No. ____

IN THE

Supreme Court of the United States

RICHARD DANIEL,

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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January 25, 2024

QUESTION PRESENTED

Congress passed § 404 of the First Step Act of 2018 to address sentences imposed prior to its enactment of the Fair Sentencing Act of 2010. To be eligible for a sentence reduction under § 404, a defendant must have been sentenced for a "covered offense." First Step Act of 2018, Pub. L. No. 115-391, § 404(a). Section 404(b) allows "a court that imposed a sentence for a covered offense . . . [to] 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.* at § 404(b).

The plain language of § 404 contains only two limitations on a district court's discretion to impose a reduced sentence. Neither of those two limitations apply to Petitioner. Nor did Congress "hide" any other limits outside the text of § 404. *Concepcion v. United States*, 142 S. Ct. 2389, 2402 (2022). Despite the text of § 404, despite the long-held principle that district courts are "entrusted with wide sentencing discretion," *id.* at 2398, and despite the reasoning of sister circuits that have held otherwise, the Eleventh Circuit has held that § 404 "is a limited remedy" that permits the district court to "reduce a defendant's sentence *only on a covered offense* and only as if sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense." *United States v. Daniel*, No. 23-11495, 2023 WL 7151343, at *2 (11th Cir. Oct. 31, 2023) (per curiam) (emphasis added).

The question presented is:

Where a defendant was sentenced for multiple offenses, some of which are now covered by § 404 of the First Step Act while others are not covered, does § 404

authorize a district court to impose a reduced sentence for both the covered offenses and the non-covered offenses, or only for the covered offenses?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *United States v. Daniel*, No. 23-11495 (11th Cir. Oct. 31, 2023);
- *United States v. Daniel*, No. 02-CR-20676 (S.D. Fla. Apr. 20, 2023);
- *United States v. Daniel*, No. 02-CR-20676 (S.D. Fla. Aug. 31, 2006).

There are no other proceedings related to this case under Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

IN THE

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Richard Daniel, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's *per curiam* opinion affirming the denial of Petitioner's motion to reduce his sentence under § 404(b) is unpublished, and available at 2023 WL 7151343 (11th Cir. Oct. 31, 2023). It is reproduced as Appendix ("App.") A, 1a–6a. The unpublished order of the United States District Court for the Southern District of Florida is docket entry 355 in Case No. 02-20676-CR-CMA. It is reproduced as App. B, 7a–11a.

STATEMENT OF JURISDICTION

The final judgment of the Eleventh Circuit was entered on October 31, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed—Petitioner's appeal of the district court's order denying his motion to reduce was denied by the Eleventh Circuit on October 31, 2023, and his petition for certiorari review has been filed within 90 days of that denial—on or before January 29, 2024.

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018 (Application of Fair Sentencing Act), Pub. L. No. 115-391, 132 Stat. 5194, 5222 (codified at 21 U.S.C. § 841 note)

(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.

STATEMENT OF THE CASE

In August 2002, a federal grand jury returned an eight-count indictment against Richard Daniel, charging him with: conspiracy to deal in firearms without a license, in violation of 18 U.S.C. § 371 (Count 1); conspiracy to distribute cocaine base and marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count 2); distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) (Counts 3 and 7); possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c) (Counts 4, 6, and 8); and distribution of marijuana, in violation of 21 U.S.C. § 841(a)(1) (Count 5). (Dist. Ct. Dkt. No. 14.) Counts 2, 3, and 7 each carried a five-year mandatory minimum sentence.

Petitioner exercised his right to a jury trial. On February 26, 2004, after a six-day trial, Petitioner was found guilty of all counts. (Dist. Ct. Dkt. No. 188.)

Prior to Petitioner's sentencing, defense counsel submitted a Motion for Downward Departure and Incorporated Sentencing Memorandum (Dist. Ct. Dkt. No. 209) arguing that the Court should not impose consecutive sentences for each of the § 924(c) counts due to sentencing manipulation by the Government.

On June 18, 2004, the district court held Petitioner's sentencing hearing. After hearing argument from both sides, including argument by counsel for Petitioner that the imposition of consecutive sentences under § 924(c) was cruel and unusual, the district court announced an aggregate sentence of 768 months:

Count	Offense	Sentence	Running
1	Conspiracy to Deal in Firearms	60 months	Concurrent
2	Conspiracy to Distribute Cocaine Base & Marijuana	108 months	Concurrent

3	Distribution of Cocaine Base	108 months	Concurrent
4	Poss. of Firearm in Furtherance of Drug Trafficking	60 months	Consecutive
5	Distribution of Marijuana	60 months	Concurrent
6	Poss. of Firearm in Furtherance of Drug Trafficking	300 months	Consecutive
7	Distribution of Cocaine Base	108 months	Concurrent
8	Poss. of Firearm in Furtherance of Drug Trafficking	300 months	Consecutive

(Dist. Ct. Dkt. No. 217.) After announcing that sentence the district court stated:

> This is an extraordinarily long sentence I am imposing, Mr. Daniel, and I can only say I am imposing it because it is my obligation to do so. If I had discretion, I would do differently.

(Dist. Ct. Dkt. No. 237-1 at 19.)

Petitioner filed a timely notice of appeal. (Dist. Ct. Dkt. No. 226.) Among other issues raised on appeal, Petitioner argued that the district court erred by applying the sentencing guidelines in a mandatory fashion. On March 23, 2006, the Eleventh Circuit vacated Petitioner's original sentences and remanded the case for resentencing. *See United States v. Daniel*, 173 F. App'x 766, 771-72 (11th Cir. 2006).

The district court held a second sentencing hearing on August 31, 2006, and resentenced Mr. Daniel to an aggregate sentence of 720 months as follows:

Count	Offense	Sentence	Running
1	Conspiracy to Deal in Firearms	60 months	Concurrent
2	Conspiracy to Distribute Cocaine Base & Marijuana	60 months	Concurrent
3	Distribution of Cocaine Base	60 months	Concurrent
4	Poss. of Firearm in Furtherance of Drug Trafficking	60 months	Consecutive
5	Distribution of Marijuana	60 months	Concurrent
6	Poss. of Firearm in Furtherance of Drug Trafficking	300 months	Consecutive
7	Distribution of Cocaine Base	60 months	Concurrent
8	Poss. of Firearm in Furtherance of Drug	300 months	Consecutive

	Trafficking		

(Dist. Ct. Dkt. No. 279.) The district court again noted that it "continue[d] to have the firm belief and conviction that these sentences are excessive, but I have no discretion to do anything other than announce the sentences which I have on today's date." *Daniel v. United States*, 08-CV-20702-CMA, Dkt. No. 51 at 8:4-7 (S.D. Fla. Jun. 19, 2010).

In December 2022—after having served approximately 247 months of his 720-month terms—Petitioner filed a *pro se* Motion to Impose Reduced Sentence Pursuant to the First Step Act of 2018. (Dist. Ct. Dkt. No. 338.) In January 2023, the Government filed its Response (Dist. Ct. Dkt. No. 343) and the district court, *sua sponte*, appointed the Federal Public Defender to represent Petitioner on his motion (Dist. Ct. Dkt. No. 344). On February 24, 2023, Petitioner, through counsel, filed an Amended Motion to Reduce Sentence, arguing that the district court could and should reduce Petitioner's sentence from 720 months to 221 months based on the plain text of § 404, the Supreme Court's holding in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), and the sentence package doctrine. (Dist. Ct. Dkt. No. 349.)

After the motion was fully briefed, the Government filed a Notice of Supplemental Authority citing the Eleventh Circuit's decision in *United States v. Files*, 63 F. 4th 920 (11th Cir. 2023), which held that *Concepcion* only abrogated in part the Eleventh Circuit's decision in *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020), and left undisturbed *Denson*'s holding that a district court is not free to reduce a defendant's sentence on counts that are not covered offenses. (Dist. Ct. Dkt.

No. 352.) Accordingly, the Government argued that because Counts 1, 4-6, and 8 are not "covered offenses" as defined in § 404, the district court lacked the authority to reduce his sentences on those counts. Petitioner timely responded to the Government's notice. (Dist. Ct. Dkt. No. 354.) The district court granted in part and denied in part Petitioner's motion to reduce his sentence. The district court held that it was bound by *Files* and could not reduce Petitioner's sentences on non-covered offenses. (Dist. Ct. Dkt. No. 355 at 3.)

Petitioner timely appealed that portion of the district court's order denying him relief on his non-covered offenses. (Dist. Ct. Dkt. No. 357.) Citing both *Files* and *Denson*, the Government filed a Motion for Summary Affirmance. Appellee Mot. for Summ. Affirm., *United States v. Daniel*, Dkt. No. 19 (11th Cir. July 26, 2023) (Case No. 23-11495). Once Petitioner filed his response, the court of appeals rescinded the briefing schedule pending its decision on the Motion for Summary Affirmance. On October 31, 2023, a three-judge panel of the court of appeals issued a *per curiam* opinion granting the Government's motion and summarily affirming the district court's order denying Petitioner's motion to reduce his sentence. *See* Pet. App. 1a-6a.

This timely petition follows.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision below creates a square conflict of authority with numerous other circuits—including the Fourth, Seventh, and Eighth Circuits—on an important and recurring post-conviction issue. The Eleventh Circuit's decision is wrong, and this case is an excellent vehicle to resolve the conflict that its opinion created. The standard criteria for certiorari are satisfied.

I. A CIRCUIT SPLIT EXISTS.

Geography alone should not determine whether a defendant will be able to obtain a sentence reduction on a non-covered offense under the First Step Act. Leaving the Eleventh Circuit decision intact would leave defendants like Mr. Daniel subject to lengthy sentences based solely on the arbitrariness of geography and despite Congress's clear intent under the First Step Act and the Fair Sentencing Act to permit district courts to reduce such sentences. This Court should grant certiorari to resolve the circuit conflict on the question presented.

Had Petitioner filed his Motion for a Sentence Reduction in the Seventh Circuit, for example, his motion would have been granted, and his sentence would have been reduced for both his covered and non-covered offenses; he would be free. In *United States v. Hudson*, the Seventh Circuit correctly held that "a court is not limited under the text of the First Step Act to reducing a sentence solely for a covered offense." 967 F.3d 605, 611 (7th Cir. 2020). As a threshold matter, the court held that "[404(b)'s] language does not bar a court from reducing a non-covered offense" and "[e]xcluding non-covered offenses from the ambit of First Step Act consideration would, in effect, impose an extra-textual limitation on the Act's applicability." *Id.* at

610. Turning to the sentencing package doctrine, which the appeals court in this case never addressed, the Seventh Circuit observed, "Sentences for covered offenses are not imposed in a vacuum, hermetically sealed off from sentences imposed for non-covered offenses. Nor could they be. Multiple terms of imprisonment are treated under federal law as a single, aggregate term of imprisonment." *Id.* at 611; *see also United States v. Hible*, 13 F.4th 647, 652 (7th Cir. 2021) ("*United States v. Hudson* holds that, when a defendant has been sentenced for two crimes, one covered by the First Step Act and the other not, a district judge has discretion to revise the entire sentencing package." (citation omitted)).

The Seventh Circuit is not alone in its interpretation of § 404. Both the Eighth Circuit and the Fourth Circuit have taken a textualist approach to the statute and determined that Congress did not intend to limit relief to defendants who were sentenced only for a covered offense.

In *United States v. Spencer*, the Eighth Circuit adopted the Seventh Circuit's interpretation that having a covered offense is simply an eligibility requirement for relief under the First Step Act. *See* 998 F.3d 843, 846 (8th Cir. 2021) (First Step Act's application "not limited to single-drug conspiracies involving crack cocaine or to defendants whose penalties would decrease after the Fair Sentencing Act" and noting that "[t]he First Step Act casts a wide net at the eligibility stage." (citation omitted)); *cf. United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020) ("The First Step Act makes possible the fashioning of the most complete relief possible." (cleaned up)). Similarly in *United States v. Gravatt*, the Fourth Circuit viewed the "covered offense" language

in § 404 as a "threshold requirement" under the First Step Act, and noted that the only "express limitations" for the Act's application are found in § 404(c)." 953 F.3d 258, 264 (4th Cir. 2020). "If Congress intended for the Act not to apply if a covered offense was combined with an offense that is not covered, it could have included that language. But it did not." *Id.*

District courts across the country have reduced sentences on non-covered offenses under § 404 of the First Step Act. *See, e.g.*, *United States v. Holmes*, No. 02-cr-24, 2021 WL 1518336, at *11 & n.4 (D.D.C. Apr. 16, 2021) (reducing sentence on 18 U.S.C. § 922(g) count and agreeing with Seventh Circuit's reasoning from *Hudson* where parties agreed defendant was eligible for sentence reduction under § 404); *United States v. Najar*, No. 95-cr-538, 2020 WL 6781809, at *8 & nn. 3-4 (D.N.M. Nov. 18, 2020) (reducing sentence on RICO and 18 U.S.C. § 924(i) counts and agreeing with the interpretation of the First Step Act adopted by the Fourth and Seventh Circuits); *United States v. German*, No. 04-cr-50134, 2020 WL 6092348, at *3 (W.D. La. Oct. 15, 2020); *United States v. Ervin*, 423 F. Supp. 3d 127, 136-37 (W.D. Pa. 2019).

The Second, Tenth, and Eleventh Circuits have interpreted § 404 to prohibit district courts from reducing a defendant's sentences on non-covered offenses. *See United States v. Young*, 998 F.3d 43 (2d Cir. 2021); *United States v. Gladney*, 44 F.4th 1253 (10th Cir. 2022), *cert. denied*, No. 23-5556 (Jan. 8, 2024). This Court should resolve the split over the application of § 404 to non-covered offenses.

II. THE DECISION BELOW IS WRONG.

The Eleventh Circuit's decision below is wrong for at least three reasons. First, the Government agrees that § 404 permits courts to grant relief on at least some non-covered offenses. Second, the decision below misreads the text of the First Step Act and injects extra-textual limitations on a court's application of § 404. And third, the decision below fails to address the sentencing package doctrine.

A. *The Government concedes that the First Step Act permits sentence reductions on "some" non-covered offenses.*

The Government has consistently argued in this Court and in lower courts that "when the record indicates that the sentencing court imposed what was effectively a single intertwined sentence that took into account the defendant's convictions for both a covered offense and a noncovered offense, then reducing the defendant's sentence for the noncovered offense is consistent with the text and purpose of Section 404 of the First Step Act." Gov't Br. in Opp. 11, *Files v. United States* (2023) (No. 22-1239). In briefing in the Eleventh Circuit, the Government acknowledged that in some cases, § 404 "authorize[s] a district court to reduce a defendant's concurrent sentence on a non-covered offense," and that unless precedent held otherwise, the court of appeals "should conclude that a sentencing court may reduce a defendant's *total sentence* in appropriate cases." Gov't C.A. Br. 28, *United States v. Files*, 63 F.4th 920 (11th Cir. 2023) (emphasis added). Put another way by the Government, "Congress's use of the phrase 'impose a reduced sentence,' simply clarifies that the court is not limited to reducing the sentence for the covered offense, but may also correspondingly reduce the overall sentence to the extent it embodies an intertwined

sentencing package." Br. in Opp. 16, *Concepcion v. United States*, 142 S. Ct. 2389 (2022) (No. 20-1650) (cleaned up); *see also* Jonathan D. Colan, *A Brief History of Section 404's Crack Sentencing Reform*, 69 DOJ J. Fed. L. & Prac. 57, 87 (2021) ("[The United States] has taken the position that a district court may reduce concurrent sentences for non-covered offenses if the sentences for those offenses were effectively determined by the sentence for the covered offense.").

The Government took a similar position in the Eighth Circuit where it conceded that "§ 404(b) allows the district court to impose the total (reduced) sentence it would have imposed had § 2 of the Fair Sentencing Act been in effect when the covered offense was committed." Second Supp. Br. of Appellee 3-4, *United States v. Spencer*, 998 F.3d 843 (8th Cir. 2021) (No. 19-2685).

B. *The text of § 404 allows courts to impose a reduced sentence on covered and non-covered offenses.*

Courts are not free to rewrite statutory text. *McNeil v. United States*, 508 U.S. 106, 111 (1993); *see also, e.g.*, *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) ("We must enforce plain and unambiguous statutory language according to its terms."). In *Concepcion*, this Court interpreted the text of § 404 and found that had Congress wanted to impose limitations on a district court's discretion, it would have written those limits into the language of the statute. *See Concepcion v. United States*, 142 S. Ct. 2389, 2402 (2022). The decision below conflicts with the plain text of § 404 and imposes limits on the district court that are not found in the plain language of the statute.

Section 404 contains three subsections. Section 404(a) defines the term "covered offense." Section 404(b) permits a court that "imposed a sentence for a covered offense" to "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." And § 404(c)—titled "Limitations"—prohibits a court from entertaining a motion made under § 404 if the sentence was previously imposed or reduced in accordance with the amendments to sections 2 and 3 of the Fair Sentencing Act of 2010 or if a previous motion made under § 404 was denied on the merits. No other limitations exist. *See Concepcion*, 142 S. Ct. at 2401 ("The only two limitations on district courts' discretion [are the two that] appear in Section 404(c).").

Section 404(a) and (b), when read together, show that a conviction for a covered offense is only an eligibility requirement. *See United States v. Hudson*, 967 F.3d 605, 611 (7th Cir. 2020) ("[A] defendant's conviction for a covered offense is a threshold requirement of *eligibility* for resentencing on an aggregate penalty." (emphasis in original)); *United States v. Spencer*, 998 F.3d 843, 846-47 (8th Cir. 2021); *United States v. White*, 984 F.3d 76, 81 (D.C. Cir. 2020) (covered offense requirement in § 404(a) is a threshold determination before court exercises its discretion); *see also United States v. Mitchell*, 832 F. App'x 387, 391-92 (6th Cir. 2020) (Stranch, J., concurring) (agreeing with Seventh Circuit's reasoning that having a covered offense is an eligibility requirement and noting that he would "decline to expand the limitations crafted by Congress" (citing *Gravatt*, 953 F.3d at 264)). Once met, the only two limits on a court's discretion are then found in § 404(c). Because no other

limitations exist in the text of the statute, § 404(b) allows courts to impose a reduced sentence on a non-covered offense. *Hudson*, 967 F.3d at 610.

In short, once it is determined that at least one of a defendant's crimes satisfies § 404's meaning of "covered offense," the sentences for all of the crimes should qualify for reduction.

C. *The decision below cannot be reconciled with the sentencing package doctrine.*

The Seventh Circuit, in *Hudson*, succinctly explained how federal sentencing works in cases with multiple counts: "Sentences for covered offenses are not imposed in a vacuum, hermetically sealed off from sentences imposed for non-covered offenses. Nor could they be. Multiple terms of imprisonment are treated under federal law as a single, aggregate term of imprisonment." *Hudson*, 967 F.3d at 611.

The Eighth Circuit, in *Spencer*, provided a more detailed explanation of multicount sentencing packages. First, it noted that if a defendant is convicted of more than one count in a multicount indictment, the case involves a sentencing package. *Spencer*, 998 F.3d at 845 n.1. It then referenced § 5G1.2 of the Sentencing Guidelines, which instructs district courts in such cases to first determine the total punishment, and then construct a combined sentence, using concurrent or consecutive sentences on each count, to reach the total punishment. *See id*. Because of the interdependent nature of the sentencing package, the imposition of a reduced sentence on one count invariably affects the other counts.

The Eleventh Circuit, in the past, has recognized the reality and pragmatism of the sentencing package doctrine. *See United States v. Fowler*, 749 F.3d 1010, 1015

(11th Cir. 2014) ("The notion is that, especially in the guidelines era, sentencing on multiple counts is an inherently interrelated, interconnected, and holistic process which requires a court to craft an overall sentence—the 'sentence package'—that reflects the guidelines and the relevant § 3553(a) factors."); *see also United States v. Walker*, 768 F. App'x 877, 880 (11th Cir. Apr. 9, 2019) ("As a rule, we treat sentences on multiple counts as a single package."); *United States v. Mixon*, 115 F.3d 900, 903 (11th Cir. 1997) ("Under the sentencing packaging concept, when a defendant raises a sentencing issue he attacks the bottom line."). The decision below, however, did not address the sentencing package doctrine, let alone reconcile that doctrine with the panel's strained interpretation of § 404.

The sentencing package doctrine explains Petitioner's sentence. Here, the district court sentenced Petitioner to the mandatory minimum, 60 months, on the covered counts, and the mandatory minimum on the § 924(c) counts, in order to create the lowest aggregate sentence possible under the relevant statutes. That the Court also imposed a sentence of 60 months on Counts 1 and 5—the non-924(c), non-covered offense counts—is unsurprising since any sentence less than 60 months on those counts would have no effect on the total sentence. Indeed, the district court's comments—at both sentencing hearings—clearly indicate that had the court been able to, it would have imposed a lower sentence. It was prevented from doing so by the covered offenses and the § 924(c) counts. In other words, Petitioner's aggregate sentence was effectively determined by the sentence for the covered offense. This was only further illustrated by the district court's adoption of Petitioner's alternative

request for relief: the court reduced the 60 month sentences on the covered offenses (Counts 2, 3, and 7) to 1 day.[1]

III. THE QUESTION PRESENTED IS IMPORTANT, AND THIS CASE IS A SUITABLE VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

Whether a defendant can receive a reduced sentence on a non-covered offense under § 404 is important to Petitioner and to the hundreds of defendants who were sentenced for covered offenses and non-covered offenses, including those where a firearms-related mandatory minimum was applied.

A. *This case is a more suitable vehicle for review than the petitions in Files or Contrera.*

This petition, unlike previous petitions denied by this Court, provides a prime example of a defendant who should have received meaningful relief under the First Step Act but was unable to because the court below held that no relief is available for his non-covered offenses. Petitioner is currently serving a 720-month sentence for covered crack-cocaine offenses and non-covered marijuana and firearms related offenses. The district court, true to the sentiments it expressed at his original sentencing in 2004 and his resentencing in 2006, agreed that a sentence reduction on Petitioner's covered offenses was appropriate and reduced his sentences on the covered offenses from 60 months to 1 day. Pet. App. at 11a.

[1] At every opportunity, the district court has reduced Petitioner's sentence as much as permitted by statute and circuit precedent. At Petitioner's resentencing, the district court reduced Petitioner's original sentence from 108 months to 60 months on the covered offenses. (Dist. Ct. Dkt. No. 279.)

This Court recently denied petitions for certiorari in *Files v. United States*, No. 22-1239 (Nov. 20, 2023), and *Contrera v. United States*, No. 21-8111 (Dec. 5, 2022). Petitioner's case differs from those cases in several important respects.

First, the Government argued in Mr. Files's case that his petition was moot because he would be released within a month of the Government's filing in opposition. Gov't Br. in Opp. 12, *Files v. United States* (2023) (No. 22-1239). There is no mootness issue here. Petitioner's release date is October 31, 2054.

Second, the severity of the sentence the court imposed in Mr. Contrera's case was controlled by neither a covered offense nor a non-covered offense with a mandatory minimum sentence. Instead, the court imposed a discretionary sentence of life in prison for murder in aid of racketeering activities. *See United States v. Contrera*, No. 20-4083, 2022 WL 301784, at *1 (2d Cir. Feb. 2, 2022). Here, Petitioner's total sentence was determined both by the covered offenses and by the non-covered offenses. The five-year mandatory minimum on the covered crack cocaine offenses led the district court to sentence the Petitioner to concurrent five-year sentences on the non-covered marijuana and firearm offenses—shorter sentences on those offenses would not have affected the overall sentence. The other component of Petitioner's sentence, the non-covered § 924(c) counts, was also mandatory and had to run consecutive to the other counts. In short, despite the district court's expressed belief that the circumstances should have permitted a shorter aggregate sentence, the court was unable to impose such a sentence because of the covered and non-covered offenses and their attendant mandatory minimums. This is in stark contrast

to the district court in *Contrera*, which freely determined that the circumstances warranted one of the severest penalties.

Finally, in opposition to both previous petitions, the Government has argued that the question whether § 404 authorizes a district court to reduce a sentence for a non-covered offense is not important. According to the Government, Petitioner belongs to the allegedly "diminishing set of defendants" who remain incarcerated for crack-cocaine offenses for which a sentence was imposed before the effective date of the Fair Sentencing Act. Gov't Br. in Opp. 22, *Contrera v. United States* (2022) (No. 21-8111). The Government argued in *Files* that the issue can only arise for defendants who (1) remain incarcerated for crack-cocaine offenses for which a sentence was imposed before August 3, 2010, the effective date of the Fair Sentencing Act; (2) have not concluded his or her First Step Act proceedings; (3) were sentenced on both a covered offense and a non-covered offense; and (4) have not yet completed their sentence for the non-covered offense. Gov't Br. in Opp. 15, *Files v. United States* (2023) (No. 22-1239). Petitioner satisfies that criteria. And if a defendant satisfies that criteria, it means that he or she has served well over a decade in prison and is likely subject to a lengthy sentence involving non-covered § 924(c) offenses. For those defendants, this question could mean the difference between immediate release and dying in prison. A matter of life and death is important.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully Submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11495

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD DANIEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:02-cr-20676-CMA-2

Before ROSENBAUM, GRANT, and LAGOA, Circuit Judges

PER CURIAM:

Richard Daniel appeals the district court's order denying his motion to reduce his sentence under § 404(b) of the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194 ("First Step Act"), as to his convictions for conspiracy to deal in firearms, distribution of marijuana, and possession of a firearm in furtherance of a drug trafficking crime. The government moved for summary affirmance, arguing that the court properly denied the motion as to those offenses because they were not covered offenses and any argument that the district court had discretion to reduce his sentence on non-covered offenses is foreclosed by *United States v. Denson*, 963 F.3d 1080 (11th Cir. 2020), and *United States v. Files*, 63 F.4th 920 (11th Cir. 2023), *pet. for cert. filed*, No. 22-1239 (U.S. June 26, 2023).

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).

The Fair Sentencing Act, enacted on August 3, 2010, amended 21 U.S.C. § 841(b)(1) to reduce the sentencing disparity between crack and powder cocaine. Fair Sentencing Act; *see Dorsey*

v. United States, 567 U.S. 260, 268-69 (2012) (detailing the history that led to the enactment of the Fair Sentencing Act, including the Sentencing Commission's criticisms that the disparity between crack and powder cocaine offenses was disproportional and reflected race-based differences). Specifically, § 2(a)(1) raised the quantity of crack cocaine necessary to trigger a 10-year mandatory minimum sentence from 50 to 280 grams, and § 2(a)(2) raised the quantity threshold to trigger a 5-year mandatory minimum from 5 grams to 28 grams. Fair Sentencing Act § 2(a)(1)–(2); 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii). These amendments were not made retroactive to defendants who were sentenced before the enactment of the Fair Sentencing Act. *United States v. Berry*, 701 F.3d 374, 377 (11th Cir. 2012).

In 2018, Congress enacted the First Step Act, which made retroactive for "covered offenses" the statutory penalties enacted under the Fair Sentencing Act. *See* First Step Act § 404. 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 sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." *Id.* § 404(b). The statute defines "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 . . . that was committed before August 3, 2010." *Id.* § 404(a). The First Step Act adds that "[n]o court shall entertain a motion" under § 404 for a sentence that "was previously imposed or previously reduced in accordance with" sections 2 and 3 of the Fair Sentencing Act, or "if a previous motion made under

this section . . . was . . . denied after a complete review of the motion on the merits." *Id.* § 404(c).

In *Denson*, we concluded, as our main holding, "that the First Step Act does not require district courts to hold a hearing with the defendant present before ruling on a defendant's motion for a reduced sentence under the Act." 963 F.3d at 1082. As an alternate and independent holding, we concluded that a sentencing modification under the First Step Act is not a critical stage in the proceedings under the two-part test in *United States v. Brown*, 879 F.3d 1231 (11th Cir. 2018), contrary to Denson's arguments on appeal. *Id.* at 1088–89. We concluded that the First Step Act does not authorize a plenary resentencing and instead "is a limited remedy." *Id.* at 1089. In so concluding, we reasoned that a district court may "reduce a defendant's sentence only on a covered offense and only as if sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense." *Id.* (quotation marks omitted). We also reasoned that a district court is not free to: (1) recalculate the defendant's original Guidelines calculations unaffected by sections 2 and 3; (2) reduce the defendant's sentence on the covered offense based on other changes in the law; or (3) reduce the defendant's sentences on non-covered offenses. *Id.* We also referenced the idea that a § 404(b) motion was a § 3582(c)(1)(B) proceeding. *Id.* at 1088.

The Supreme Court held in *Concepcion v. United States* that sentencing courts may consider intervening changes of law or fact in adjudicating a First Step Act motion. 142 S. Ct. 2389, 2396 (2022).

The Supreme Court stated that, while courts must consider these arguments when raised by the parties, whether to reduce the defendant's sentence remains within their sound discretion. *Id.* The Court explained that sentencing courts have historically had wide latitude to consider any information relevant to understanding a defendant's individual circumstances, and "[n]othing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district court's sentencing discretion." *Id.* at 2401. In so holding, the Supreme Court overruled our prior holding in *Denson* that a court cannot reduce a defendant's sentence based on changes in the law beyond those mandated by the Fair Sentencing Act. *Id.* at 2398 n.2 (citing *Denson*, 963 F.3d at 1089).

In *Files*, we recently explained that *Concepcion* abrogated aspects of *Denson* regarding whether a court adjudicating a First Step Act motion could consider changes in law unrelated to those specified in the Fair Sentencing Act but that *Concepcion* did not abrogate *Denson*'s holding that a court could not reduce defendants' sentences for non-covered offenses. 63 F.4th at 930–31. We also explained that the Supreme Court's discussion in *Concepcion* pertained to the absence of limitations by Congress on how a district court exercises its discretion in reducing a defendant's sentence, not its authority to do so in the first place. *Id.* at 931. We confirmed that a district court can consistently apply "*Denson*'s holding limiting the categories of sentences that can be reduced and *Concepcion*'s holding empowering courts to exercise broad discretion in imposing reduced sentences for those qualifying offenses." *Id.*

Under the prior panel precedent rule, "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 this [C]ourt sitting *en banc*." *United States v. Dudley*, 5 F.4th 1249, 1265 (11th Cir. 2021) (quotation marks omitted).

We thus conclude that summary affirmance is warranted here because the government's position is correct as a matter of law. *Groendyke Transp.*, 406 F.2d at 1162. Notably, Daniel does not dispute that the offenses are non-covered offenses. As such, Daniel's arguments are foreclosed by this Court's prior precedent in *Denson* and *Files*. *Denson*, 963 F.3d at 1088–89; *Files*, 63 F.4th at 930–31; *Dudley*, 5 F.4th at 1265. Further, any argument that *Concepcion* abrogated *Denson* is foreclosed by *Files*. *Files*, 63 F.4th at 930–31. Other than *Concepcion*, Daniel does not point to any case from this Court or the Supreme Court that abrogated *Denson* and *Files*. *Dudley*, 5 F.4th at 1265.

Because the government's position is correct as a matter of law, we GRANT the government's motion for summary affirmance and affirm the district's order denying Daniel's motion to reduce his sentence under § 404(b) of the First Step Act. *Groendyke Transp.*, 406 F.2d at 1162.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-20676-CR-ALTONAGA

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD DANIEL,

Defendant.

_____/

ORDER

THIS CAUSE is before the Court on Defendant, Richard Daniel's Amended Motion to Reduce Sentence [ECF No. 349], filed on February 24, 2023. On March 10, 2023, the Government filed its Response in Opposition [ECF No. 350], to which Defendant filed a Reply [ECF No. 351]. After a review of the parties' written submissions, the record, and applicable law, the Court concludes that the Amended Motion should be granted in part and denied in part.

The Undersigned sentenced Defendant to 720-months' imprisonment as follows:

Count	Offense	Sentence	Running
1	Conspiracy to Deal in Firearms	60 months	Concurrent
2	Conspiracy to Distribute Cocaine Base	60 months	Concurrent
3	Distribution of Cocaine Base	60 months	Concurrent
4	Possession of Firearm in Furtherance of Drug Trafficking	60 months	Consecutive
5	Distribution of Marijuana	60 months	Concurrent
6	Possession of Firearms in Furtherance of Drug Trafficking	300 months	Consecutive
7	Distribution of Cocaine Base	60 months	Concurrent
8	Possession of Firearms in Furtherance of Drug Trafficking	300 months	Consecutive

(*See* Am. J. [ECF No. 279]). Defendant argues that his 720-month sentence should be reduced to a 221-month sentence. (*See* Am. Mot. 12–13).

When the Court sentenced Defendant, his cocaine-base offenses in Counts 2, 3, and 7 "resulted in a statutory sentencing range of 5 to 40 years' imprisonment" even though "100 times as much powder cocaine [was required] to trigger the same penalties." *Concepcion v. United States*, 142 S. Ct. 2389, 2396 (2022) (alteration added). To correct the disparities in sentencing for cocaine offenses, Congress passed the Fair Sentencing Act in 2010. *See id.* "Section 2 of that Act increased the amount of crack cocaine needed to trigger the 5-to-40-year sentencing range from 5 grams to 27 grams." *Id.* at 2396–97 (citation omitted). Section 3 eliminated the mandatory minimum sentence for simple possession of cocaine base. *See* Pub. L. No. 111–220, 124 Stat. 2372, § 3.

Then, in 2018, Congress passed the First Step Act, which "authorized district courts to impose a reduced sentence for qualifying movants as if sections 2 and 3 of the Fair Sentencing Act were in effect at the time the covered offense was committed." *Concepcion*, 142 S. Ct. at 2397 (citation, quotation marks, and alterations omitted; other alteration adopted). An offense is considered "covered" by the First Step Act if the associated statutory penalties were "modified by section 2 or 3 of the Fair Sentencing Act[.]" Pub. L. No. 115–391, 132 Stat. 5194, § 404(a) (alteration added). Counts 2, 3, and 7 are covered offenses because they involve charges for distribution of cocaine base and conspiracy to distribute cocaine base, which were both addressed by the Fair Sentencing Act. *See* Pub. L. No. 111–220, 124 Stat. 2372, § 2; (Am. Mot. 6). The Government does not object to a reduction of Defendant's sentences for the covered offenses. (*See* Resp. 11).

Defendant argues the Court should go farther, however, and reduce his sentences on all counts regardless of whether the offenses are covered by the First Step Act. (*See* Am. Mot. 6). He points to the severe disparity between the 720-months' sentence he received for possession of

firearms in furtherance of drug trafficking — Counts 4, 6, and 8 — and the 180-months' sentence he would receive if he were sentenced today. (*See id.*). He also argues that if he were "caught with two marijuana cigarettes" today, "it is unlikely [he] would be arrested, let alone convicted of a crime." (*Id.* 16). He maintains that the Court is entitled to reduce his sentences for non-covered offenses while resentencing him under the First Step Act. (*See id.* 6).

On March 27, 2023, the Government filed a Notice of Supplemental Authority [ECF No. 352] alerting the Court to the Eleventh Circuit's opinion in *United States v. Files*, which clarified "that a district court is permitted to reduce a defendant's sentence under the First Step Act only on a covered offense and is not free to change the defendant's sentences on counts that are not covered offenses[.]" 63 F.4th 920, 931 (11th Cir. 2023) (alteration added; other alteration adopted; citation and quotation marks omitted); *see also United States v. Gee*, 843 F. App'x 215, 217 (11th Cir. 2021). Following publication of *Files* in the reporter, the Court entered an Order [ECF No. 353] requiring Defendant to respond to the Notice and address whether *Files* impacted the relief he sought. (*See* Apr. 12, 2023 Order 1). In his Response to the Notice [ECF No. 354], Defendant acknowledges that *Files* would preclude the Court from reducing his sentences on offenses that are not covered by the First Step Act. (*See* Def.'s Resp. to Notice 1). Nevertheless, he maintains that *Files* was "wrongly decided" and preserves his arguments for reduction of non-covered offenses for purposes of further appellate review. (*Id.* 1–2).

Files is indeed binding on the Court; that decision precludes the Court from reducing Defendant's sentences on Counts 4, 5, 6 and 8, which are not covered by the First Step Act. 63 F.4th at 931; *see also* 11th Cir. R. 36-2. Since the Government concedes that Defendant is entitled to sentence reductions for the covered offenses (*see* Resp. 11), and *Files* precludes sentence reductions of the non-covered offenses, the only question left for the Court to consider is whether

Defendant is entitled to resentencing despite that the resentencing will not change his overall sentence. (*See* Def.'s Resp. to Gov't Notice 2–3).

Resentencing is appropriate. Even though the Court cannot reduce Defendant's overall sentence, "a reduction in his concurrent sentences for the covered offenses may be beneficial to him in the event of future changes in the legal landscape." *United States v. Files*, No. 97-cr-0099, 2021 WL 3463784, at *5 (S.D. Ala. Aug. 5, 2021), *aff'd*, 63 F.4th at 920; *see also United States v. Hunt*, No. 19-14830, 2022 WL 4115308, at *3 (11th Cir. Sept. 9, 2022). As stated, the Government concedes that Defendant is entitled to the requested sentence reductions for the covered offenses. (*See* Resp. 11). Consequently, there is no question that the Court's exercise of its discretion to reduce Defendant's sentences for his covered offenses under section 404 of the First Step Act is appropriate.

"District courts have wide latitude to determine whether and how to exercise their discretion in this context." *United States v. Jones*, 962 F.3d 1290, 1304 (11th Cir. 2020). Defendant proposes a reduction of "his sentences on the covered offenses from 60 months to 1 day." (Am. Mot. 16 n.8). The Government does not dispute this reduction, and the Court agrees it is appropriate. Defendant will be thus resentenced as follows:

Count	Offense	Sentence	Running
1	Conspiracy to Deal in Firearms	60 months	Concurrent
2	Conspiracy to Distribute Cocaine Base	1 day	Concurrent
3	Distribution of Cocaine Base	1 day	Concurrent
4	Possession of Firearm in Furtherance of Drug Trafficking	60 months	Consecutive
5	Distribution of Marijuana	60 months	Concurrent
6	Possession of Firearms in Furtherance of Drug Trafficking	300 months	Consecutive
7	Distribution of Cocaine Base	1 day	Concurrent
8	Possession of Firearms in Furtherance of Drug Trafficking	300 months	Consecutive

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's Amended Motion [ECF No. 349] is **GRANTED in part** and **DENIED in part**. The Motion is **GRANTED** as to Defendant's crack-cocaine offenses (Counts 2, 3, and 7). In the Court's discretion, Defendant's sentence as to each of those counts is reduced from 60 months to 1 day. The Motion is **DENIED** as to Defendant's non-covered offenses (Counts 4, 5, 6, and 8). Since Count 1 for conspiracy to deal in firearms and Count 5 for distribution of marijuana run concurrent to Defendant's cocaine base offenses, the 720-year sentence of imprisonment that Defendant received remains unchanged.

A second amended judgment will be entered by separate order.

DONE AND ORDERED in Miami, Florida, this 20th day of April, 2023.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE