

No. _____

IN THE
Supreme Court of the United States

TONY FORD,
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

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QUESTION PRESENTED

Previously, the courts of appeals were divided over whether a district court could consider intervening changes to the law during First Step Act proceedings. Last year, this Court addressed the matter in *Concepcion v. United States*, 597 U.S. 481 (2022), and 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.” *Id.* at 2404. However, the Eleventh Circuit Court of Appeals has since held a district court’s discretion is far more limited. Specifically, the Eleventh Circuit held that, before it has authority to reduce a defendant’s sentence under the First Step Act, a district court must determine whether the defendant has already received the lowest statutory penalty based only on the Fair Sentencing Act and not taking any other intervening changes to the law into account.

The question presented is: Whether the Eleventh Circuit’s limitation on First Step relief contravenes *Concepcion*’s holding, that in deciding whether to reduce the sentence of an eligible defendant, court’s may consider intervening changes of law?

PARTIES TO PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner is Tony Ford, defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below. Petitioner is not a corporation.

RELATED PROCEEDINGS

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

- *United States v. Tony Ford*, No. 8:05-cr-44-SCB-JSS (March 6, 2020)

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

- *United States v. Ford*, 858 F. App'x 325 (11th Cir. 2021)
- *United States v. Tony Ford*, No. 20-11126 (August 13, 2021) (order denying rehearing)

TABLE OF CONTENTS

| | |
|--|-----|
| Questions Presented for Review | i |
| Parties to Proceedings and Rule 29.6 Statement | ii |
| Related Proceedings..... | ii |
| Table of Contents | iii |
| Table of Appendices | vi |
| Table of Authorities | v |
| Petition for a Writ of Certiorari..... | 1 |
| Opinions Below | 1 |
| Jurisdiction..... | 1 |
| Constitutional and Statutory Provisions Involved..... | 2 |
| Statement of the Case | 7 |
| Reasons for Granting the Writ | 13 |
| The decision conflicts with <i>Concepcion</i> and circuit consensus..... | 13 |
| Conclusion | 19 |

TABLE OF APPENDICES

| | |
|---|---|
| <i>United States v. Ford,</i> 2023 WL 5606226 (11 th Cir. 2023) | A |
| <i>United States v. Ford,</i> 858 F. App'x 325 (11th Cir. 2021) | B |
| <i>United States v. Ford,</i> United States District Court Opinion, 8:05-cr-44 | C |

TABLE OF AUTHORITIES

| Cases | Page(s) |
|--|----------------|
| <i>United States v. Ford</i> , 2023 WL 5606226 (11th Cir. 2023)..... | <i>passim</i> |
| <i>United States v. Hogsett</i> , 982 F.3d 463 (7th Cir. 2020)..... | 11 |
| <i>Concepcion v. United States</i> , 597 U.S. 481 (2022) | <i>passim</i> |
| <i>United States v Clowers</i> , 62 F.4th 1377 (11th Cir. 2023)..... | 12 |
| <i>United States v. Jones</i> , 962 F.3d 290 (11th Cir. 2020) | 10, 11 |
| <i>United States v. Smith</i> , 954 F.3d 446 (1st Cir. 2020)..... | 11, 12 |
| <i>United States v. Reed</i> , 58 F.4th 816 (4th Cir. 2023) | 18, 19 |
| Statutes | |
| 18 U.S.C. § 3582..... | 8 |
| 21 U.S.C. § 841 | <i>passim</i> |
| 28 U.S.C. § 1254..... | 1 |
| 21 U.S.C. § 851 | 7 |

PETITION FOR A WRIT OF CERTIORARI

Petitioner Tony Ford respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's initial opinion was reported at *United States v. Ford*, 858 F. App'x 325 (11th Cir. 2021) (Appendix B). This Court granted Mr. Ford's petition for certiorari, vacated his judgment, and remanded the case to the Eleventh Circuit for further consideration in light of *Concepcion v. United States*, 597 U.S. 481 (2022). *Ford v. United States*, 143 S. Ct. 71 (2022). The Eleventh Circuit issued its second opinion which was reported at *United States v. Ford*, 2023 WL 5606226 (11th Cir. 2023) (Appendix A).

JURISDICTION

The Eleventh Circuit issued its opinion, after remand from this Court, on August 30, 2023. (Appendix A). This Court extended the time to file the petition for writ of certiorari up until December 28, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The First Step Act of 2018

Entitled “Application of the Fair Sentencing Act,” Section 404 of the First Step Act of 2018 provides in full:

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

Pub L. No. 115-391, 132 Stat. 5194, § 404.

B. The Fair Sentencing Act of 2010

Entitled “Cocaine Sentencing Disparity Reduction,” Section 2 of the Fair Sentencing Act of 2010 provides, in relevant part:

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking “50 grams” and inserting “280 grams”; and

(2) in subparagraph (B)(iii), by striking “5 grams” and inserting “28 grams”.

Pub. L. No. 111-220, 124 Stat. 2372, § 2(a).

C. 21 U.S.C. § 841

As amended by the Fair Sentencing Act of 2010, 21 U.S.C. § 841 provides, in pertinent part:

(a) Unlawful acts Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

(b) Penalties Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 280 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. . . .

* * *

(B) In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 28 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment . . .

(C) In the case of a controlled substance in schedule I or II . . . , except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . .

Notwithstanding section 3583 of title 18, any sentence

imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. . . .

21 U.S.C. §§ 841(a)(1), (b)(1)(A)–(C).

D. 21 U.S.C. § 802

As amended by the First Step Act of 2018, 21 U.S.C. § 802 defines the following offenses:

(57) The term “serious drug felony” means an offense described in section 924(e)(2) of Title 18 for which--

- (A)** the offender served a term of imprisonment of more than 12 months; and
- (B)** the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

(58) The term “serious violent felony” means--

- (A)** an offense described in section 3559(c)(2) of Title 18 for which the offender served a term of imprisonment of more than 12 months; and
- (B)** any offense that would be a felony violation of section 113 of Title 18, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months.

STATEMENT OF THE CASE

At Mr. Ford's original sentencing, the statutory penalties to which he was subject were Life imprisonment as to count one, up to 30 years' imprisonment as to counts two and four, 10 years to Life imprisonment as to counts five, six, and seven, and up to 10 years' imprisonment as to count eleven. This was based on a 21 U.S.C. § 851 enhancement filed by the government before Mr. Ford proceeded to trial. Due to the statutory mandatory minimum, Mr. Ford's guideline range was Life imprisonment; absent the § 851 enhancement, his guideline range would have been 360 months to Life, based on a total offense level of 42 and criminal history category of VI. As it had no choice, the district court sentenced Mr. Ford to Life imprisonment as to count one, concurrent terms of 360 months' imprisonment as to counts two, four, five, six, and seven, and 120 months as to count eleven.

The First Step Act was signed into law on December 21, 2018. Section 404(b) of the First Step Act makes retroactive the Fair Sentencing Act of 2010's reduction in the disparity between crack and powder cocaine sentences to defendants whose offense occurred before

the Act’s passage. First Step Act of 2018, Pub. L. No. 115-391 (S. 756), 132 Stat. 5194 (enacted Dec. 21, 2018).

On September 30, 2019, Mr. Ford filed a motion to reduce sentence pursuant to the First Step Act, arguing that he was eligible for a reduced sentence and, therefore, the district court had broad discretion to modify his previously imposed term of imprisonment pursuant to 18 U.S.C. § 3582(c)(1)(B) and Section 404 of the First Step Act, retroactively applying the amended statutory provisions of sections 2 or 3 the Fair Sentencing Act.

The district court denied Mr. Ford’s motion for relief under the First Step Act on March 6, 2020. (Appendix C). The district court found Mr. Ford ineligible for relief, holding that his conviction for count one, which was a multi-drug conspiracy offense involving both powder cocaine and crack cocaine, was not a “covered offense” for purposes of the First Step Act because the Fair Sentencing Act did not modify the statutory penalties for powder cocaine offenses. *Id.* at 3–4. The district court added, “Finally, if this Court is incorrect and Ford does qualify for a reduction, this Court **would reduce** his sentence down from the life

sentence imposed on November 18, 2008, to 300 months in the Bureau of Prisons.” *Id.* at 4 (emphasis in original).

Mr. Ford appealed to the Eleventh Circuit Court of Appeals and argued that the district court erred when it found him ineligible for relief and denied his motion under Section 404 of the First Step Act of 2018 because the statutory offense of conviction also contained a charge of 5 kilograms of powder cocaine. Further, he maintained that even if he remains subject to the enhanced penalty provisions of § 841(b)(1)(A) as to the powder cocaine part of the conspiracy, under current law the minimum mandatory term of imprisonment may not exceed 25 years in any case prosecuted today. He requested that the appeals court vacate the district court’s order and remand his case for a complete review on the merits.

The Eleventh Circuit affirmed the district court, finding that the district court had no authority to reduce Mr. Ford’s sentence because he remained subject to a mandatory Life sentence as to the powder cocaine aspect of the dual-object conspiracy count. (Appendix B). The Eleventh Circuit disagreed in part with the district court and found that Mr. Ford was convicted of a “covered offense” within the meaning of § 404(a).

(Appendix B). However, it held that he was ineligible for relief based on two implicit limitations found in § 404(b). *Id.* This Court held that the “as if” clause found in First Step Act § 404(b) “impose[d] two limitations on the district court’s authority to reduce a sentence under the First Step Act.” *Id.* (*citing United States v. Jones*, 962 F.3d 1290, 1303 (11th Cir. 2020)). “First, the district court cannot reduce a sentence where the movant ‘received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act’” *Id.* (*quoting Jones*, 962 F.3d at 1303). “Second, in determining what a movant’s statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant’s statutory penalty at the time of sentencing.” *Id.* Therefore, even though Mr. Ford was convicted of a “covered offense,” the Eleventh Circuit held that the district court was not permitted to reduce his sentence because he “was responsible for 5 kilograms of powder cocaine,” therefore, “[Mr.] Ford’s sentence of life imprisonment is still the lowest possible penalty that would be available to him under the Fair Sentencing Act.” *Id.*

The Eleventh Circuit rejected Mr. Ford’s argument that he was eligible for relief, because, due to an intervening change in the law, he would no longer be subject to the § 851 enhancement. *Id.* Mr. Ford argued that under the current law, his statutory penalty would be reduced from a mandatory Life sentence to 10 years to Life. *See id.* This Court held “[t]hat Ford might be subject to a lower statutory mandatory sentence under the most recent version of section 841(b)(1)(A) is immaterial.” *Id.* Thereafter, Mr. Ford moved for rehearing and rehearing en banc and the petition was denied on August 13, 2021.

Afterwards, this Court issued an opinion in *Concepcion*, granted Mr. Ford’s petition for writ of certiorari, vacated the judgment, and remanded for reconsideration in light of *Concepcion*. *Ford v. United States*, 143 S. Ct. 71 (2022).

The Eleventh Circuit ordered that the parties file supplemental briefs addressing the effect of *Concepcion* and *United States v. Jackson*, 58 F.4th 1331 (11th Cir. 2023), on the disposition on Mr. Ford’s case. *See* (Appendix A). Mr. Ford filed a supplemental brief and requested that his case be remanded to the district court as the district court had discretion under *Concepcion* to consider an intervening change to the

statutory-mandatory-minimum sentence in section 841(b)(1)(A) in ruling on his First Step Act motion. (Appendix A). Mr. Ford further argued that the Eleventh Circuit’s holding in *Jackson* did not affect his appeal. In *Jackson*, the Eleventh Circuit distinguished *Concepcion*, opining that the discretion in *Concepcion* was limited to sentencing matters, while *Jackson* was seeking to revisit an issue related to his guilt – namely the judge-determined drug quantity in his pre-*Apprendi* case.

The Eleventh Circuit reinstated its prior opinion and affirmed the district court’s denial of Mr. Ford’s motion for a reduced sentence. (Appendix A). The Eleventh Circuit cited its prior precedent of *Jackson* and *United States v. Jones*, 58 F.4th 1331, 1333 (11th Cir. 2023), and drew a distinction between matters it described as arising before a sentencing court can exercise its discretion and matters where “the sentencing court’s discretion comes into play.” *Id.* The Eleventh Circuit held that *Concepcion* only applied after determining statutory sentencing ranges and drug quantity amounts. *Id.* The Eleventh Circuit also cited its recent decision in *United States v. Clowers*, 62 F.4th 1377, 1380-81 (11th Cir. 2023), where it held that a district court determined

the applicable statutory penalty by “recalculate[ing] the statutory sentencing range as if the Fair Sentencing Act’s changes- *and only those changes--* were in effect at the time the offense was committed.” *See id.* at 1378. Thus in calculating the minimum-statutory-penalty that Mr. Ford was subject to under the Fair Sentencing Act, the Eleventh Circuit held a district court may only consider those changes made by the Fair Sentencing Act and not consider that Mr. Ford might be subject to a lower statutory mandatory sentence under the most recent version of section 841(b)(1)(A).

REASONS FOR GRANTING THE WRIT

When this Court issued its ruling in *Concepcion*, any question regarding the scope of discretion that a district court had to consider intervening changes of the law during First Step Act proceedings should have been resolved. But for Mr. Ford and other defendants in the Eleventh Circuit, the matter remains in question. Mr. Ford respectfully requests that this Court accept jurisdiction of this case, reverse the Eleventh Circuit and grant Mr. Ford and all the defendants in the Eleventh Circuit equal access to the benefit of the First Step Act.

The decision below conflicts with this Court’s holding in *Concepcion v. United States*, 597 U.S. 481 (2022).

This Court remanded Mr. Ford’s case to the Eleventh Circuit with instructions to consider it in light of *Concepcion*. But instead of applying *Concepcion* to Mr. Ford’s case, the Eleventh Circuit has created an artificial distinction between issues that are “sentencing discretionary matters” and “statutory sentencing matters.” This dichotomy prevents district court from considering whether intervening changes in the law may have changed the statutory penalties faced by a defendant, which is in direct contradiction of *Concepcion*.

The Eleventh Circuit Court of Appeals decision in Mr. Ford's case conflicts with the holding of *Concepcion* that the "as if" clause in § 404(b) of the First Step Act does not constrain a reviewing court's discretion to reduce a sentence for a covered offense. This Court reasoned that "only . . . Congress or the Constitution [can] limit the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, . . ." *Concepcion*, 142 S. Ct. at 2396. And "[n]othing in the text and structure of the First Step Act expressly, or even implicitly," contains such a limitation. *Id.* at 2401. It thus concluded courts may consider intervening changes of law in addition to those enacted by the Fair Sentencing Act in resolving an eligible defendant's motion. *Id.* at 2404.

In *Ford*, however, the Eleventh Circuit held that intervening changes of the law may not be considered until after statutory penalties are first determined by considering only application of the Fair Sentencing Act and not any other intervening law. The Eleventh Circuit relied on its earlier precedent in *Jones* and *Jackson* holding guilt related matters such as drug quantity were not to be considered under

the First Step Act. But under *Concepcion*, Mr. Ford was entitled to relief based on a change in the law regarding his §851 enhancement. That is a sentencing matter and not a guilt related matter. Therefore, *Jackson* should not have affected Mr. Ford's case.

In *Concepcion*, this Court held that nothing in the First Step Act limits the information that a district court may consider when deciding whether to exercise its discretion and impose a reduced sentence under the Act. *Concepcion*, 142 S. Ct. at 2401-02. This Court explicitly held:

The only two limitations on district courts' discretion appear in § 404(c): A district court may not consider a First Step motion if the movant's sentence was already reduced under the Fair Sentencing Act or if the court considered and rejected a motion under the First Step Act.

Id. at 2401-02. "By its terms, § 404(c) does not prohibit district courts from considering any arguments in favor of, or against, sentence modification." *Id.* at 2394. Thus, this Court held that district courts have broad discretion in the information they may rely on in sentencing, and "[t]hat discretion also carries forward to later proceedings that may modify an original sentence." *Concepcion*, 142 S. Ct. at 2398. "It is only when Congress or the Constitution limit the

scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's obligation to consider information is restrained." *Concepcion*, 142 S. Ct. at 2396. "Nothing in the text and structure of the First Step Act expressly, or even implicitly," contains such a limitation. *Id.* at 2401.

Importantly this Court in *Concepcion* rejected the Eleventh Circuit underlying premise that the "as if" language in § 404(b) imposes a substantive limit on the information a court can consider under the Act. *Id.* at 2402. It held that Congress did not "hide any limitations on district courts' discretion outside of § 404(c)," and "Section 404(b) does not enact any additional such limitations." *Id.* This Court found instead that the "as if" language in § 404(b) was added simply "to overcome 1 U.S.C. § 109, which creates a presumption that Congress does not repeal federal criminal penalties unless it says so 'expressly,'" and "to make clear that the Fair Sentencing Act applied retroactively." 142 S. Ct. at 2394, 2402.

In short, *Concepcion* created a two-step framework for analyzing motions under § 404. First, a district court must determine whether a defendant is eligible for a reduction or modification, which simply

depends on whether he or she was convicted of a “covered offense” under § 404(a). *Id.* at 2401. Second, if the defendant is eligible, the district court may reduce the defendant’s sentence “as if” Sections 2 and 3 of the Fair Sentencing Act were in effect, but the “as if” clause does not ... limit the information a district court may use to inform its decision whether and how much to reduce a sentence.” *Id.* at 2402. As *Concepcion* recognized, are only two limits on a district court’s discretion to reduce a defendant’s sentence for a covered offense—those in § 404(c), neither of which apply to Mr. Ford.

Concepcion was intended to, and should have, resolved the split over reviewing courts’ discretion to consider intervening law. But the Eleventh Circuit maintains its position that the “as if” clause limits district courts’ discretion, even after this Court expressly and unequivocally held that such a limitation does not exist. *Concepcion*,¹⁴² S. Ct. at 2403.

Concepcion’s “language is both broad and clear.” *United States v. Reed*, 58 F.4th 816, 824 (4th Cir. 2023) (holding *Concepcion* abrogated its earlier holding that district court abused its discretion by refusing to reduce defendant’s sentence under the Act). “A district court’s

‘discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence,’ and ‘nothing in the First Step Act contains such a limitation.’” *Reed*, 58 F.4th at 821–22 (quoting *Concepcion*, 142 S. Ct. at 2397, 2398). The Eleventh Circuit was wrong to read such a limitation into the Act and wrong to not properly *Concepcion*.

CONCLUSION

Based upon the foregoing, the petition should be granted. Mr. Ford asks this Court to grant certiorari and review the decision of the United States Court of Appeals for the Eleventh Circuit, or, in the alternative, to grant this petition, and summarily reverse its decision.

Respectfully submitted,

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