NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM L. GLADNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

CORRECTED PETITION FOR WRIT OF CERTIORARI

DAVID G. MAXTED
Maxted Law LLC
1543 Champa Street, Suite 400
Denver, Colorado 80202
(303) 353-1535
dave@maxtedlaw.com

Counsel for Petitioner William L. Gladney

QUESTION PRESENTED

This case presents a circuit split regarding statutory interpretation of the First Step Act on a common scenario facing federal courts nationwide. The Seventh Circuit conducted a plain reading of the statute to conclude individuals convicted of "covered" and non-covered offenses may receive a sentence reduction when the offenses intertwine and were grouped at sentencing. Decisions of the Fourth and Sixth Circuits suggest agreement with this analysis, which is also supported by this Court's plain reading of the First Step Act in related contexts.

However, the Tenth Circuit reached the opposite conclusion—though without much textual analysis of the statute or explanation for creating the split—and has been joined on its side of the split by the Second and Eleventh Circuits.

The question presented by this circuit split is therefore:

> May district courts reduce the sentence of those convicted of covered and non-covered offenses under the First Step Act, when the offenses intertwined and were grouped at sentencing as part of the same sentencing package?

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

PETITION FOR A WRIT OF CERTIORARI

William L. Gladney respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is published at 44 F.4th 1253 (10th Cir. 2022) and is provided as Appendix A1. The district court's relevant order is provided as Appendix A2. The Tenth Circuit order denying the petition for rehearing is provided as Appendix A3.

JURISDICTION

The Tenth Circuit issued its opinion on August 15, 2022. Mr. Gladney timely petitioned for rehearing, which was denied by the Tenth Circuit on April 21, 2023. This Petition is timely filed within 90 days of entry of the order denying rehearing under Rule 13.3. Jurisdiction lies in this Court under 28 U.S.C. § 1254(1).

FEDERAL PROVISION INVOLVED

Section 404 of the First Step Act of 2018 (Pub. L. No. 115-391):

> (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

I. Mr. Gladney Was Sentenced To Life In Prison For Intertwined Crack And RICO Offenses Grouped Under The Sentencing Guidelines.

Mr. Gladney was convicted at trial on three interrelated counts and sentenced to concurrent life sentences. Count 1 charged racketeering (RICO) under 18 U.S.C. §§ 1962(c) and 1963(a), Count 3 charged conspiracy to distribute and possession with the intent to distribute more than 50 grams of cocaine base ("crack") under 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A), and Count 21 charged for using, carrying, or possessing a firearm in relation to a drug trafficking crime, and aiding and abetting, under 18 U.S.C. §§ 924(c)(1) and (2). The case involved crack cocaine distribution and related conduct at a motel where Mr. Gladney's crimes "all occurred," and the facts underlying the crack and RICO conspiracies intertwined and overlapped. *Gladney*, 44 F.4th at 1255.

Mr. Gladney is a Black man now 66 years old. Although Mr. Gladney had no prior felony convictions, the district court sentenced him to life in prison on Counts 1 and 3, and a 10-year consecutive sentence on Count 21. The district court acknowledged Counts 1 and 3 interrelate because the sentencing guideline calculations for Counts 1 and 3 were "grouped" together. *Id.* at 1255-56; A2 at 21.

Reflecting the unified sentence, the district court several times referred to its "sentence" in the singular. *Id.*

II. Congress Acted To Redress Excessive And Racially-Disparate Crack Sentences Through The Fair Sentencing Act And The First Step Act.

At the time of Mr. Gladney's sentencing, he faced the 100:1 drug weight disparity between crack and powder cocaine sentencing which was imposed by the Anti-Drug Abuse Act of 1986, a disparity now widely recognized as unjust and racially-biased. *See, e.g.*, *Dorsey v. United States*, 567 U.S. 260, 268 (2012) (noting "unjustified race-based differences" behind the disparity); U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* at 2 (2007) (the sentencing regime came under "almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups.").

A few years after Mr. Gladney's sentencing, the Fair Sentencing Act of 2010 was signed into law. The Fair Sentencing Act raised from 50 to 280 grams the amount of crack cocaine triggering the 10 years to life imprisonment sentence under 21 U.S.C. § 841, while 50 grams would carry a maximum of 40 years. *See* Pub. L. No. 111-220, § 2, 124 Stat 2372, 2372 (2010) ("Fair Sentencing Act"); *Dorsey*, 567 U.S. at 268. However, this change was not retroactive, leaving individuals like Mr. Gladney with no means of relief to reduce his life sentence.

In the First Step Act of 2018, Congress acted to give retroactive relief. Section 404 of the First Step Act authorizes district courts to reduce the sentence for those convicted of a "covered offense," which the statute defines 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." It is undisputed that Mr. Gladney was convicted of a covered offense in Count 3.[1]

III. The District Court Ruling.

Mr. Gladney filed a pro se motion for a sentence reduction under the First Step Act and was appointed counsel. Counsel requested funding in order to investigate Mr. Gladney's claim for relief on the merits, including obtaining records and interviewing witnesses for information which may support a sentence reduction. The district court denied that request "without prejudice," explaining it would first address the "purely legally issue" as to whether Mr. Gladney was eligible for a reduction under the statute. *Gladney*, 44 F.4th at 1257. Counsel followed the district court's instructions and briefed only the legal issue of eligibility for a reduction.

[1] The district court below also ruled that Count 1 RICO was not a covered offense even though underlying that conviction were crack cocaine predicate acts, a conclusion Mr. Gladney disagrees with. A2 at 10. However, for purposes of this petition, even assuming for sake of argument that his RICO conviction is non-covered, Mr. Gladney argues he is eligible for a First Step Act reduction.

The district court denied the motion. It assumed the RICO conviction was not a covered offense, and further assumed a non-covered offense sentence could not be reduced, even when grouped with a covered offense. *Gladney*, 44 F.4th at 1257-58; A2 at 10. Based on these assumptions, the district court believed Mr. Gladney lacked standing because he would still be serving a life sentence on Count 1 even if Count 3 were reduced. *Id.* Although it had stated it would only address the "purely legal issue" of eligibility for a reduction, the district court went on to suggest that even if Mr. Gladney were eligible for a reduction, it would decline to do so. *Id.* However, Mr. Gladney never had the chance to present his case for a reduction on the merits due to the district court's instruction to counsel only to address the purely legal issue of eligibility in the first instance.

IV. The Tenth Circuit Created A Circuit Split Without Explanation Or The Necessary Textual Analysis.

Mr. Gladney appealed, pointing out that the Seventh Circuit in *United States v. Hudson*, 967 F.3d 605, 610 (7th Cir. 2020) ruled that someone convicted of both covered and non-covered offenses grouped at sentencing is eligible for a reduction under the First Step Act. Should the reasoning of *Hudson* be followed, Mr. Gladney would have standing and be eligible for a sentence reduction.

The Tenth Circuit disagreed with Mr. Gladney and affirmed, concluding that its decision in *United States v. Mannie*, 971 F.3d 1145 (10th Cir. 2020) had "effectively rejected" Mr. Gladney's argument, even though *Mannie* failed to conduct any textual analysis of the question or explain any reason to disagree with the Seventh Circuit in *Hudson*. *Gladney*, 44 F.4th at 1261-62. In *Mannie*, appellant was convicted of crack cocaine and several other counts of conviction resulting in concurrent sentences. *Id.* Denying First Step Act relief, the Tenth Circuit assumed without explanation that a non-covered offense, *even when intertwined and grouped with a covered offense*, could never be reduced. *Id.* This assumption directly contradicted the statutory interpretation by the Seventh Circuit in *Hudson*, yet the Tenth Circuit in *Mannie* failed to explain the contradiction or even cite *Hudson* when reaching this conclusion. Based on its unexplained assumption, the Tenth Circuit concluded appellant lacked Article III standing because reducing the sentence on the crack offense would not reduce the concurrent life sentence on the RICO, so no net reduction in time in prison would result. *Id.*

In Mr. Gladney's case, the Tenth Circuit followed *Mannie* and its unreasoned assumption about First Step Act eligibility, holding that Mr. Gladney lacked standing for a sentence reduction. *Gladney*, 44 F.4th at 1263. Starting from the flawed premise that his RICO conviction sentence could never be reduced—even

when it was grouped and intertwined with a crack cocaine offense—it concluded that reducing the life sentence on the crack cocaine offense would have no benefit to him. This time the Tenth Circuit acknowledged its conclusion in *Mannie* had created a split with the Seventh Circuit, but it once again failed to explain or justify the split, and again failed to conduct the necessary textual analysis of the First Step Act. *Id.* at 1262 n.5.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant The Petition To Resolve The Circuit Split.

A. The Textual Analysis Of The Seventh Circuit In *Hudson* Is Correct.

This case presents a vehicle for resolving a circuit split impacting application of the First Step Act nationwide. District courts nationally struggle with the scenario of individuals seeking a sentence reduction involving "covered" and non-covered offenses. The unresolved circuit split will continue to sow confusion and divergence until this Court steps in to settle the law.

The Seventh Circuit in *Hudson* addressed head-on whether the First Step Act authorizes a sentence reduction for a person convicted of covered and non-covered offenses grouped at sentencing. There, appellant had been convicted of crack cocaine offenses "covered" by § 404 (b), and a non-covered firearm offense, which were grouped at sentencing and factually interrelated. Drawing on the Fourth

Circuit's reading of the First Step Act in *United States v. Gravatt*, 953 F.3d 258 (4th Cir. 2020), the Seventh Circuit conducted a plain reading of the text of § 404 to conclude that where a person is convicted of a "covered" offense, a district court may reduce both the covered and any non-covered offenses:

> This conclusion aligns with the text of the First Step Act, which says: a court that "imposed a sentence for a covered offense" may "impose a reduced sentence as if" the Fair Sentencing Act "were in effect at the time the covered offense was committed." § 404(b). That language does not bar a court from reducing a non-covered offense. The district court agreed that Hudson's crack offenses were covered offenses; and the text of the First Step Act requires no more for a court to consider whether it should exercise its discretion to reduce a single, aggregate sentence that includes covered and non-covered offenses.

Hudson, 967 F.3d at 610.

Following axioms of statutory interpretation, the *Hudson* panel reasoned that it would be improper to read unwritten limitations into § 404 which Congress chose not to include:

> Excluding non-covered offenses from the ambit of First Step Act consideration would, in effect, impose an extra-textual limitation on the Act's applicability. In Section 404(c), the Act sets forth two express limitations on its applicability. . . . If Congress intended the Act not to apply when a covered offense is grouped with a non-covered offense, it could have included that language. It did not. And "we decline to expand the limitations crafted by Congress." *Gravatt*, 953 F.3d at 264.

Id. at 610-11. Buttressing this plain reading of the law, the court's conclusion "comports with the manner in which sentences are imposed" under sentencing package doctrine:

> 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, 18 U.S.C. § 3584(c), and we've recognized "a criminal sentence is a package composed of several parts."

Id.

Recently, the Seventh Circuit reiterated that its ruling in *Hudson* applies to interrelated offenses grouped at sentencing, and that the First Step Act in its view does not authorize a sentence reduction on non-grouped offenses that were "distinct and disaggregated" from a covered offense. *United States v. Curtis*, 66 F.4th 690, 694 (7th Cir. 2023) (affirming district court's declining to consider imposing a reduced sentence for non-covered firearm offenses not grouped with a covered offense and that were "distinct and disaggregated" from crack cocaine sentence).

The reasoning of the Fourth and Sixth Circuits in related scenarios suggests they would follow *Hudson*'s plain reading of the First Step Act to conclude that the grouped sentence on covered and non-covered offenses may be reduced. *Gravatt*,

953 F.3d at 264 ("We decline to expand the [§ 404] limitations crafted by Congress."); *United States v. DesAnges*, No. 5:95-CR-70046-1, 2023 WL 3309876, at *10 (W.D. Va. May 8, 2023) (granting sentence reduction for covered and non-covered offenses where defendant had been sentenced to life in prison for conduct involving crack conspiracy as well as a "cruel and heinous murder"); *United States v. Mitchell*, 832 Fed. Appx. 387, 390 (6th Cir. 2020) (unpublished) (Stranch, J. concurring) (agreeing with "sister circuits" including *Gravatt* and *Hudson* in anticipation of addressing the issue); *United States v. Chambers*, No. 21-1331, 2022 WL 612805, at *7 (6th Cir. Mar. 2, 2022) (unpublished) (Clay, J., dissenting on other grounds) (*Hudson* was correctly decided and "[s]ince *Hudson*, other circuits have indicated a willingness to follow [the Seventh Circuit].").

The Seventh Circuit's reasoning in *Hudson* also anticipated the plain reading of the First Step Act by this Court in *Concepcion v. United States*, 142 S. Ct. 2389 (2022). There, the question was "whether a district court adjudicating a motion under § 404 may consider other intervening changes in law" in deciding whether to grant relief. *Id.* Reversing the First Circuit to hold that district court may consider such intervening changes, this Court concluded that nothing in the "text and structure" of § 404 contained a limitation on the information a district court may consider when reducing a sentencing. *Id.* at 2401. Rather, "[t]he only two limitations

on district courts' discretion appear in § 404(c)." *Id.* The textual analysis of *Concepcion* therefore supports the Seventh Circuit's similar textual analysis in *Hudson*. Both cases stand for the proposition that reading unwritten exceptions into the First Step Act is forbidden.

The textual analysis of the First Step Act by the Seventh Circuit in *Hudson* is correct. It is consistent with this Court's precedent and the reasoning of multiple other circuits. The First Step Act by its terms authorizes reducing the sentence of covered offenses. Where the sentence on a covered offense was grouped with the sentence on non-covered offenses, nothing in the First Step Act precludes a district court from reducing that grouped sentence.

B. The Tenth Circuit Created A Split Without Explanation.

On the other side of the split, the Tenth Circuit in *Mannie* and *Gladney* and the Second Circuit in *United States v. Young*, 998 F.3d 43, 55 (2d Cir. 2021) issued rulings splitting with the Seventh Circuit. A recent ruling by the Eleventh Circuit, *United States v. Files*, 63 F.4th 920, 931 (11th Cir. 2023), deepens the split. Yet, neither the Tenth, Second, or Eleventh Circuits conducted the necessary textual analysis of the First Step Act, nor did they defend any disagreement with *Hudson*.

In *Gladney*, the Tenth Circuit noted the split its prior ruling in *Mannie* had created:

> We note that this holding in *Mannie* created a circuit split because, approximately a month before *Mannie* was issued, the Seventh Circuit held that Section 404(b) of the First Step Act "does not bar a court from reducing [the sentence for] a non-covered offense" in cases where the non-covered offense "was grouped with [the] covered offenses for sentencing, and the resulting aggregate sentence included … sentences for both the [non-covered] and covered offenses." *United States v. Hudson*, 967 F.3d 605, 610 (7th Cir. 2020).

Gladney, 44 F.4th at 1262 n.5. But scouring the *Mannie* opinion for any textual analysis of the First Step Act as to the question presented here, or any explanation for deviating from *Hudson*, turns up nothing. *See Mannie*, 971 F.3d 1145.

In *Mannie*, appellant had been convicted of grouped "covered" and non-covered offenses under the First Step Act, and his sentences ran concurrently. 971 F.3d at 1153. Without any statutory analysis of the question, the Tenth Circuit in *Mannie* assumed that non-covered offenses could never be reduced under the First Step Act—even when part of the same grouped sentence with a covered offense. *Id.* Based on that flawed assumption, the court concluded appellant lacked Article III standing. The assumption is apparent in the question the circuit court presented in an order for supplemental briefing:

> Whether this case presents a live case or controversy because any relief that may be provided to the defendant upon *his challenge to the length of*

> *his sentence under Count 1 would be illusory since the defendant cannot challenge his concurrent sentences under Counts 2 and 6.*

Id. at 1153 n.8 (emphasis added).

Scrutiny of this framing exposes the flaw: it *assumes* non-covered offense sentences may never be reduced, even when grouped with covered offenses as part of the ultimate sentence the court imposes. Had *Mannie* instead asked the question of statutory authority, it would have had to engage in the textual analysis performed by the Seventh Circuit in *Hudson*. Although *Gladney* presented the opportunity for the Tenth Circuit to overturn the flawed precedent or at least explain itself, it declined to do so and ruled that *Mannie* would be followed. *Gladney*, 44 F.4th at 1262 n.5.

Similar to the Tenth, the Second Circuit also split with the Seventh Circuit without explanation when it issued *United States v. Young*, 998 F.3d 43, 55 (2d Cir. 2021). There, the Second Circuit ruled that even though appellant was convicted of covered and non-covered offenses which were grouped at sentencing, the sentence on the non-covered offense could not be reduced because there was no "specific modification authorization" under the First Step Act. *Id.* But just like *Mannie*, the Second Circuit failed to explain its disagreement with *Hudson*.

A panel of the Eleventh Circuit in *United States v. Files*, 63 F.4th 920, 931 (11th Cir. 2023) similarly ruled that a district court may only reduce the sentence on

a "covered offense," and that this does not include reducing the sentence on "counts that are not 'covered offenses.'" Suggesting a divergence of opinion within that circuit, a panel of the Eleventh Circuit previously reached a contrary conclusion in an unpublished ruling. *United States v. Shaw*, 829 F. App'x 906, 908 (11th Cir. 2020) (unpublished) (remanding where "at least some" of the convictions, but not all, were covered under § 404).

C. The Unsettled Split Impacts A Substantial Number Of Cases.

Like Mr. Gladney's case, the government often charges overlapping offenses arising from the a set of facts, so it is naturally a common scenario for individuals to have been convicted of crack cocaine as well as RICO, firearm, or some other offense(s) in the same case. As a result, district courts nationwide have faced the question presented by this petition. Courts will continue to struggle with this question of law until it is settled by this Court.

Numerous courts have agreed with Mr. Gladney's position and found eligibility for a sentence reduction on grouped covered and non-covered offenses. *See, e.g., United States v. Mothersill*, 421 F.Supp.3d 1313 (N.D. Fla. Nov. 13, 2019) (defendant eligible for sentence reduction not just on crack cocaine offense, but also on RICO conviction for which felony murder was a predicate offense); *United States v. Mazzini*, 487 F. Supp. 3d 1170, 1179 (D.N.M. 2020) (granting reduction in case

involving covered and non-covered RICO convictions); *United States v. Jones*, No. 3:99-CR-264-5 (VAB), 2019 WL 6907304 at *8 (D. Conn. Dec. 19, 2019) (unreported) (court has authority to grant reduction including for non-covered RICO offenses); *United States v. Powell*, No. 3:99-CR-264-18 (VAB), 2019 WL 4889112, at *7 (D. Conn. Oct. 3, 2019) (unreported) (same); *United States v. Jackson*, 515 F. Supp. 3d 708, 712 (E.D. Mich. 2021) (agreeing with *Hudson* that covered and non-covered offenses aggregated at sentencing may be reduced); *United States v. Vallejo*, No. CR 07-00154 (NLH), 2022 WL 16834598, at *4 (D.N.J. Nov. 9, 2022) (presence of non-covered offense does not bar sentence reduction); *United States v. Sumler*, No. CR 95-154-2 (BAH), 2021 WL 6134594, at *20 (D.D.C. Dec. 28, 2021) (finding non-covered offense must be interdependent with covered offense to be eligible for a reduction).

Other district courts have ruled that non-covered offenses may never be reduced along with covered offenses under the First Step Act. *See, e.g., United States v. Watkins*, No. CR 08-231, 2023 WL 2811658, at *1 (W.D. Pa. Apr. 6, 2023) (agreeing with Tenth Circuit that non-covered offense sentence may not be reduced along with covered offense); *United States v. Mendiola*, No. 3:08-CR-00119-JKS, 2020

WL 7049086, at *2 (D. Alaska Nov. 30, 2020) (suggesting a non-covered offense may not be reduced along with a covered offense).

The government itself has taken varying positions. Though opposing eligibility for Mr. Gladney, in other cases the government agreed that non-covered offenses may be reduced in some circumstances along with covered offenses. *See, e.g.*, *United States v. Williams*, 2019 WL 3251520, at *2 (D.S.C. July 19, 2019) (government conceded "if a defendant received a sentence for a crack offense that is concurrent to sentences imposed for non-crack offenses, the court may impose a new sentence that has the effect of reducing the terms of imprisonment for the non-crack offenses."); *United States v. Cyrus*, No. 4:99-221-CMC, 2019 WL 4267517, at *3 (D.S.C. Sept. 10, 2019) ("The Government further concedes the court has the discretion to impose a reduced sentence that has the effect of reducing Defendant's sentence on a non-covered offense. . . ."); *United States v. Anderson*, No. 0:04-353 (CMC), 2019 WL 4440088, at *4 (D.S.C. Sept. 17, 2019) (same); *United States v. Clarke*, 4:92-CR-4013-WS/CAS, 2019 WL 7499892, at *1 (N.D. Fla. Oct. 24, 2019) ("the government now concedes that, *if* Clarke *is* eligible for a sentence reduction on the crack offenses

(Counts 1, 2, and 3), then the court *does* have the authority to reduce Clarke's sentences on" the non-covered offenses).

District courts nationally continue to face the issue presented by this circuit split. The Supreme Court should grant the petition and settle the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: September 6, 2023.

Respectfully submitted,

s/ David G. Maxted
DAVID G. MAXTED
MAXTED LAW LLC
1543 Champa Street, Suite 400
Denver, Colorado 80202
(303) 353-1535
dave@maxtedlaw.com

Counsel for Petitioner William L. Gladney