NO:

In the Supreme Court of the United States

ERVIN THORNTON, II,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Section 404 of the First Step Act opened a pathway to sentencing relief for people convicted of crack cocaine offenses prior to August 3, 2010. The act's text limits relief to those individuals convicted of a "covered offense." And "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." In the mine run of drug distribution cases, it isn't hard to determine the statutory penalty: the indictment and verdict form will contain drug type and quantity. But what about a pre-*Apprendi* case, before drug type and quantity became elements of the substantive offense? In those cases, the indictment and verdict form may, as here, say nothing helpful about drug type and quantity. This case addresses the interplay between *Apprendi* and Section 404 of the First Step Act, an issue that has split the circuits. Succinctly stated, the question presented is: in a pre-*Apprendi* case, how does a district court decide a person's statute of conviction and thus determine § 404 eligibility?

RELATED OPINIONS

The following proceedings are related to this case within the meaning of Rule 14.1(b)(iii)

- *United States v. Thornton*, No. 23-1635, 2025 WL 2181483 (6th Cir. Aug. 1, 2025)
- *United States v. Thornton*, No. 21-1418, 2023 WL 2293101 (6th Cir. Mar. 1, 2023)
- *United States v. Thornton & Brown*, 234 F.3d 1271 (6th Cir. 2000) (table)

PARTIES TO THE PROCEEDINGS

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

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Ervin Thornton respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's decision denying en banc review is not reported but reprinted in the appendix at page one. The decision of the Sixth Circuit panel is not reported but found at *United States v. Thornton*, No. 23-1635, 2025 WL 2181483, at *1 (6th Cir. Aug. 1, 2025). It is reprinted in the appendix at page three. The district

court's written order is not published in the Federal Supplement and not found in any electronic database but included in the appendix at page 11.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the court of appeals affirming the judgment against Thornton was issued August 1, 2025 and the Sixth Circuit denied en banc review on October 13, 2025. This petition is timely filed pursuant to Supreme Court Rule 13.1.

STATEMENT OF THE CASE

1. In the 1990s, Ervin Thornton was convicted of, among other things, a conspiracy to distribute controlled substances. On Counts 1 and 8, the two charges relevant to this appeal, Thornton received sentences of life and 40 years, respectively. On those two counts, three pieces of the record compel a conclusion that crack, not cocaine base, accounted for Thornton's long sentences.

2. First, much of the evidence introduced at trial was about Thornton selling crack cocaine, even though the indictment referenced "cocaine." Second, the jury instructions allowed the jury to convict Thornton of trafficking powder *and* crack cocaine. And last but not least, the statutory penalties set forth in Thornton's presentence report (PSR) and judgment match the crack penalty provisions in effect at the time of his conviction and sentencing.

3. The sentencing record, which should be the first place a reviewing court looks in a pre-*Apprendi* case such as this, bolsters the conclusion that Thornton was convicted of and sentenced for crack cocaine.

4. In official correspondence to the probation department, the trial prosecutor summarized the government's case: "Thornton sold cocaine (crack and powder) and marijuana from a variety of locations[.]" The trial prosecutor informed probation that Thornton faced "a ten-year statutory minimum pursuant to 21 U.S.C. § 841(b) (1)(A)(ii) and (iii)[,]" the penalty provisions for powder cocaine and crack cocaine, respectively. (*Id.* at 4.)

5. Relying on facts contained in the PSR, the sentencing court made only one drug quantity finding: Thornton's conspiratorial conduct involved 1.5 kilograms of crack cocaine. The crack quantity finding made Thornton eligible for a life sentence on Count 1 (the controlled substance conspiracy).

6. By contrast, for the judge to impose a life sentence for powder cocaine, the judge would have had to find a conspiracy involving 5 kilograms or more. But here, no such finding appears in the record.

7. Because the PSR and sentencing transcript resolve the threshold § 404 eligibility question in Thornton's favor, the district court erred in concluding Thornton distributed cocaine, not crack cocaine, and from there erred in denying Thornton's request for sentencing relief.

8. In affirming the district court's decision, the Sixth Circuit panel got both fact and law wrong. On the facts, the panel saw no clear error in the district court's conclusion that Thornton distributed cocaine, not crack cocaine.

9. On the law, the panel failed to account for the sea change that was *Apprendi*. *Apprendi* swept away a world where an indictment charged, in broad strokes, a conspiracy to distribute controlled substances; trial homed in on the question of intent; and only at sentencing, with a judge at the helm, did critical factual findings on drug type and quantity get made.

10. Those pre-*Apprendi* circumstances, present at Thornton's trial and sentencing, required the panel to look beyond indictment and jury instructions to determine Thornton's offense of conviction. But the panel didn't do so, instead focusing on the indictment, judgment, and verdict form. None of those places contained the sentencing court's critical factual findings on drug type and quantity which made possible Thornton's elevated sentences.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit's decision creates a circuit split over how to reconcile *Apprendi* with Section 404 of the First Step Act.

Back in the 1990s, at Thornton's sentencing, the court made an explicit finding as to the quantity of crack cocaine attributable to Thornton—1.5 kilograms. The sentencing court made no further factual findings as to drug quantity or type (such as powder cocaine). When Thornton's sentencing occurred, the finding of 1.5

kilograms of crack cocaine elevated the maximum punishments—up to life on Count 1 (drug conspiracy) and up to 40 years on Count 8 (possession with intent to distribute cocaine). Thornton received the maximum on both counts.

Years later, Thornton sought relief under § 404 of the First Step Act of 2018. But a new district court denied relief "after finding that [Thornton's] drug counts involved only powder cocaine—offenses the [First Step] Act does not cover." *United States v. Thornton*, No. 23-1635, 2025 WL 2181483, at *1 (6th Cir. Aug. 1, 2025). The new district court's findings sidestepped the original district court's specific finding as to crack only. The new district court myopically focused on the indictment, verdict form, and judgment, all of which said powder cocaine, not cocaine base (or crack). And the panel affirmed that those three documents are the only places a district court need look to determine the offense of conviction. *Thornton*, 2025 WL 2181483 at *2. Even though Thornton currently serves two sentences based on an explicit finding of a quantity of crack cocaine, Thornton has been denied relief at every level.

To be sure, the panel noted the absence of crack cocaine in the indictment, jury instructions, verdict, and judgment. *Thornton*, 2025 WL 2181483 at *2. But Thornton's case preceded the sea change brought about by *Apprendi*. Pre-*Apprendi*, the government didn't need to put drug type or quantity into the indictment, jury instructions, or verdict form. So, it should come as no surprise that Thornton's charging and conviction documents don't say crack.

In a pre-*Apprendi* case, the only clarity comes from the fact-finding done at sentencing where, here, the district court made plain that Thornton would serve two sentences based on his possession of crack cocaine. The panel's decision relies on binding precedent in the Sixth Circuit: *United States v. Boulding*, 960 F.3d 774 (6th Cir. 2020). But *Boulding* is in tension with *United States v. Coleman*, 66 F.4th 108 (3d Cir 2023), a decision of a sibling circuit that answers the important question presented by this case.

Begin with the background needed to see the importance of the question presented. Section 404 of the First Step Act opened a pathway to sentencing relief for people convicted of crack cocaine offenses prior to August 3, 2010. The text of the First Step Act limits relief to those individuals convicted of a "covered offense." And "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." In short, eligibility under § 404 turns on the drug crime's penalty provision. And that makes sense: with § 404 Congress meant to provide relief to people serving an overly harsh penalty for crack cocaine convictions.

Here, the panel rightly pointed out that Thornton's "relevant penalty statute, 21 U.S.C. § 841(b)(1)(A)(ii)-(iii), distinguishes between cocaine powder and 'cocaine base' (crack)." 2025 WL 2181483 at *2. To determine whether Thornton's offense involved powder or crack, the panel applied *Boulding*, which says eligibility "turns on the statute of conviction alone." *Boulding*, 960 F.3d at 781. Consistent with

Boulding, the panel looked only at the "indictment, verdict, and judgment." *Thornton*, 2025 WL 2181483 at *2.

However, those documents didn't help in this case. As to Count 1, the life sentence was only lawful if it flowed from the sentencing court's finding that the conspiracy involved at least 1.5 kilograms of crack. Turning to Count 8, that one requires a bit more explanation. Count 8 charged possession with intent to distribute on a single day—January 31, 1997. The PSR indicates that on the relevant date, law enforcement seized 13 grams of crack, in addition to other narcotics, from Thornton's place of business. At the time, an offense involving 5 grams or more of crack carried a minimum of 5 years and a maximum of 40 years in prison under § 841(b)(1)-(B)(iii). Thornton's 40-year sentence for the 13 grams of crack on Count 8 is consistent with a crack conviction.

Yes, Thornton's charging document referred to "cocaine." But as just explained, his sentences are only possible if the sentencing court made explicit findings as to crack. And the absence of a citation to Thornton's penalty provisions in the conviction-related documents makes sense—the clarity at sentencing demanded by *Apprendi* and its progeny was not yet baked into the federal sentencing process when Thornton was sentenced. Point is, Thornton's pre-*Apprendi* conviction-related documents shed little light on his offenses of conviction for purposes of determining his eligibility for relief under § 404.

So, the Sixth Circuit's approach in *Boulding* which is binding in the Sixth Circuit, doesn't squarely address the important question presented by Thornton's case. *Boulding* dealt with a charging document written and filed in the post-*Apprendi* era. And post-*Apprendi,* any fact that "increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). Accordingly, *Boulding* applies to cases in which the indictment, verdict, and judgment will include drug type and quantity when either, or both, elevate the maximum possible punishment. The statute of conviction (and its penalty provision) will appear on the face of those three documents.

But what about pre-*Apprendi* cases? How does a district court go about determining the "statute of conviction"? The answer comes from *United States v. Coleman*, 66 F.4th 108 (3d Cir. 2023). In pre-*Apprendi* cases, *Coleman* directs district courts to "examine the entire record to determine the statute of conviction." *Thornton*, 2025 WL 2181483 at *3 (White, J., concurring). And crucially, *Coleman* recognizes that in a pre-*Apprendi* case it "made no sense" for the lower court "to confine its inquiry to the indictment—which had no reason to distinguish powder from crack cocaine—when determining Coleman's statute of conviction" even though Coleman's indictment recognized "the cocaine types as distinct." *Coleman*, 66 F.4th at 111.

Pairing *Coleman* with *Boulding* would harmonize the circuit split while remaining true to the text and purpose of § 404. The rule in *Boulding* provides a bright-line path marker in most cases before the district courts. That's because most drug cases in the system are post-*Apprendi*. Adding *Coleman* to the mix only helps the district courts fairly apply the plain text of § 404 to convictions and sentences imposed pre-*Apprendi*. The whole point of § 404 was to remedy sentencing disparities between powder and crack cocaine. Hence the text's focus on modifications to "statutory penalties" to define "covered offense."

Indeed, Thornton continues to serve lengthy sentences based on a district court's finding that he possessed 1.5 kilograms of crack cocaine. Had the district court found that Thornton possessed 1.5 kilograms of *powder* cocaine, his current sentences would be unlawful. But because Thornton's indictment, jury instructions, verdict form, and judgment were all prepared and entered pre-*Apprendi*, before the law required more factual specificity in those documents, he doesn't get the benefit of the relief provided by the First Step Act. Certiorari is thus appropriate to address the important question presented and provide relief to Thornton.

CONCLUSION

For the foregoing reasons, Petitioner Ervin Thornton prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,
FEDERAL PUBLIC DEFENDER

By:
/s/ Matthew A. Monahan
Matthew A. Monahan
Assistant Federal Defender
Counsel for Petitioner Ervin Thornton

Detroit, Michigan
January 12, 2026

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Ervin Thornton, pursuant to SUP. CT. R. 39.1, respectfully moves for leave to file the accompanying petition for writ of certiorari in the Supreme Court of the United States without payment of costs and to proceed *in forma pauperis*.

Petitioner was previously found financially unable to obtain counsel and the Federal Public Defender of the Eastern District of Michigan was appointed to represent Petitioner pursuant to 18 U.S.C. § 3006A. Therefore, in reliance upon RULE 39.1 and § 3006A(d)(6), Petitioner has not attached the affidavit which would otherwise be required by 28 U.S.C. § 1746.

FEDERAL PUBLIC DEFENDER

By: /s/ Matthew A. Monahan
Matthew A. Monahan
Assistant Federal Defender
Counsel for Petitioner Ervin Thornton

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CERTIFICATE OF SERVICE

I certify that, in accordance with SUP. CT. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed In Forma Pauperis, (3) Certificate of Service, and (4) Declaration Verifying Timely Filing, were served by mail within three days upon the United States Attorney's Office for the Eastern District of Michigan and the Office of Solicitor General for the United States.

FEDERAL PUBLIC DEFENDER

By: /s/ Matthew A. Monahan
Matthew A. Monahan
Assistant Federal Defender
Counsel for Petitioner Ervin Thornton

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DECLARATION VERIFYING TIMELY FILING

Petitioner Ervin Thornton, through undersigned counsel, and under SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was sent through the United States Postal Service by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing, addressed to the Clerk of the Supreme Court of the United States, on January 12, 2026, which is timely pursuant to the rules of this Court.

By: /s/ Matthew A. Monahan
Matthew A. Monahan
Assistant Federal Defender
Counsel for Petitioner Ervin Thornton