed their offenses after August 3, 2010. *See Dorsey*, 567 U.S. at 280-281.

Before the Fair Sentencing Act, 50 grams of crack triggered § 841(b)(1)(A)'s mandatory sentence of life imprisonment for defendants with two prior felony drug convictions. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2006). After the Act, that sentence applies only to offenses involving more than 280 grams of crack. *See* Fair Sentencing Act § 2. Likewise, before the Fair Sentencing Act, 5 grams of crack triggered § 841(b)(1)(B)'s sentencing range of 10-years-to-life for defendants with one prior felony drug conviction. *See* 21 U.S.C. § 841(b)(1)(B)(iii) (2006). After the Act, that range applies only to offenses involving more than 28 grams of crack. *See* Fair Sentencing Act § 2. Both before and after the Act, defendants with a prior felony

drug conviction and whose offense involved a detectable, but unspecified, amount of crack face § 841(b)(1)(C)'s maximum sentence of 30 years. *See* 21 U.S.C. § 841(b)(1)(C) (2006); 21 U.S.C. § 841(b)(1)(C) (2012).

2. Eight years later, Congress passed the First Step Act of 2018. Among other reforms, the Act made the relevant provisions of the Fair Sentencing Act retroactive. *See Terry*, 141 S. Ct. at 1861-62.

Section 404(b) provides that, "A court that imposed a sentence for a covered offense may, on motion of the defendant, * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." First Step Act § 404(b). Section 404(a), in turn, defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by sections 2 and 3 of the Fair Sentencing Act * * *, that was committed before August 3, 2010." First Step Act § 404(a).[1]

Section 404 thus establishes a two-step process for reducing a defendant's sentence. First, the court must determine whether the defendant is eligible for relief. "An offender is eligible for a sentence reduction * * * only if he previously received 'a sentence for a covered offense,' " as defined by Section 404(a). *Terry*, 141 S. Ct. at 1862 (citation omitted). Second, if the defendant is eligible, the court may, under Section 404(b), "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the

[1] Section 404(c) contains a few limitations that are not relevant here. First Step Act § 404(c).

time the covered offense was committed." First Step Act § 404(b).

3. This Court has issued two decisions interpreting the Act.

First, in *Terry*, this Court construed Section 404(a)'s definition of "covered offense" to refer to the defendant's statute of conviction. The issue in that case was whether defendants convicted before 2010 under § 841(b)(1)(C) have "covered offenses" and are thus eligible for relief. In holding that such offenders were ineligible for relief, this Court explained that Section 404(a)'s reference to "a violation of a Federal criminal statute" simply means "offense." 141 S. Ct. at 1862 (citations omitted). *Terry* further explained that offenses are defined by statutory "elements." *Id.* For purposes of the First Step Act, then, a defendant's "offense" is the statute, as defined by its elements, that the defendant was convicted of violating. *Id.* at 1862-63. That offense is then "covered" if the "Fair Sentencing Act modified" its "statutory penalties." *Id.* at 1862.

Breaking down the pre-2010 version of § 841 into its component elements, the Court identified "three crack offenses," only two of which were singled out by Congress for First Step Act relief. *Id.* "The elements of the first offense"—defined in part by § 841(b)(1)(A)—"were (1) knowing or intentional possession with intent to distribute, (2) crack, of (3) at least 50 grams." *Id.* "The elements of the second offense"—defined in part by § 841(b)(1)(B)—"were (1) knowing or intentional possession with intent to distribute, (2) crack, of (3) at least 5 grams." *Id.* "And the elements of the third offense"—defined by in part by § 841(b)(1)(C)—"were (1) knowing or intentional possession with

intent to distribute, (2) some unspecified amount of a schedule I or II drug." *Id.*

As this Court explained, the Fair Sentencing Act "modified" the "statutory penalties" only for the first two offenses: "[A] person charged" with the elements of the first offense "after 2010 is now subject to the more lenient prison range for" § 841(b)(1)(B), which after the Fair Sentencing Act is triggered by 28 grams. *Terry*, 141 S. Ct. at 1863. "Similarly," the second offense "is now punishable by" § 841(b)(1)(C)'s sentencing range. *Id.* "The statutory penalties thus changed for all subparagraph (A) and (B) offenders." *Id.*

Terry accordingly holds that "all" defendants with pre-2010 convictions for "crack offense[s]" under § 841(b)(1)(A) and (B) have "covered offenses" and are therefore eligible for relief. 141 S. Ct. at 1863-64; *see also id.* at 1867 (Sotomayor, J., concurring in part and concurring in the judgment) ("[E]veryone with a pre-August 3, 2010, crack conviction under § 841(b)(1)(A)[,] * * * including career offenders, has a 'covered offense' and is eligible for resentencing.").

Second, in *Concepcion*, this Court held that "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence" under Section 404(b). 142 S. Ct. at 2404. In so doing, *Concepcion* resolved a circuit split concerning the meaning of Section 404(b)'s "as if" clause. Some circuits interpreted this provision to mean that courts *must* consider intervening changes in law or fact when imposing a reduced sentence; some circuits concluded that courts *may* consider such intervening changes; and some circuits, including the Eleventh Circuit, held that courts *could*

not consider such changes and could instead consider *only* the changes effected by the Fair Sentencing Act. *See id.* at 2398 & n.2.

Concepcion held that courts *may*—and when defendants make the argument, *must*—consider intervening changes in law or fact. *Id.* at 2404. The Court explicitly rejected the argument that Section 404(b) limits this discretion. As this Court held, Section 404(b)'s "as if" clause "does not erect any * * * limitations" on "district courts' discretion" to reduce an eligible defendant's sentence. *Id.* at 2402. Instead, "[t]he term 'as if' simply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act." *Id.*

B. Factual and Procedural Background

1. In 1995, a jury found Ingram guilty of conspiracy to possess with intent distribute crack, in violation of 21 U.S.C. §§ 846 and 841. Pet. App. 6a. No drug quantity was charged or proven. *See id.* at 19a (excerpt of indictment); *id.* at 21a-23a (excerpt of jury instructions); *id.* at 24a (verdict). Because the government had filed a notice of enhancement of sentencing pursuant to 21 U.S.C. § 851, Ingram faced § 841(b)(1)'s enhanced statutory penalties. *See supra* pp. 7-8 (discussing § 841(b)(1)'s pre-Fair Sentencing Act penalties).

The presentence investigation report concluded that Ingram was responsible for over four kilograms of crack. Pet. App. 6a-7a. Between this drug quantity and Ingram's prior offenses, the report determined that Ingram "was subject to * * * a mandatory minimum sentence of life imprisonment * * * pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851." Pet. App. 7a. The report calculated Ingram's Guidelines range as 360

months to life. *Id.* "Because of Ingram's statutory mandatory sentence of life imprisonment, however, the guideline range * * * became life imprisonment under U.S.S.G. § 5G1.1(c)(2)." *Id.*

The district court adopted the report's drug quantity, and that "judge-found" drug quantity "triggered increased statutory penalties." *Id.* at 11a. The court accordingly sentenced Ingram to life imprisonment under § 841(b)(1)(A). *Id.* at 7a.[2]

On direct appeal, the Eleventh Circuit affirmed. *United States* v. *Ingram*, 100 F.3d 971 (11th Cir. 1996) (unpublished table decision).

2. In 2019, Ingram filed a *pro se* motion under Section 404 of the First Step Act. *See* Pet. App. 7a. He explained that his 1995 crack conviction under § 841(b)(1)(A) was a "covered offense" under Section 404(a) because the Fair Sentencing Act reduced the statutory penalties for that offense from mandatory life to 10-years-to-life. D. Ct. Dkt. 251 at 3-4. He asked the court to exercise its discretion under Section 404(b) to reduce his sentence to 30 years, which is the bottom of his Guidelines range. *See id.* at 4-6. Ingram also pointed out that, because no drug quantity was

---

[2] Ingram was also convicted of five counts of distribution of crack, all in violation of 21 U.S.C. § 841. Pet. App. 6a. The district court sentenced him to concurrent sentences of 30 years for those counts—one sentence under § 841(b)(1)(B) and four under § 841(b)(1)(C). *Id.* at 7a. Those convictions and sentences are not at issue here. To the extent Ingram sought a reduced sentence for his § 841(b)(1)(C) offenses, he abandoned that argument on appeal. *See id.* at 7a-8a & n.4. As to his § 841(b)(1)(B) offense, the Eleventh Circuit held that the district court *could* reduce that sentence, *see id.* at 11a-13a, but on remand, the district court declined to do so, *see* D. Ct. Dkt. 294. Ingram did not appeal that order.

charged or proven, the maximum sentence allowable under *Apprendi* would be the one provided by § 841(b)(1)(C)—30 years. *See id.* at 4 n.2.

The district court denied Ingram's motion. Pet. App. 8a. According to the district court, Ingram was ineligible for resentencing because his offense involved "280 grams or more of crack"—an amount sufficient to trigger § 841(b)(1)(A)'s mandatory life sentence even after the Fair Sentencing Act. *Id.* This "280 grams or more of crack" was drawn from the judge's finding at Ingram's 1995 sentencing that Ingram was responsible for more than four kilograms of crack.

3. Ingram appealed, arguing that eligibility for relief under the First Step Act turns solely on the statute of conviction.

While Ingram's appeal was pending, the Eleventh Circuit issued *Jones*. There, the Eleventh Circuit held that "a movant has a 'covered offense' " under Section 404(a) "if his offense triggered a statutory penalty that has since been modified by the Fair Sentencing Act." *Jones*, 962 F.3d at 1298. But "a movant's satisfaction of the 'covered offense' requirement does not necessarily mean that a district court can reduce his sentence." *Id.* at 1303. That is because "[a]ny reduction must be 'as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed.' " *Id.* (quoting First Step Act § 404(b)).

The Eleventh Circuit perceived "two limits" in "[t]his 'as-if' requirement." *Id.* First, a court cannot reduce "a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Id.* "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.*

Under this rule, a defendant's statutory penalty under the Fair Sentencing Act turns on whether he was sentenced before or after this Court's decision in *Apprendi*. *See United States* v. *Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021). Before *Apprendi*, courts determined for themselves, by a preponderance of the evidence, the drug quantity necessary to trigger § 841(b)(1)(A) and (B)'s penalties. *Id.* According to the Eleventh Circuit, because a sentencing court "could have" used this judge-found drug quantity to determine a pre-*Apprendi* defendant's statutory penalty "at the time of sentencing"—because *Apprendi* had not yet recognized that practice as unconstitutional—courts *must* use that same judge-found drug quantity to determine what that defendant's statutory penalty "would be" under the Fair Sentencing Act. *Jones*, 962 F.3d at 1303. By contrast, for defendants sentenced after *Apprendi*, the statutory penalty is determined by their statute of conviction. *See id.* at 1303-04.

After *Jones* issued, the panel assigned to Ingram's appeal concluded that "*Jones* controls this appeal." Pet. App. 8a. The panel first found that "Ingram's offenses qualify as 'covered offenses' under the First Step Act." *Id.* at 10a. But under the Eleventh Circuit's rule, the panel explained, "the district court was bound by its earlier drug-quantity finding and was entitled to rely on those judge-found factual findings—made pre-*Apprendi*—that triggered increased statutory penalties." *Id.* at 11a. That drug quantity

triggered the same mandatory life sentence under the post-Fair Sentencing Act version of § 841(b)(1)(A) that Ingram had originally received. *Id.* The panel therefore "affirm[ed] the district court's determination that Ingram was ineligible under the First Step Act for a reduced sentence." *Id.*

Ingram petitioned for rehearing. *See id.* at 16a-17a. The Eleventh Circuit denied the petition. *Id.*

4. Ingram filed a certiorari petition in this Court, explaining that his case presented a similar question as the one presented in *Concepcion*. *See* Petition for Writ of Certiorari, No. 21-1274 (Feb. 16, 2022). While his petition was pending, this Court decided *Concepcion*. After this Court decided *Concepcion*, it granted Ingram's petition, vacated the judgment, and remanded to the Eleventh Circuit for further consideration in light of *Concepcion*. Pet. App. 4a.

Ingram's petition was not the only petition arising from the Eleventh Circuit that was granted, vacated, and remanded in light of *Concepcion*. Several other, similar cases received the same treatment. *See, e.g.*, *Jackson* v. *United States*, 143 S. Ct. 72 (Oct. 3, 2022) (mem.).

Addressing one such case, the Eleventh Circuit reaffirmed its prior decision in *Jones*. *See Jackson*, 58 F.4th at 1335. In *Jackson*, the Eleventh Circuit held that "*Concepcion* did not abrogate *Jones*'s holding that '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.' " 58 F.4th at 1335 (quoting *Jones*, 962 F.3d at 1303). The way the Eleventh Circuit saw it, *Jones* and *Concepcion* pertained to different parts of the Section 404 process. *Jones* concerned how to determine the

defendant's statutory penalty. *Id.* at 1336. And that statutory penalty, the Eleventh Circuit clarified in *Jackson*, is determined by "how much of a drug the defendant possessed." *Id.*

"*Concepcion*, by contrast, addressed" the next step: "which factors the district court may consider in deciding an appropriate sentence" within the statutory sentencing range. *Id.* *Concepcion* did not "hold that First Step Act movants could relitigate their cases from the ground up." *Id.* at 1337. And according to the Eleventh Circuit, that is what courts would be allowing if they determined a pre-*Apprendi* defendant's offense based on anything but the judge-found drug quantity: They would be freeing defendants to "use *Apprendi* to redefine [their] offense[s]." *Id.* The court accordingly reinstated its opinion in *Jones*. *Id.* at 1338.

The Eleventh Circuit panel assigned to Ingram's appeal then applied *Jackson* to again deny Ingram relief. *See* Pet. App. 1a-3a. As the panel explained, "[w]e have since concluded that the Supreme Court's decision in *Concepcion* did not abrogate the reasoning of our decision in *Jones*." *Id.* at 2a. "Because * * * *Jones* remains binding law," the panel "reinstated [its] prior decision in this appeal." *Id.* at 3a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S CATEGORICAL DENIAL OF RELIEF TO ELIGIBLE DEFENDANTS VIOLATES THIS COURT'S PRECEDENTS AND SPLITS WITH OTHER CIRCUITS.

The Eleventh Circuit's practice of categorically denying relief to otherwise-eligible defendants based on judge-found drug quantities violates *Terry*, where this Court held that "all" defendants with pre-2010 crack convictions under § 841(b)(1)(A) are eligible for relief because the elements of their statute of conviction now trigger, after the Fair Sentencing Act, the "more lenient prison range" in § 841(b)(1)(B). 141 S. Ct. at 1862-63. It also splits with every other court to have considered the issue. This Court should grant the petition and reverse.

A. The Eleventh Circuit's Rule Violates *Terry*.

Terry held that a defendant's "offense" is based on the "elements" of the defendant's statute of conviction. 141 S. Ct. at 1862-63. Under that elements-based framework, Ingram is eligible for relief because he was convicted of a pre-2010 crack offense under § 841(b)(1)(A), an offense that, if he were convicted after the Fair Sentencing Act, would expose him to "the more lenient prison range" in § 841(b)(1)(B). 141 S. Ct. at 1863. The Eleventh Circuit nonetheless held that Ingram was ineligible for relief because the drug quantity found by the judge at sentencing triggered the same mandatory life sentence under § 841(b)(1)(A) Ingram received in 1995. Pet. App. 11a. The Eleventh Circuit reached this conclusion by applying its rule that a pre-*Apprendi* defendant's "offense" is defined

by "how much of a drug the defendant possessed." *Jackson*, 58 F.4th at 1336. That rule is both irreconcilable with *Terry*'s holding that a defendant's "offense" is based on the "elements" of the defendant's statute of conviction, and wrong as a matter of statutory interpretation.

1. The Eleventh Circuit's rule categorically foreclosing First Step Act relief for certain pre-*Apprendi* defendants with pre-2010 crack convictions under § 841(b)(1)(A) violates *Terry*.

As *Terry* explained, the First Step Act has only one eligibility requirement: that the defendant "previously received 'a sentence for a covered offense,' " as defined by Section 404(a). *Terry*, 141 S. Ct. at 1862. *Terry* interpreted that eligibility requirement to mean that a defendant's eligibility turns on the "elements" of the statute he was convicted of violating. *Id.* Under that elements-based approach, "*all*" defendants with pre-2010 crack convictions under § 841(b)(1)(A) are eligible for relief. 141 S. Ct. at 1863 (emphasis added); *see id.* at 1867 (Sotomayor, J., concurring in part and concurring in the judgment) ("As the Court explains, everyone with a pre-August 3, 2010, crack conviction under § 841(b)(1)(A)[,] * * * including career offenders, has a 'covered offense' and is eligible for resentencing.").

Yet the Eleventh Circuit holds that *some* defendants with pre-2010 crack convictions under § 841(b)(1)(A) are *not* eligible for relief based—not on the elements of their statute of conviction—but on facts found by the judge at sentencing. *See Jackson*, 58 F.4th at 1336 (explaining that a defendant's "substantive offense" is defined by "how much of a drug the defendant possessed").

The Eleventh Circuit confuses the *means* of committing a crime with the *elements* of that crime. Means and elements are fundamentally different. Elements define a crime by establishing what circumstances must exist and what actions a person must take to be found guilty of the crime. *See Mathis* v. *United States*, 579 U.S. 500, 504 (2016). A defendant cannot be convicted of a crime unless the government has proven each element beyond a reasonable doubt. *Id.* Means, by contrast, are the "brute facts" referring to *how* a crime has been committed; they are "extraneous to the crime's legal requirements" and "need neither be found by a jury nor admitted by a defendant." *Id.* (citations omitted).

The judge's finding that Ingram's crime involved more than four kilograms of crack refers to the *means* of satisfying the more-than-50-grams-of-crack element in the pre-2010 version of § 841(b)(1)(A). But both in 1995 and today, distributing more than four kilograms of crack is not an *element* of any offense. Beyond confirming that Ingram was in fact convicted for an offense involving more than 50 grams of crack, that judge-found quantity is irrelevant to determining his "offense" and the corresponding statutory penalty.

In light of *Terry*'s elements-based approach to eligibility, the Eleventh Circuit's conclusion that Ingram was "ineligible" for relief based on the *means* of the crime, Pet. App. 11a, plainly cannot stand.

2. The Eleventh Circuit's interpretation of Section 404(b) is also inconsistent with the plain text of the statute, which makes clear that the same offense that determines a defendant's eligibility determines his statutory penalty.

Section 404(b) uses the phrase "covered offense" twice, once to establish who is eligible, and once to authorize courts to grant relief: "A court [1] that imposed a sentence for a *covered offense* [2] 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." First Step Act § 404(b) (emphases added).

Section 404(a) provides a single definition of "covered offense," one that applies across "this section." *Id.* § 404(a). In the context of determining the reach of Section 404(b)'s eligibility clause, *Terry* interpreted Section 404(a)'s definition of "covered offense" to refer to the elements of the defendant's statute of conviction. 141 S. Ct. at 1862-63. That interpretation applies to the second, relief-enabling reference to "covered offense" just as much as it applies to the first, eligibility-defining reference. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 86 (2006) ("Generally, 'identical words used in different parts of the same statute are * * * presumed to have the same meaning.' " (citation omitted)). A defendant's "offense"—both for purposes of determining the defendant's eligibility and enabling relief—is thus determined according to the *elements* of the defendant's statute of conviction.

However, in the Eleventh Circuit's view, Section 404(b)'s first "covered offense" refers to the defendant's statute of conviction, while the second refers to the *factual conduct* underlying that conviction. *See* Pet. App. 9a-11a. That is wrong. "[C]overed offense" cannot mean two different things in the same sentence. *See, e.g.*, *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 231-232 (2007) (rejecting

interpretation that would have given two different meanings to the same phrase in one statute).

3. The Eleventh Circuit's rationale for its rule also cannot withstand scrutiny.

The Eleventh Circuit concluded that courts are "bound by" pre-*Apprendi* judge-found drug quantities when determining the defendant's offense and corresponding statutory penalty because *Apprendi* itself is not retroactively applicable. *See Jones*, 962 F.3d at 1302-03; *Jackson*, 58 F.4th at 1337-38. As the Eleventh Circuit saw it, considering *Apprendi* during First Step Act proceedings would be allowing the defendant to "redefine his offense." *Jackson*, 58 F.4th at 1337-38.

The Eleventh Circuit is wrong. Identifying the relevant offense has nothing to do with *Apprendi*. Under *Terry*, the relevant offense is determined by the elements of the defendant's statute of conviction. *See* 141 S. Ct. at 1862. Both before and after *Apprendi*, one element in Ingram's offense was 50 grams of crack. The fact that a judge in 1995 determined by a preponderance of the evidence that this drug-quantity element was satisfied by evidence that Ingram possessed four kilograms of crack does not make the 50-gram element any less an element.

The Eleventh Circuit's surmise that defendants are attempting to redefine their offenses by way of *Apprendi* is not only wrong, it's rich. Under the Eleventh Circuit's approach, *courts*—not defendants—are in the practice of redefining offenses. The Eleventh Circuit denied Ingram relief because his offense "involv[ed] 280 grams or more of crack." Pet. App. 8a (quoting district court order). *But there was no such offense in 1995.* It is pure speculation to conclude that

Ingram would have been convicted in 1995 of a hypothetical post-2010 offense of conspiracy to possess with intent to distribute more than 280 grams. *See United States* v. *Broadway*, 1 F.4th 1206, 1211-12 (10th Cir. 2021) (discussing speculation required by pegging relief to actual drug quantity).

B. Every Other Court Of Appeals To Have Considered The Question Holds That Eligibility Turns On The Statute Of Conviction, Not Conduct Underlying The Conviction.

Every other circuit that has addressed the issue has correctly held that "eligibility for resentencing under the First Step Act turns on the statute of conviction alone"—not the defendant's underlying conduct. *Boulding*, 960 F.3d at 781 (6th Cir.); *see also, e.g.*, *United States* v. *Davis*, 961 F.3d 181, 189-190 (2d Cir. 2020); *United States* v. *Coleman*, 66 F.4th 108, 110 (3d Cir. 2023); *United States* v. *Wirsing*, 943 F.3d 175, 185-186 (4th Cir. 2019); *United States* v. *Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United States* v. *Shaw*, 957 F.3d 734, 739 (7th Cir. 2020); *United States* v. *McDonald*, 944 F.3d 769, 772 (8th Cir. 2019); *United States* v. *Crooks*, 997 F.3d 1273, 1277 (10th Cir. 2021); *White*, 984 F.3d at 86 (D.C. Cir.).

None of these circuits has erected a second eligibility requirement foreclosing relief if the actual drug quantity, whether found before *Apprendi* or after, triggers the same statutory penalty after the Fair Sentencing Act. Indeed, the only circuits that have considered such a framework—the Sixth, Eighth, Tenth, and D.C. Circuits—have rejected it. These circuits have explicitly held that district courts must use the drug-quantity element in the defendant's statute of conviction to determine the statutory penalty and *cannot*

categorically bar relief based on the actual drug quantity.

Take, for example, the Eighth Circuit's decision in *Robinson*. There, the Eighth Circuit considered the appeal of a pre-*Apprendi* defendant who is identically situated to Ingram in every relevant way: He was convicted in 1995 "for conspiracy to distribute 50 grams or more of crack cocaine" and received a "mandatory life term of life imprisonment" because of his "two prior felony drug offense convictions." 9 F.4th at 958-959. The district court held that the defendant was eligible for relief under Section 404(a), but concluded that, based on the judge-found drug quantity, the defendant was "subject to the same mandatory life sentence," even after the Fair Sentencing Act. *Id.* at 958. The Eighth Circuit rejected that approach as "contrary to the principle that '[t]he First Step Act applies to offenses, not conduct.' " *Id.* (citation omitted). The Eighth Circuit accordingly held that a defendant's "offense of conviction—not the underlying drug quantity—determines his applicable statutory sentencing range" under Section 404(b). *Id.* at 959. The defendant's statutory penalty—if he had been sentenced after the enactment of the Fair Sentencing Act—was thus § 841(b)(1)(B)'s range of 10-years-to-life. *Id.* On remand, the district court reduced the defendant's life sentence to time served. *See United States* v. *Robinson*, No. 8:95CR79, 2021 WL 5958356, at *2 (D. Neb. Dec. 16, 2021).

The D.C. Circuit has issued a similar decision. *See White*, 984 F.3d at 85-88. *White* concerned the First Step Act appeals of two pre-*Apprendi* defendants convicted in 1994 of crack offenses involving more than 50 grams. *Id.* at 83. At sentencing, the district court

judge had found that the drug quantities involved in their offenses were roughly 20 kilograms and sentenced them to life imprisonment. *Id.* at 83-84. When the defendants sought First Step Act relief, the district court "found that relief was not 'available' to [the defendants] under section 404(b)" because "the Fair Sentencing Act would have had no effect on [their] sentences * * * based on the quantities of crack cocaine attributed to" them. *Id.* at 84.

The D.C. Circuit reversed, explaining that a court cannot "deem relief categorically unavailable due to defendant-specific drug quantities." *Id.* at 88; *see id.* at 82-83. Instead, "[f]or a court to impose a sentence 'as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect,' the court must use the revised penalty range now applicable to the drug amount in the original statute of conviction." *Id.* at 86 (citation omitted). "[T]he District Court [accordingly] had discretion to impose reduced sentences as low as" 5 years under § 841(b)(1)(B). *Id.* On remand, the district court reduced the defendants' life sentences to 33 years' and 35 years' imprisonment, respectively. *See United States* v. *White*, No. CR 93-97 (BAH), 2022 WL 3646614, at *1 (D.D.C. Aug. 24, 2022).

The Sixth and the Tenth Circuits have reached consistent results in the context of post-*Apprendi* defendants. *United States* v. *Wynn*, No. 21-3543, 2023 WL 1305109 (6th Cir. Jan. 31, 2023), and *Broadway*, 1 F.4th 1206 (10th Cir. 2021), concerned defendants who pled guilty to § 841(b)(1)(A) or (B) offenses and who stipulated that their crimes involved more than the statutory drug-quantity threshold. *Wynn*, 2023 WL 1305109, at *1; *Broadway*, 1 F.4th at 1208. Both district courts found the respective defendants eligible

under Section 404(a), but concluded that the defendants were not entitled to a reduction because the stipulated drug quantities triggered the same sentencing ranges under Section 404(b). *Wynn*, 2023 WL 1305109, at *1; *Broadway*, 1 F.4th at 1208. The Sixth and Tenth Circuits rejected that approach, explaining that each defendant's statutory penalty is determined by the drug-quantity element in their statute of conviction, not the actual drug quantity underlying that conviction. *Wynn*, 2023 WL 1305109, at *2; *Broadway*, 1 F.4th at 1211.

The Sixth, Eighth, Tenth, and D.C. Circuits make explicit what nearly every other circuit has implicitly concluded—a defendant's statutory penalty is determined by the statute of conviction:

- In *United States* v. *Cooper*, 803 F. App'x 33, 34 (7th Cir. 2020), the Seventh Circuit concluded that the statutory penalty for a pre-*Apprendi* § 841(b)(1)(A) career offender held responsible for between 150 and 500 grams of crack is § 841(b)(1)(B)'s range of 10-years-to-life.
- In *United States* v. *Reed*, 58 F.4th 816, 822 (4th Cir. 2023), the Fourth Circuit concluded that the "correct revised statutory" penalty for a pre-*Apprendi* § 841(b)(1)(A) offender is § 841(b)(1)(B)'s range of 5-to-40 years.
- In *United States* v. *Ortiz*, 832 F. App'x 715, 719 (2d Cir. 2020) (summary order), the Second Circuit concluded that the statutory mandatory minimum for a § 841(b)(1)(A) offender whose offense involved between 150 grams and 500 grams of crack is five years under § 841(b)(1)(B).

- In *United States* v. *Hardwick*, 802 F. App'x 707, 709-710 (3d Cir. 2020) (per curiam), the Third Circuit found that a § 841(b)(1)(A) offender's statutory penalty is § 841(b)(1)(B)'s range of 5-to-40 years.
- And in *United States* v. *Jackson*, 945 F.3d 315, 319, 321 (5th Cir. 2019), the Fifth Circuit concluded that the statutory penalty for a § 841(b)(1)(A) offender serving mandatory life is "ten years to life" under § 841(b)(1)(B).[3]

Had Ingram's case arisen in *any* of these circuits, he would have been deemed eligible for relief and would have been entitled to receive a reduced sentence within § 841(b)(1)(B)'s sentencing range of 10-years-to-life. The Eleventh Circuit, however, barred Ingram from receiving such relief because of the judge-found drug quantity in his case. Pet. App. 11a.

II. THE ELEVENTH CIRCUIT'S RULE THAT COURTS ARE "BOUND BY" THE JUDGE-FOUND DRUG QUANTITY VIOLATES *CONCEPCION* AND SPLITS WITH OTHER COURTS.

This Court should reverse for a second reason: The Eleventh Circuit's requirement that district courts are "bound by" the judge-found drug quantity when considering whether to reduce a defendant's sentence, *Jones*, 962 F.3d at 1303, violates *Concepcion*. This "bound by" restriction effectively prevents courts from considering the effect *Apprendi* would have on a pre-

[3] *See also* Amicus Brief for Nat'l Ass'n of Fed. Defenders ("NAFD Br.") 17-21 & nn.17-18, *Perez* v. *United States*, No. 22-7794 (U.S. June 30, 2023) (collecting other cases).

Apprendi defendant's sentence—despite *Concepcion*'s clear holding that courts *may* consider such intervening legal changes during Section 404 proceedings, 142 S. Ct. at 2404. Because other courts of appeals abide by *Concepcion*, this holding also creates a circuit split.

A. The Solicitor General Agrees That The Eleventh Circuit's Rule Is Wrong.

1. In the Eleventh Circuit, district courts are "bound by" judge-found drug quantities when considering whether to reduce a pre-*Apprendi* defendant's sentence under the First Step Act. *See Jones*, 962 F.3d at 1303-04. This limitation prevents courts from considering what the defendant's sentence would be in light of intervening changes in the law. To take this case as an example, the district court is precluded from considering that, based on the facts found beyond a reasonable doubt by the jury, the maximum sentence allowable under *Apprendi* is § 841(b)(1)(C)'s maximum sentence of 30 years. *See Apprendi*, 530 U.S. at 490; Pet. App. 10a-11a.

This violates *Concepcion*. *Concepcion* held that the First Step Act "allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." 142 S. Ct. at 2404. *Apprendi* is an intervening change of law. *See, e.g.*, *McCoy* v. *United States*, 266 F.3d 1245, 1256 (11th Cir. 2001) (explaining that *Apprendi* "established a new rule of criminal procedure"). Under *Concepcion*, then, when a district court considers whether to reduce an eligible defendant's sentence, courts *cannot* be "bound by" their prior

judge-found facts; they must be allowed to consider *Apprendi*.[4]

The Solicitor General agrees. In her brief in *Concepcion*, she averred that Section 404's text "leaves to the sound discretion of the district court the choice of which factors to consider in evaluating the propriety of a sentence reduction in a particular case." Br. for United States at 40, *Concepcion*, 142 S. Ct. 2389 (No. 20-1650). This includes the effect that *Apprendi* has on a pre-*Apprendi* defendant's sentence: As the Solicitor General aptly put it, "Congress would not have expected a district court adjudicating a Section 404 motion to be bound by prior judicial findings inconsistent with *Apprendi*." *Id.* at 40 n.*. After all, "because the Fair Sentencing Act postdated *Booker*," "Congress presumably expected courts to treat" the pre-*Booker* regime—including judge-found drug quantities that increased the applicable statutory penalties—"as advisory in the Section 404 context." *Id*.

2. The Eleventh Circuit's justification for its "bound by" rule does not hold water. The Eleventh Circuit's rule is rooted in one of the "limits" it saw in Section 404(b)'s "as if" clause: 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

---

[4] A court is not prohibited from considering pre-*Apprendi* judge-found drug quantities when exercising its discretion to reduce a defendant's sentence. *See Robinson*, 9 F.4th at 959 (holding that district courts "may take * * * the sentencing court's drug quantity finding," made pre-*Apprendi*, "into account"); *White*, 984 F.3d at 88 (similar). *Concepcion* merely requires that courts be *allowed to consider* intervening changes in the law, not that courts *must apply* such changes. *See* 142 S. Ct. at 2404-05.

determine the movant's statutory penalty at the time of sentencing." *Jones*, 962 F.3d at 1303.

But as *Concepcion* squarely holds, that clause *contains no such limits*. According to *Concepcion*, Section 404(b)'s "as if" clause "does not erect" "*any* limitations on district courts' discretion." 142 S. Ct. at 2402 (emphasis added). This clause instead "specifically requires district courts to apply the legal changes in the Fair Sentencing Act when calculating the Guidelines if they chose to modify a sentence." *Id.* "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.*

Concepcion is not ambiguous on this point. The opinion *Concepcion* reversed had interpreted the "as if" clause to erect a similar categorical bar to relief for otherwise-eligible defendants. *See United States* v. *Concepcion*, 991 F.3d 279, 289 (1st Cir. 2021). And *Concepcion* abrogated three other decisions—including one from the Eleventh Circuit—that had also interpreted the "as if" clause to limit a district court's discretion to reduce a defendant's sentence. *See United States* v. *Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020); *United States* v. *Kelley*, 962 F.3d 470, 475 (9th Cir. 2020); *United States* v. *Hegwood*, 934 F.3d 414, 418-419 (5th Cir. 2019). The Eleventh Circuit's decision below is of a piece with these cases, and should be reversed (again) for the same reason.

3. After this Court vacated the Eleventh Circuit's decision, the Eleventh Circuit tried to distinguish *Concepcion* on the ground that *Concepcion* concerns "which factors the district court may consider in deciding an appropriate sentence" within the revised statutory sentencing range, whereas *its* rule concerns

how to determine the predicate question of what the defendant's "substantive offense" and corresponding statutory sentencing range is. *Jackson*, 58 F.4th at 1336-37. But in trying to get around *Concepcion*'s holding that the "as if" clause contains no limits, the Eleventh Circuit crashed into *Terry*—which squarely answers the question of how to determine the defendant's "offense" and corresponding statutory penalty. *See supra* pp. 17-21.

The Eleventh Circuit also said on remand that *Concepcion*'s footnote that "[a] district court cannot * * * recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act," 142 S. Ct. at 2402 n.6, supports its view that "a movant * * * cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act," *Jackson*, 58 F.4th at 1337 (citation omitted). It does not. A crucial part of properly calculating the benchmark Guidelines range is determining the relevant statutory penalty, which under *Terry* is based on the statute of conviction. Nothing in *Concepcion* contradicts that.

B. Every Other Court Of Appeals To Have Considered The Question Holds That District Courts Can Consider The Effect *Apprendi* Would Have On A Defendant's Sentence.

The Third, Sixth, and Seventh Circuits have all explicitly recognized that district courts *can* consider the effect *Apprendi* would have on a defendant's sentence in Section 404 proceedings. *See Andrews*, 2023 WL 2136784, at *2 n.1 (3d Cir.); *Ware*, 964 F.3d at 488 (6th Cir.) (holding that "the impact that *Apprendi* would have had on [the] statutory sentencing range is a

factor that the district court may consider"); *Mason*, 855 F. App'x at 299 (7th Cir.) (holding that because "the First Step Act 'authorizes but does not require a district court to apply intervening judicial decisions,' " the district court did not err in rejecting the defendant's argument that the court should consider *Apprendi* when "calculating the updated statutory penalties" (citation omitted)).

Andrews (3d Cir.) is illustrative. That case concerned a defendant convicted in 1993 of a crack offense under § 841(b)(1)(A). 2023 WL 2136784, at *1. The jury did not find the defendant responsible for a specific drug amount. Instead, at the defendant's sentencing, "the District Court determined that he distributed 41.7 kilograms of crack." *Id.* (emphasis omitted); *see also United States* v. *Andrews*, No. CR 92-671-08, 2022 WL 18830794, at *2 (E.D. Pa. Sept. 9, 2022). The defendant later sought a sentence reduction under the First Step Act. 2023 WL 2136784, at *1-2. Looking to the defendant's "statute of conviction," the court found the defendant eligible for relief. *Id.* (citation omitted). Then, when considering whether to reduce the defendant's sentence, the court "consider[ed] 'the impact *Apprendi* would have had on his statutory range.' " 2022 WL 18830794, at *2 (quoting *Ware*, 964 F.3d at 488-489 (6th Cir.)). As the court explained, because the jury did not find a drug quantity, "[w]ere he sentenced today, [the defendant] would thus be subject to a statutory maximum of 20 years' imprisonment," under § 841(b)(1)(C). *Id.* Citing *Concepcion*, the Third Circuit blessed the district court's decision to "consider * * * *Apprendi*" and otherwise affirmed. 2023 WL 2136784, at *2 n.1, *3 (citation omitted).

By contrast, in the Eleventh Circuit, district courts are "bound by" judge-found drug quantities when considering whether to reduce a pre-*Apprendi* defendant's sentence under Section 404. *See Jones*, 962 F.3d at 1302-03. Because courts are "bound by" that quantity, they cannot even *consider* that if a pre-*Apprendi* defendant like Ingram were sentenced today, he would be subject to § 841(b)(1)(C)'s more lenient statutory penalty. Courts are instead required to mechanically determine the statutory penalty using the same unconstitutional method they used at the defendant's original sentencing. *Jones*, 962 F.3d at 1302-03.

III. THE QUESTIONS PRESENTED ARE RECURRING AND IMPORTANT.

The Eleventh Circuit's "tortured interpretation of the First Step Act," *United States* v. *Jackson*, 995 F.3d 1308, 1316 (11th Cir. 2021) (Martin, J., dissenting from denial of rehearing en banc), categorically bars relief for prisoners who have been imprisoned the longest under recognizably unjust sentencing laws and who were sentenced without the same constitutional safeguards enjoyed by every criminal defendant since this Court issued *Apprendi* in June 2000. This perverse interpretation of the First Step Act perpetuates—if not worsens—the exact disparity Congress passed the Act to resolve. And it does so for only one class of prisoners nationwide: prisoners in Florida, Georgia, and Alabama who were sentenced before

June 26, 2000. Other petitions pending before this Court present the same issues.[5]

1. The practical effect of the Eleventh Circuit's two-tiered approach is to preclude relief for defendants sentenced in violation of the Sixth Amendment before *Apprendi* was decided in June 2000, but to leave the door open for the same category of defendants sentenced after that date.

Consider *United States* v. *Bell*, 822 F. App'x 884 (11th Cir. 2020) (per curiam). "In 2005, a jury found Bell guilty of" offenses "involving at least 50 grams" of crack. *Id.* at 885. At sentencing, Bell was held responsible for 1.5 kilograms of crack cocaine based on a finding in his presentence investigation report. *Id.* Despite this drug quantity, the Eleventh Circuit concluded that the district court had "authority to reduce [Bell's] sentence under the First Step Act." *Id.* at 887.

The key difference between Ingram and Bell is a date: June 26, 2000. Because Ingram was sentenced before *Apprendi*, his sentence remains unchanged. But had he been sentenced after *Apprendi*, he—like Bell—could have received a lower sentence. "The random injustice of this result is clear." *Jackson*, 995 F.3d at 1316 (Martin, J., dissenting from denial of rehearing en banc).

The Eleventh Circuit's rule therefore perpetuates the constitutional error in pre-*Apprendi* defendants' sentences. The "constitutional protections" this Court

---

[5] *See Jackson* v. *United States*, No. 22-7728 (U.S. June 5, 2023); *Clowers* v. *United States*, No. 22-7783 (U.S. June 12, 2023); *Perez* v. *United States*, No. 22-7794 (U.S. June 12, 2023); *Williams* v. *United States*, No. 23-5014 (U.S. June 20, 2023); *Harper* v. *United States*, No. 20-13296, 2023 WL 3166351 (11th Cir. May 1, 2023), *petition for writ of cert. filed* (U.S. July 6, 2023).

articulated in *Apprendi* are "of surpassing importance" and rooted in centuries-old principles of "the common law." *Apprendi*, 530 U.S. at 476-477. Indeed, the rule that a jury must find beyond a reasonable doubt every fact that increases a defendant's statutory penalty flows from the very meaning of *crime* itself. *Alleyne* v. *United States*, 570 U.S. 99, 108-111 (2013). This rule is so fundamental to a fair trial that "if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, *even if* the defendant ultimately received a sentence falling within * * * the range applicable without that aggravating fact." *Id.* at 115. And yet the Eleventh Circuit bars courts from even *considering* these fundamental principles during resentencing proceedings more than two decades after this Court articulated them.

2. The Eleventh Circuit's rule also flouts Congress's stated purpose in enacting the First Step Act: to remedy the injustice of defendants who committed offenses after August 3, 2010, facing significantly less-harsh penalties than those defendants who committed offenses before August 3, 2010. The Eleventh Circuit replaces that date-based dividing line with a new one—June 26, 2000.

It is either ironic or outright absurd to conclude that a remedial statute *removing* an arbitrary date-based right to relief itself was limited by another arbitrary date—one hidden in a provision giving courts the authority to impose reduced sentences on defendants subject to the harsh, pre-Fair Sentencing Act regime. *Cf. New York State Dep't of Soc. Servs.* v. *Dublino*, 413 U.S. 405, 419-420 (1973) ("[Courts] cannot interpret

federal statutes to negate their own stated purposes.").

3. Ingram is not alone. The defendants harmed by the Eleventh Circuit's rule include many individuals who are serving mandatory life sentences based on drug quantities found by a preponderance of the evidence by a judge, rather than beyond a reasonable doubt by a jury.[6] As the National Association of Federal Defenders has explained, practically everywhere else, these prisoners could see their mandatory life sentences reduced.[7] But because they were convicted in Florida, Georgia, or Alabama, they cannot.

---

[6] *See supra* p. 33 n.5; *see also, e.g.*, *United States* v. *Lee*, No. 22-11409, 2023 WL 2230268 (11th Cir. Feb. 27, 2023); *United States* v. *Taylor*, No. 21-11689, 2021 WL 5321846 (11th Cir. Nov. 16, 2021); *United States* v. *Ford*, 855 F. App'x 542 (11th Cir. 2021); *United States* v. *Williams*, No. CR 493-082-12, 2023 WL 2605025 (S.D. Ga. Mar. 22, 2023); *United States* v. *McCoy*, No. 8:90-CR-132-T-36AAS, 2021 WL 5040402 (M.D. Fla. Oct. 29, 2021).

[7] *See* NAFD Br. at 17-21.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
JO-ANN TAMILA SAGAR
MICHAEL J. WEST
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Counsel for Petitioner

JULY 2023