PETITION APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v. **Case No. 3:95-cr-7-HES-MCR**

CALVIN SOLOMON
_____/

O R D E R

This matter is before the Court on Solomon's "Motion to Reduce Sentence Pursuant to The First Step Act of 2018" (Dkt. 216), the "United States' Response to Solomon's Motion for Reduction of Sentence Pursuant to Sectio 404 of The First Step Act" (Dkt. 220) and Solomon's "Reply in Support of Motion to Reduce Sentence" (Dkt. 226).

In 1995, a grand jury charged Solomon with one count of having conspired to distribute crack cocaine and five kilograms or more of cocaine, in violation of 21 U.S.C. § 846. (Dkt. 3). Before the trial, the Government filed an Information and Notice of Prior Convictions under 21 U.S.C. § 851, based on Solomon's two prior Florida cocaine convictions. (Dkt. 55). This subjected Solomon to a mandatory life sentence if he was convicted. A jury found Solomon guilty. (Dkt. 62).

Before sentencing, the Probation Office prepared a Presentence Investigation Report ("PSR") and held Solomon accountable for at least 1.5

kilograms of crack cocaine. (PSR ¶ 15). Solomon, according to the PSR, qualified as a career offender, *id.* ¶ 23, and his guidelines range was life in prison. *Id.* ¶ 57.

In August 1995, the Court sentenced Solomon to life in prison followed by 10 years' supervised release. (Dkt. 71). Solomon's conviction and sentence were affirmed on appeal. (Dkt. 81).

In this motion, Solomon argues he is eligible for a sentence reduction under § 404 of the First Step Act. The Government opposes suggesting Solomon's offense remains punishable under § 841(b)(1)(A), and he is serving the statutory-minimum sentence.

The Fair Sentencing provision of the First Step Act permits defendants sentenced for crack-cocaine offenses before August 3, 2010, the effective date of the Fair Sentencing Act, to seek a sentence reduction. The Fair Sentencing Act "was passed in an effort to reduce the sentencing disparities between crack and powder cocaine." *United States v. White*, No. 22-10027, 2022 WL 17409564, at *1 (11th Cir. Dec. 5, 2022).

The First Step Act made retroactive the statutory penalties enacted under the Fair Sentencing Act for "covered offenses." "Under § 404(b) of the First Step Act, a court that imposed a sentence for a covered offense may impose a reduced sentence as if §§ 2 and 3 of the Fair Sentencing Act were in

effect at the time the covered offense was committed." *White*, 2022 WL 17409564, at *1 (internal citations omitted).

Not every defendant is eligible for a reduction. "To be eligible for a sentence reduction, a movant must have a 'covered offense,' meaning he must have been sentenced for a crack-cocaine offense that triggered the higher penalties in § 841(b)(1)(A)(iii) or (B)(iii)." *Id.* (citing *United States v. Jones*, 962 F.3d 1290, 1298 (11th Cir. 2020)). Importantly, "a defendant is ineligible if he was sentenced to the lowest statutory penalty that would also be available to him under the Fair Sentencing Act." *White*, 2022 WL 17409564, at *1.

The parties agree Solomon's conviction qualifies as a covered offense. Yet the Government suggests Solomon's offense remains punishable under § 841(b)(1)(A) due to his pre-*Apprendi* attributable drug amount.

The finding of a covered offense is only the beginning of the First Step analysis. *See United States v. Saldana*, No. 20-14707, 2022 WL 4088349, at *2 (11th Cir. Sept. 7, 2022) (explaining a covered offense "does not necessarily mean that the district court is authorized to reduce his sentence."). The Eleventh Circuit has explained the next step, "in determining what a movant's statutory penalty would have been under the Fair Sentencing Act, the district court is bound by a previous drug-quantity finding that could

have been used to determine the movant's statutory penalty at the time of sentencing." *Id.* at *2.

During sentencing, the Court held Solomon accountable for at least 1.5 kilograms of crack cocaine. (Dkt. 80, pg. 21); *see also* (PSR ¶ 15). This crack cocaine finding coupled with the § 851 enhancement for his career offender status, means Solomon remains subject to the enhanced penalties in § 841(b)(1)(A). Solomon is, therefore, serving the lowest statutory penalty availably to him—life in prison. (Dkts. 55, 71). *See* Jones, 962 F.3d at 1303; *see also United States v. Patterson*, 840 F. App'x 510, 513 (11th Cir. 2021) (explaining "The district court correctly found that the penalties for Patterson's offense had not been reduced. Had the Fair Sentencing Act been in effect at the time Patterson committed his offense, he still would have been subject to § 841(b)(1)(A)'s penalties based on the sentencing court's determination that his offense involved at least 1.5 kilograms of crack cocaine."); *United States v. Timmons*, 820 F. App'x 949, 959 (11th Cir. 2020) (although district court erred in stating conviction was not a covered offense, the Eleventh Circuit affirmed the denial because "Timmons received the lowest statutory penalty available for his offense," based on the judge-found drug quantity finding); *United States v. Ingram*, No. CR594-002, 2022 WL 125031, at *2 (S.D. Ga. Jan. 12, 2022) (explaining a district court is without

authority to reduce a sentence if the sentence was still the lowest possible penalty available under the Fair Sentencing Act);

Finally, even if Solomon were eligible for sentence reduction under the First Step Act the Court would decline to do so. The Eleventh Circuit has emphasized any sentence reduction under § 404 of the First Step Act is discretionary. *See Saldana*, 2022 WL 4088349, at *3 ("although a district court may have the authority to reduce a sentence under § 404 of the First Step Act, it is not required to do so.").

The Court has scrutinized all aspects of Solomon's case, including the 18 U.S.C. § 3553(a) factors, and determined he does not warrant a sentence reduction. Solomon's disregard for the law is evident in his criminal history. From 1984 to 1993, Solomon twice violently assaulted a woman and he accumulated convictions for aggravated assault with a firearm, assault, battery, sale or possession of drugs, and the unlawful possession of firearms. (PSR ¶¶ 25–34).

Solomon's prison sentences also failed to deter him from drugs. Shortly after his release from prison for his 1985 conviction, Solomon sold cocaine to an undercover officer and received a 366-day sentence. *Id.* ¶ 27. This pattern continued years later when he sold marijuana to an undercover officer. *Id.* ¶ 33. At the time of his federal offense, Solomon was on probation for

possession of cocaine and petty larceny. Solomon's criminal history is such that even if the Court had jurisdiction to reduce Solomon's sentence, it would not do so.

Accordingly, it is **ORDERED**:

Solomon's "Motion to Reduce Sentence Pursuant to The First Step Act of 2018" (Dkt. 216) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida, this 1st day of February, 2023.

HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

Copies to:
Adam Labonte, Esq.
Laura J. Daines, Esq.
Samantha Beckman, Esq.

APPENDIX B

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 23-10480

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CALVIN SOLOMON,
a.k.a. Scabo,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:95-cr-00007-HES-MCR-1

Before JORDAN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Calvin Solomon appeals the district court's order denying his motion for a sentence reduction pursuant to § 404 of the First Step Act of 2018. The government has moved for summary affirmance and to stay the briefing schedule. We grant the government's motion for summary affirmance.

I.

In 1995, a grand jury charged Solomon with conspiring to distribute five kilograms or more of powder cocaine and an unspecified amount of crack cocaine. At trial, a jury found Solomon guilty of the conspiracy offense. At sentencing, the district court found that the offense involved at least 1.5 kilograms of crack cocaine. Based on this drug quantity and because Solomon had at least two prior convictions for felony drug offenses, the district court was required to impose a mandatory life sentence. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (1995).

In 2010, Congress passed the Fair Sentencing Act to address disparities in sentences between offenses involving crack cocaine and those involving powder cocaine. *See* Pub. L. No. 111-220, 124 Stat. 2372 (2010); *see also Kimbrough v. United States*, 552 U.S. 85, 97–100 (2007) (providing background on disparity). The Fair Sentencing Act increased the quantity of crack cocaine necessary to trigger the highest statutory penalties from 50 grams to 280 grams

and the quantity of crack cocaine necessary to trigger intermediate statutory penalties from 5 grams to 28 grams. *See* Fair Sentencing Act § 2; 21 U.S.C § 841(b)(1)(A)(iii), (B)(iii) (2011). But the Fair Sentencing Act's reduced penalties applied only to defendants who were sentenced on or after the Fair Sentencing Act's effective date. *Dorsey v. United States*, 567 U.S. 260, 264 (2012).

In 2018, Congress passed the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018). Among other things, the First Step Act gave district courts the discretion to apply retroactively the reduced statutory penalties for crack-cocaine offenses in the Fair Sentencing Act of 2010 to movants sentenced before those penalties became effective. *See* First Step Act § 404.

Solomon filed a motion in the district court seeking a sentence reduction under the First Step Act. The district court denied the motion. It found that Solomon was not eligible for a sentence reduction because he already was "serving the lowest statutory penalty availabl[e] to him" under the Fair Sentencing. Doc. 227 at 4.[1] In calculating what Solomon's sentence would have been under the Fair Sentencing Act, the district court used the drug quantity found at sentencing: 1.5 kilograms of crack cocaine. Given this drug quantity and Solomon's prior felony drug convictions, the district court concluded that he would have remained subject to a mandatory life sentence under the Fair Sentencing Act. The district court then continued on to say even if Solomon were eligible for a

[1] "Doc." numbers refer to the district court's docket entries.

sentence reduction, it would not exercise its discretion to reduce his sentence.

This is Solomon's appeal. After Solomon filed his appellant's brief, the government filed a motion for summary affirmance.

II.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).[2]

We review *de novo* whether a district court had the authority to modify a defendant's term of imprisonment under the First Step Act. *United States v. Jackson*, 58 F.4th 1331, 1335 (11th Cir. 2023).

III.

District courts generally lack the authority to modify a term of imprisonment once it has been imposed. *See* 18 U.S.C. § 3582(c). But the First Step Act permits district courts to reduce some previously-imposed terms of imprisonment for offenses involving crack

[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

cocaine. *See* First Step Act § 404. Under § 404, a district court that sentenced a movant 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." *Id.* § 404(b).

The First Step Act defines a "covered offense" 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." *Id.* § 404(a). Those sections contain the quantity adjustments for minimum sentences put in place to reduce the disparity between crack and powder cocaine sentences. *See Dorsey*, 567 U.S. at 269. As a result, "if a [movant] was sentenced before the effective date of the Fair Sentencing Act for an offense that includes as an element the quantity of crack cocaine described in [§ 841(b)(1)(A)(iii)], his offense is a covered offense under the First Step Act." *United States v. Clowers*, 62 F.4th 1377, 1380 (11th Cir. 2023).

But a district court does not have the authority to reduce the sentence of every movant with a covered offense. *See id.* Because the First Step Act specifies that any sentence reduction must be made "as if" the Fair Sentencing Act were in effect at the time of the movant's offense, we have held that "no relief is available under the First Step Act" if the movant "received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Id.* (internal quotation marks omitted).

We have previously addressed how a district court determines what a movant's statutory penalty would have been under

the Fair Sentencing Act. *See United States v. Jones*, 962 F.3d 1290, 1300–02 (11th Cir. 2020), *vacated sub nom. Jackson v. United States*, 143 S. Ct. 72 (2022), *reinstated by Jackson*, 58 F.4th at 1333. As we have explained, a "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," including a drug-quantity finding "made by a judge." *Id.* at 1302–03.We acknowledged that the Supreme Court in *Apprendi v. New Jersey* recognized that a jury must make such a drug-quantity finding when it increases the statutory penalty. *Id.* at 1302 (citing 530 U.S. 466, 490 (2000)). But we held that for a movant who was sentenced prior to *Apprendi*, a district court could look to a drug-quantity finding made by a judge at sentencing because that finding was used to set the movant's penalty range and "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." *Id.* (internal citation omitted).

Later, the Supreme Court held in *Concepcion v. United States* that district courts may consider intervening changes of law or fact when deciding whether to exercise their discretion under § 404 to reduce an eligible movant's sentence. 142 S. Ct. 2389, 2396 (2022). In reaching this conclusion, the Court emphasized that district courts have discretion in sentencing proceedings. *See id.* at 2398–2401. The Court concluded "the First Step Act simply did not contravene this well-established sentencing practice," explaining that "[n]othing in the text and structure of the First Step Act expressly,

or even implicitly, overcomes the established tradition of district courts' sentencing discretion." *Id.* at 2401.

Later, the Supreme Court granted a petition for a writ of certiorari filed by one of the four movants from the consolidated appeal in *Jones*, vacated our judgment, and remanded for further consideration in light of *Concepcion*. *See Jackson*, 143 S. Ct. at 73. On remand, the movant argued that *Concepcion* abrogated the holding in *Jones* that district courts are bound by drug quantity findings made at sentencing because *Concepcion* made clear that district courts are free to consider intervening changes in law, such as *Apprendi*. *Jackson*, 58 F.4th at 1335–36. We rejected this argument, concluding that "*Concepcion* did not abrogate the reasoning of our decision in . . . *Jones*," and reinstated our prior decision. *Id.* at 1333.

In this appeal, Solomon argues that the district court erred in concluding that he was ineligible for a sentence reduction because under *Apprendi* the district court could not look at the drug quantity finding made at sentencing to determine what his penalty range would have been under the Fair Sentencing Act. But Solomon concedes that this argument is foreclosed by *Jackson*. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.").

Given our binding precedent, we conclude that there is no substantial question as to the outcome of this appeal; therefore, summary affirmance is appropriate. *See Groendyke Transp.*, 406 F.2d

at 1162. Accordingly, the government's motion for summary affirmance is GRANTED and its motion to stay the briefing schedule is DENIED as moot.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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October 10, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-10480-AA
Case Style: USA v. Calvin Solomon
District Court Docket No: 3:95-cr-00007-HES-MCR-1

All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

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OPIN-1 Ntc of Issuance of Opinion