No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CALVIN SOLOMON,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

---

PETITION FOR A WRIT OF CERTIORARI

A. Fitzgerald Hall, Esq.
Federal Defender

Laura J. Daines, Esq.
Counsel of Record
Assistant Federal Defender
400 N. Tampa St., Ste. 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Email: Laura_Daines@fd.org

QUESTION PRESENTED

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

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

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

The question presented is: Do this Court's First Step Act precedents admit of the uniquely Eleventh Circuit's intermediate step whereby, for the discrete group of individuals still serving sentences imposed before *Apprendi v. New Jersey*, 530 U.S. 446 (2000), the facts found by the judge at sentencing control the imprisonment range and thus render an individual who is "eligible" at step one, nevertheless ineligible for relief at the discretionary step two?[1]

[1] This same question is also presented in *Jackson v. United States*, Case No. 22-7728; *United States v. Perez*, Case No. 22-7794; *United States v. Clowers*, Case No. 22-7783; *Williams v. United States*, No. 23-5014; *Ingram v. United States*, No. 23-341; and *Harper v. United States*, No. 23-27. These cases have been distributed for conference on January 5, 2024.

RELATED PROCEEDINGS

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

United States v. Solomon, Case No. 3:95-cr-7-HES-MCR.

United States Court of Appeals (11th Cir.)

United States v. Solomon, No. 23-10480.

TABLE OF CONTENTS

Appendices

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES - *CONTINUED*

Cases **Page(s)**

Cases **Page(s)**

Statutes

Other Authorities

Other Authorities **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Calvin Solomon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

ORDER AND OPINION BELOW

The district court's order denying Mr. Solomon's motion for a sentence reduction under the First Step Act is provided in Appendix A. The Eleventh Circuit's unpublished opinion summarily affirming the district court's order is provided in Appendix B.

JURISDICTION

The Eleventh Circuit entered its judgment on October 10, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

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

> (a) DEFINITION OF COVERED OFFENSE. — In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED. — A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS. — No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously

> imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

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

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

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

INTRODUCTION

Sections 404(a) and 404(b) of the First Step Act of 2018 establish a two-step procedure for district courts to follow in determining whether to impose reduced sentences for defendants previously sentenced under the unjust "100-to-1" crack-to-powder cocaine sentencing ratio.[2]

In the first step, the court must determine whether the defendant has a "covered offense" under § 404(a). In *Terry v. United States*, 141 S. Ct. 1858 (2021),

[2] The remaining subsection of Section 404, § 404(c) clarifies the discretionary nature of the remedy and includes two express limitations on a court's ability to impose a reduced sentence, which are not applicable here.

this Court held that whether a defendant had a "covered offense" depends on the elements of the offense. *Terry* further held that any defendant sentenced for a crack cocaine offense under 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B), before August 3, 2010, has a "covered offense."

The second, discretionary, step is governed by § 404(b). In *Concepcion v. United States*, 142 S. Ct. 2389 (2022), this Court held that, at this step, district courts may consider intervening changes in fact or law, without limitation. Importantly, *Concepcion* both considered, and rejected, the premise that the "as if" language in § 404(b) imposes substantive limitations on a court's discretion.[3]

In 1995, Mr. Solomon was found guilty of conspiracy to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 841. During the sentencing hearing, the district court adopted the pre-sentencing report's attribution of 2711.8 grams of crack cocaine to Mr. Solomon, and classification of his offense as involving at least 1.5 kilograms of crack cocaine. Because the government filed an Information and Notice of Prior Convictions under 21 U.S.C. § 851 based on two prior Florida cocaine convictions, Mr. Solomon was subjected to a mandatory life sentence.

Although the Fair Sentencing Act reduced the penalties for his offense and the First Step Act made those penalties retroactive, the Eleventh Circuit nevertheless held that Mr. Solomon was ineligible for a sentence reduction because the earlier judge-found quantity governed. The Eleventh Circuit's ruling was based on its

[3] *See* Pub L. No. 115-391, 132 Stat. 5194 § 404(b) ("A court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed.").

decision in *United States v. Jackson*, 58 F.4th 1331 (11th Cir. 2023), in which it reaffirmed that even after *Concepcion*, a district court is bound by pre-*Apprendi*, judge-found drug quantities. As a result, and notwithstanding his covered offense, Mr. Solomon could not receive a reduced sentence because the quantity of crack cocaine identified in his PSR would still have triggered a mandatory life sentence after the passage of the Fair Sentencing Act.

In response to other petitions pending in this Court raising the same or similar issues, the government has agreed with petitioners that the decision in *Jackson* is "erroneous." Br. for the United States in Opp'n, *Harper v. United States*, No. 23-27, at 11 (Nov. 9, 2023). The government explained in *Harper* that, when passing the First Step Act, "Congress envisioned that courts would" not follow the "constitutionally flawed sentencing regimes" that existed before *Apprendi*, but would instead would impose reduced sentences "in a manner consistent with *Apprendi*." *Id.* at 10. In other words, following the First Step Act, the government agrees that "district courts must recalculate the penalty range consistent with *Apprendi* by using the drug quantity found by the jury or admitted by the defendant in a plea agreement." *Id.* at 10-11. Thus, the government has conceded that the Eleventh Circuit's continued use of judge-found drug quantities in cases such as Mr. Jackson's is inconsistent with the First Step Act.

In addition to being inconsistent with the First Step Act, the Eleventh Circuit's decisions in *Jackson* and this case conflict with *Terry's* holding that the "statutory penalties . . . changed for all subparagraph (A) and (B) offenders," *Terry*, 141 S. Ct.

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

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

STATEMENT OF THE CASE

1. In 1995, Mr. Solomon was charged by indictment with conspiracy to distribute at least 5 kilograms of cocaine, and an unspecified quantity of cocaine base. The government later filed an Information and Notice of Prior Convictions under 21 U.S.C. § 851, based on Mr. Solomon's two prior Florida cocaine convictions. Mr. Solomon was ultimately found guilty by a jury.

In anticipation of sentencing, the Probation Office submitted a PSR that

attributed 2711.8 grams of crack cocaine to Mr. Solomon, resulting in an offense involving at least 1.5 kilograms of cocaine base. Because of his prior convictions, Mr. Solomon was subject to an enhanced statutory penalty of mandatory life imprisonment. The district court adopted the factual findings and guideline application in the PSR and sentenced Mr. Solomon to life imprisonment. The jury verdict and judgment are silent as to drug quantities.

2. In November 2022, Mr. Solomon moved to reduce his sentence under the First Step Act. The district court denied his motion on February 1, 2023, finding that he was not eligible for a reduction under § 404 of the First Step Act. In particular, the district court found that it was bound by the judge-found quantity from the original sentencing, and that Mr. Solomon would still be subject to a mandatory term of life imprisonment if the Fair Sentencing Act had been effective during his original sentencing. The district court therefore determined that it lacked authority to reduce Mr. Solomon's sentence. The district court also stated that, even if Mr. Solomon was eligible, it would exercise its discretionary authority to deny his motion.

3. On appeal, the Eleventh Circuit summarily affirmed the district court's denial of Mr. Solomon's motion based on its decision in *Jackson*.

REASONS FOR GRANTING THE WRIT

I. *Jackson* conflicts with *Terry* and the decisions of every other circuit to have addressed the issue.

Section 404(a) of the First Step Act of 2018 conditions a defendant's eligibility for a reduced sentence on having previously been sentenced for a "covered offense," which is defined as "a violation of a Federal criminal statute, the statutory penalties

for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010." Pub L. No. 115-391, 132 Stat. 5194, § 404(a). In *Terry v. United States*, 141 S. Ct. 1858 (2021), this Court held the term "statutory penalties," in this definition "references the entire, integrated phrase, 'a violation of a Federal criminal statute.'" 141 S. Ct. at 1862 (citation omitted). "And that phrase means 'offense.'" *Id.* (citation omitted). *Terry* thus held that the relevant question, for determining a defendant's eligibility for discretionary relief under the First Step Act, is "whether the Fair Sentencing Act modified the statutory penalties for petitioner's offense." *Id.*

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

The Court explained:

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

Id. (internal footnote omitted).

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

The government agreed in the district court that Mr. Solomon committed an offense that triggered the penalties in 21 U.S.C. § 841(b)(1)(A) or (b)(1)(B) that qualified as a "covered offense" under § 404.[4] As this Court stated in *Terry*, "[t]he statutory penalties . . . changed for all subparagraph (A) and (B) offenders." 141 S. Ct. at 1863. And, under the clear text, "§ 2(a) of the Fair Sentencing Act modified the

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

statutory penalties . . . for subparagraph (A) and (B) crack offenses—that is, the offense that triggered mandatory-minimum penalties." *Id.* at 1864.

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

No other circuit has followed the Eleventh Circuit's lead in using the specific quantity of crack cocaine involved in a covered offense to foreclose relief under the First Step Act—not for defendants sentenced before *Apprendi*, and not for those sentenced after *Apprendi*. Instead, every other circuit to have addressed the issue has correctly held that "[i]t is the statute under which a defendant was convicted, not the defendant's actual conduct, that determines whether a defendant was sentenced for a 'covered offense' within the meaning of Section 404(a)." *See United States v. Davis*, 961 F.3d 181, 182 (2d Cir. 2020).[5] In these circuits, even defendants subject

[5] *See also*, *e.g.*, *United States v. Coleman*, 66 F.4th 108, 110 (3d Cir. 2023) ("We therefore determine eligibility for § 404(b) relief by looking only to the statutory elements of the crime of conviction."); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019) ("[W]hether a defendant has a 'covered offense' under section 404(a) depends only on the statute under which he was convicted."); *United States v. Boulding*, 960 F.3d 774, 781 (6th Cir. 2020) ("[E]ligibility for resentencing under the First Step Act turns on the statute of conviction alone"); *United States v. Shaw*, 957 F.3d 734, 739 (7th

to mandatory life sentences under the recidivism enhancement in 21 U.S.C. §§ 841(b)(1)(A) and 851 have been found to be fully eligible for discretionary relief under the First Step Act, without respect to the drug quantity involved in their offenses.[6] Again, this is true both with respect to defendants sentenced before and after *Apprendi*.

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

Cir. 2020) ("[T]he statute of conviction alone determines eligibility for First Step Act relief."); *United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021) ("a district court should look to the minimum drug quantity associated with an eligible defendant's offense of conviction, rather than his underlying conduct"); *United States v. White*, 984 F.3d 756 87 (D.C. Cir. 2020) ("The court may consider both judge-found and jury-found drug quantities as part of its exercise of discretion. . . . . But the court may not deem relief categorically unavailable due to defendant-specific drug quantities.").

[6] *See Jackson*, 945 F.3d at 320 (agreeing that defendant sentenced to statutory life sentence in 2003 was eligible for a reduced sentence, even though PSI found him responsible for more than 280 grams of crack cocaine); *Boulding*, 960 F.3d at 776 (finding defendant sentenced to mandatory life sentence under 21 U.S.C. §§ 841(b)(1)(A) and 851 eligible for a reduced sentence, even though PSI found him responsible for 650.4 grams of crack cocaine); *United States v. Moore*, 50 F.4th 597, 599 (7th Cir. 2022) (affirming partial reduction in sentence for defendant sentenced to mandatory life based on prior drug convictions); *United States v. Cooper*, 803 F. App'x 33 (7th Cir. 2020) (same); *United States v. Robinson*, 9 F.4th 954 (8th Cir. 2021) ("[T]he district court erred as a matter of law when it relied on the sentencing court's drug quantity finding of 2.35 kilograms of crack cocaine to determine Robinson's applicable statutory sentencing range under the Fair Sentencing Act and the First Step Act."); *United States v. Birdine*, 962 F.3d 1032 (8th Cir. 2020) ("Thus, while Birdine is still subject to a possible life sentence on Count 1, it is no longer mandatory."); *United States v. Bagby*, 835 F. App'x 375, 378 (10th Cir. 2020) ("[T]he government now agrees with Mr. Bagby that eligibility for First Step Act relief is based on the statute under which a defendant was convicted, not the defendant's actual conduct.").

Robinson, 9 F.4th at 956. Just as in Mr. Solomon's case, the district court denied relief based on the quantity of crack found at sentencing. *See id.* at 958 ("That is, because the revised version of § 841(b)(1)(A)(iii) provided for a mandatory life sentence if the defendant was convicted of 280 grams or more of crack cocaine and had two or more prior felony drug offense convictions, the [district] court reasoned that the sentencing court's drug quantity finding satisfied that threshold, depriving it of the discretion to reduce Robinson's sentence under the First Step Act.").

But unlike here, the circuit court reversed. *Id.* The Eighth Circuit explained that "[b]ecause the statutory penalties of [§ 841(b)(1)(A)] were modified by § 2 of the Fair Sentencing Act—raising the requisite threshold quantity from 50 to 280 grams—Robinson's offense is a covered offense, and he is consequently eligible for a sentence reduction." *Id.* (citations omitted); *see id*. (citing *Terry*, 141 S. Ct. at 1863, as "noting that the Fair Sentencing Act plainly 'modified' the 'statutory penalties' of 21 U.S.C. § 841(b)(1)(A)(iii), (b)(1)(B)(iii))") (internal quotation marks omitted).

As in Mr. Solomon's case, the district court in *Robinson* had been "of the view . . . that it could not reduce Robinson's sentence" because the original sentencing judge had found Robinson responsible for more than the post-Fair Sentencing Act threshold amount of 280 grams. *Id*. at 958. But the Eighth Circuit explained that "[a] movant's statutory sentencing range under the First Step Act is dictated by the movant's offense of conviction, not his relevant conduct." *Id.* (citing *United States v. White*, 984 F.3d 76, 86) (D.C. Cir. 2020)). The Eighth Circuit therefore held that "the district court erred as a matter of law when it relied on the sentencing court's drug quantity

finding . . . to determine Robinson's applicable statutory sentencing range under the Fair Sentencing Act and the First Step Act." *Id.* at 959.[7]

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

II. *Jackson* conflicts with *Concepcion*.

Jackson also conflicts with *Concepcion*, which held that, at the second, discretionary stage of a First Step Act motion, a district court may consider other intervening changes of law in adjudicating the motion. 142 S. Ct. at 2396. This Court granted certiorari in *Concepcion* to resolve a split among the circuits regarding whether a district court may, may not, or must consider intervening changes of law

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

and fact when ruling on a motion under the First Step Act. The Court held that district courts may consider such changes, without limitation: "It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's obligation to consider information is restrained." *Id*. And "[n]othing in the text and structure of the First Step Act expressly, or even implicitly," contains such a limitation. *Id.* at 2401.

Significantly, the Court *expressly* rejected the premise—central to the Eleventh Circuit's holding—that the "as if" language in § 404(b) imposes a substantive limit on a district court's discretion under the Act. The First Circuit in *Concepcion* had done the same thing that the Eleventh Circuit did here: interpreted the "as if"" clause to erect a categorical bar to relief, for those who were sentenced for a 'covered offense' under § 404(a), but for whom a change in sentencing exposure relied on a change in law "external to the Fair Sentencing Act." *United States v. Concepcion,* 991 F.3d 279, 286 (1st Cir. 2021). This Court rejected that analysis. *See Concepcion*, 142 S. Ct. at 2405.

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

In *Jackson*, the Eleventh Circuit held that *Concepcion* did not apply to individuals like Mr. Solomon because *Concepcion* applies only at the second, discretionary step of a First Step Act motion—not the initial, first-step, eligibility determination. 58 F.4th at 1331. But, under this Court's precedents, the only issue that arises before the sentencing court's discretion comes into play is the determination whether the defendant was sentenced for a "covered offense." And that issue was resolved by *Terry*–which held that all §§ 841(b)(1)(A) and (B) crack offenses were covered offenses because the penalties changed for *all* of them. 141 S. Ct. at 1863. *Terry* and *Concepcion,* together, make clear that § 404(a)'s definition of "covered offense" is the statute's *only* categorical eligibility hurdle. The Eleventh Circuit nonetheless continues to impose additional limitations based on the "as if" language in § 404(b)—even after this Court expressly and unequivocally held that these limitations *do not exist*. *See Concepcion*, 142 S. Ct. at 2403.

Furthermore, *Apprendi* is, of course, a legal change; so under *Concepcion,* a district court deciding a § 404 motion may consider the impact of *Apprendi* on the case. *See United States v. Andrews*, 2023 WL 2136784, *2 n.1 (3d Cir. Feb. 21, 2023) ("[T]he District Court recognized here that it could 'consider the impact *Apprendi* would have had on his statutory range in determining whether to grant relief under

Section 404"') (citing, *e.g.*, *Concepcion*, 142 S. Ct. at 2402); *see also United States v. Ware*, 964 F.3d 482, 489 (6th Cir. 2020) ("[T]he impact that *Apprendi* would have had on [the] statutory sentencing range is a factor that the district court may consider when deciding whether, in its discretion, to grant relief to a defendant home Congress has made eligible for relief.").

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

Concepcion's "language is both broad and clear." *United States v. Reed*, 58 F.4th 816, 824 (4th Cir. 2023) (holding that *Concepcion* abrogated its earlier holding in *United States v. Collington*, 995 F.3d 347, 358–59 (4th Cir. 2021), that a district court abused its discretion by refusing to reduce a defendant's sentence under the Act). "A district court's 'discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence,' and 'nothing in the First Step Act contains such a limitation.'" *Id.* at 821–22 (quoting *Concepcion*, 142 S. Ct. at 2397, 2398). The Eleventh Circuit was wrong to read such a limitation into the Act.[8]

III. The Eleventh Circuit's anomalous rule has no basis in the statutory

[8] The Eleventh Circuit continues to erroneously interpret the First Step Act as substantively limiting the courts' discretion. *See United States v. McCoy*, -- F. 4th --, 2023 WL 8634904, at *3 (11th Cir. Dec. 14, 2023) (explaining that the "as-if" clause imposes "two relevant limits").

text and prejudices a class of defendants who have already been doubly harmed by decades of unjust laws and unconstitutional procedures.

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

In its responses to other petitions in this Court that are similar to Mr. Solomon's, the government has conceded "that the Eleventh circuit erred in concluding that the district court was bound by a prior drug-quantity finding that, inconsistent with *Apprendi*[], was made by a judge by a preponderance of the evidence and used to determine a defendant's statutory range." Br. for the United States in Opp'n, *Harper v. United States*, No. 23-27, 9 (U.S. Nov. 9, 2023); *see also* Memo. for the United States in Opp'n, *Jackson v. United States*, 22-7728, at 1-2 (U.S. Nov. 9, 2023) (citing to the United States' response in *Harper* to reiterate that the Eleventh Circuit's decision in *Jackson* is incorrect); Memo. for the United States in Opp'n, *Williams v. United States*, at 1-2 (U.S. Nov. 13, 2023) (same); Memo for the United States in Opp'n, *Clowers v. United States*, No. 22-7783, at 1-2 (U.S. Nov. 17, 2023) (same); Memo. for the United States in Opp'n, *Perez v. United States*, No. 22-7794, at 1-2 (U.S. Nov. 17, 2023) (same); Memo. for the United States in Opp'n, *Ingram v. United States*, at 1-2 (U.S. Dec. 1, 2023) (same). The government further recognized that in *Jackson*, the Eleventh Circuit "fail[e]d to take proper account of Congress

having legislated against existing constitutional sentencing requirements when providing for First Step Act sentence-reduction proceedings." Br. for the United States in Opp'n, *Harper v. United States*, No. 23-27, 11 (U.S. Nov. 9, 2023). And the government explained that "when authorizing district courts to 'impose a reduced sentence' First Step Act § 404(b), 132 Stat. 5222, Congress envisioned that courts would do so in a manner consistent with *Apprendi*," and "did not expect courts to instead follow constitutionally flawed sentencing regimes that had long ago been corrected by this Court." *Id.* at 10.

As Judge Martin recognized, the Eleventh Circuit's "tortured interpretation of the First Step Act" . . . "prohibits an entire class of prisoners in Alabama, Florida, and Georgia from getting relief Congress meant for them to have." *United States v. Jackson*, 995 F.3d 1308, 1316 (11th Cir. 2021) (Martin, J., dissenting from the denial of rehearing en banc). This class of prisoners is the class of defendants who were subject to the some of the most unjust laws in the modern criminal legal system (the 100-to-1 crack-to-powder cocaine ratio), without some of the most important procedural protections our system has to offer (i.e., the jury trial protections recognized by *Apprendi* and its progeny).

The Eleventh Circuit justified this disparity based on the fact that *Apprendi* itself is not retroactively applicable to cases on collateral review. The court reasoned that, "just as a movant may not use *Apprendi* to collaterally attack his sentence, he cannot rely on *Apprendi* to redefine his offense for purposes of a First Step Act motion." *Jackson,* 58 F.4th at 1335 (citations omitted).

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

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

The defendants harmed by *Jackson* include many individuals who are serving

mandatory life sentences, like Mr. Solomon, based on unproven—and, at the time superfluous for purposes of the statutory range—allegations of drug quantity included in a PSR.[9] Because "relief would have been available to [him] almost anywhere else in our country," *Jackson*, 995 F.3d at 1316 (Martin, J., dissenting from the denial of rehearing en banc), Mr. Solomon respectfully asks this Court to grant review.

Alternatively, in view of the conflict between the opinion below and this Court's holdings in *Terry* and *Concepcion*, as well as the decisions of every other circuit to have considered the matter, and the government's agreement that Congress "would not have expected" this result, *see infra at* 19, this case may be appropriate for summary reversal. *See, e.g.*, *CNH Indus. N.V. v. Reese,* 138 S. Ct. 761 (2018) (per curiam) (reversing a Sixth Circuit decision holding that a series of circuit-specific inferences, known as the "*Yard-man* inferences," could be relied on to render a collective-bargaining agreement ambiguous, after a 2015 decision of the Court rejected those same inferences as "inconsistent with ordinary principles of contract law": "Because the Sixth Circuit's analysis is '*Yard-Man* re-born, re-built, and re-purposed for new adventures,' . . . we reverse.") (quotation omitted); *Spears v. United States*, 555 U.S. 261, 263 (2009) (per curiam) ("Because the Eighth Circuit's decision

---

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

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

CONCLUSION

For the above reasons, Mr. Solomon respectfully requests that this Court grant his petition for a writ of certiorari and either review or summarily reverse the Eleventh Circuit's decision.

Respectfully submitted,

A. Fitzgerald Hall, Esq.
Federal Defender

/s/ Laura J. Daines
Laura J. Daines, Esq.
Counsel of Record
Assistant Federal Defender
400 N. Tampa St., Ste. 2700
Tampa, Florida 33602
Telephone: (813) 228-2715
Email: Laura_Daines@fd.org