No. 21-5348

IN THE SUPREME COURT OF THE UNITED STATES

JAMES H. BATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the district court did not abuse its discretion in declining to reduce petitioner's sentence under Section 404(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. La.):

United States v. Bates, No. 06-cr-243 (Apr. 23, 2020)

United States Court of Appeals (5th Cir.):

United States v. Bates, No. 07-31153 (May 13, 2009)

United States v. Bates, No. 09-30038 (Nov. 23, 2010)

United States v. Bates, No. 11-30220 (Aug. 31, 2011)

In re Bates, No. 16-31110 (Dec. 16, 2016)

United States v. Bates, No. 20-30293 (Apr. 6, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 844 Fed. Appx. 748. The order of the district court is not published in the Federal Supplement but is available at 2020 WL 1954016.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2021. The petition for a writ of certiorari was filed on August 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2007, following a guilty plea in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of possessing with intent to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006). Judgment 1. The district court sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals dismissed petitioner's appeal as frivolous. 324 Fed. Appx. 439, 439-440.

In 2008, the district court sua sponte declined to reduce petitioner's sentence under 18 U.S.C. 3582(c)(2), and the court of appeals dismissed petitioner's appeal as frivolous. 402 Fed. Appx. 929, 930. In 2011, the district court denied petitioner's motion to set aside his conviction under 28 U.S.C. 2255; both the district court and the court of appeals declined to issue a certificate of appealability. 2011 WL 290381, at *5; 11-30220 C.A. Order 1 (Aug. 31, 2011). In 2016, the court of appeals declined to authorize petitioner to file a second or successive Section 2255 motion. 16-31110 C.A. Order 1 (Dec. 16, 2016). In 2017, the district court denied petitioner's motion to reduce his sentence under Section 3582(c)(2), 2017 WL 10087271, at *1, and petitioner did not appeal.

After the enactment of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a sentence reduction under Section 404 of that Act, 132 Stat. 5222. The

district court denied petitioner's motion, 2020 WL 1954016, at *1, and the court of appeals affirmed, Pet. App. 1-2.

1. Petitioner was arrested in 2006 after agreeing to sell 4.5 ounces of crack cocaine to a confidential informant working for federal law enforcement. Presentence Investigation Report (PSR) ¶ 6. Petitioner told the agents who arrested him that he had obtained the crack cocaine earlier that day, and he led them to the location where he had buried it in a wooded area behind his home. PSR ¶ 7. Agents recovered 112.7 grams of crack cocaine, along with a digital scale and a shovel, from petitioner's hiding spot. Ibid.; see PSR ¶ 9. Petitioner confessed again in a recorded interview at a local police station. PSR ¶ 8.

A grand jury in the Eastern District of Louisiana charged petitioner with possessing with intent to distribute 50 or more grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006). Indictment 1-2. The government filed a notice under 21 U.S.C. 851 that petitioner was subject to an enhanced sentence of "not * * * less than 20 years and not more than life imprisonment" under Section 841(b)(1)(A) due to a prior federal conviction for distributing crack cocaine. 21 U.S.C. 841(b)(1)(A) (2006); see D. Ct. Doc. 24, at 1-2 (Nov. 28, 2006).

In 2007, petitioner pleaded guilty to the indictment. Judgment 1. The Probation Office determined that he qualified as a career offender under the Sentencing Guidelines, and although the correct advisory guidelines range would have been 262 to 327

months, Pet. 3, the PSR erroneously calculated a lower range of 240 months -- the statutory minimum sentence. PSR ¶¶ 24, 116; see Sentencing Guidelines §§ 4B1.1, 5G1.1(b) (2006). Petitioner did not object to that calculation, and the district court adopted it at sentencing. Sentencing Tr. 2-3. The court then sentenced petitioner to 240 months of imprisonment, to be followed by ten years of supervised release. Id. at 3; see Judgment 2-3.

Petitioner appealed. After his court-appointed counsel filed an Anders brief, the court of appeals dismissed the appeal as frivolous. 324 Fed. Appx. at 439-440; see Anders v. California, 386 U.S. 738, 744-745 (1967).

2. In 2007, after petitioner's sentencing, the U.S. Sentencing Commission amended the Sentencing Guidelines to reduce the base offense level for certain drug offenses involving crack cocaine. Sentencing Guidelines App. C Supp., Amend. 706 (Nov. 1, 2007). The Commission later made those changes retroactive. See id. Amend. 713 (Mar. 3, 2008). Under 18 U.S.C. 3582(c)(2), a district court may modify a previously imposed term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." In 2009, the district court in petitioner's case sua sponte considered whether to reduce his sentence under Section 3582(c)(2) in light of Amendment 706, and declined to do so. See 12/10/08 Order 1. The court's order stated that petitioner was ineligible for relief "as a career

offender" who had received a "restricted sentence" (the statutory minimum). Ibid. Petitioner appealed. After his court-appointed counsel filed an Anders brief, the court of appeals dismissed the appeal. 402 Fed. Appx. at 930.

In 2010, petitioner filed a pro se motion seeking to set aside his conviction under 28 U.S.C. 2255, on the theory that he had received ineffective assistance of counsel at sentencing and during his direct appeal. D. Ct. Doc. 61, at 1, 6-7 (July 30, 2010). In 2011, the district court denied his Section 2255 motion and declined to issue a certificate of appealability. 2011 WL 290381, at *1-*5; see 28 U.S.C. 2253(c)(2)(B). The court of appeals also declined to issue a certificate of appealability. 11-30220 C.A. Order 1.

3. In 2016, petitioner filed motions to reduce his sentence under Section 3582(c)(1)(A) and (2). D. Ct. Docs. 86, 87 (Mar. 14, 2016). With respect to Section 3582(c)(2), petitioner argued for a sentence reduction in light of Amendments 750 and 782 to the Sentencing Guidelines. See D. Ct. Doc. 86, at 2.

In Amendment 750, the Sentencing Commission altered the drug-quantity table in the Guidelines in response to the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which had increased the amount of crack cocaine necessary to trigger certain enhanced statutory penalties. Sentencing Guidelines App. C Supp., Amend. 750 (Nov. 1, 2011); see generally Terry v. United States, 141 S. Ct. 1858, 1861-1862 (2021). As relevant here, the Fair

Sentencing Act increased the amount of crack cocaine necessary to trigger the enhanced penalties in Section 841(b)(1)(A) -- the provision under which petitioner was sentenced -- from 50 grams to 280 grams. § 2(a)(1), 124 Stat. 2372. Those statutory changes applied only to defendants, unlike petitioner, who were sentenced after August 3, 2010 -- the effective date of the Fair Sentencing Act. Dorsey v. United States, 567 U.S. 260, 273 (2012). In Amendment 782, the Commission made additional changes to the drug-quantity table for crack-cocaine offenses. Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The Commission made both of those amendments retroactive in pertinent part. Sentencing Guidelines § 1B1.10(a)(1) and (d).

The district court denied petitioner's motions. 2017 WL 10087271, at *1. The court explained that any retroactive changes to the Guidelines were of no consequence to petitioner's sentence because he "was sentenced to the mandatory minimum sentence of 240 months required under the then-effective version of section 841(b)." Ibid. Petitioner did not appeal.

In 2016, petitioner also filed a second motion under Section 2255. D. Ct. Doc. 88, at 1 (June 23, 2016). The district court transferred the motion to the court of appeals, which declined to authorize petitioner to file a second or successive Section 2255 motion. 16-31110 C.A. Order 1.

4. In 2019, petitioner filed a motion for a reduction of his sentence under Section 404 of the First Step Act. The district

court denied the motion, 2020 WL 1954016, at *1, and the court of appeals affirmed, Pet. App. 1-2.

a. Congress enacted Section 404 of the First Step Act in 2018 to create a mechanism for certain defendants sentenced for crack-cocaine offenses before the effective date of the Fair Sentencing Act to seek sentence reductions based on that Act's changes. The mechanism is available only if the defendant was sentenced for a "covered offense," which Section 404(a) of the First Step Act 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 of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." 132 Stat. 5222; see Terry, 141 S. Ct. at 1862.

Under Section 404(b), a district 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 were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222 (citation omitted). Section 404(c) states that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section," 132 Stat. 5222.

b. The Eastern District of Louisiana has established a screening committee to identify defendants who are potentially eligible for a reduction of sentence under Section 404 of the First

Step Act. See E.D. La. General Order 1-2 (Jan. 29, 2019). The screening committee identified petitioner as potentially eligible, and petitioner requested a reduction of his sentence to 188 months or time served. D. Ct. Doc. 108, at 6 (Oct. 22, 2019); see D. Ct. Doc. No. 103, at 3 (Sept. 10, 2019).

The government agreed that petitioner was sentenced for a "covered offense" as defined in Section 404(a) of the First Step Act but urged the district court to exercise its discretion to decline to grant any reduction. D. Ct. Doc. 103, at 7. The government stated that "[i]n considering whether and to what extent to reduce [petitioner's] sentence, [the court] should consider the factors under 18 U.S.C. § 3553(a) along with [petitioner's] positive and negative post-offense conduct." Ibid. The government also observed that petitioner's sentence of 240 months was still above the bottom of the Guidelines range that petitioner would have faced at the time of his sentencing, had the Fair Sentencing Act been in effect (and had his Guidelines range been calculated correctly). See id. at 2-3, 7; p. 4, supra.

The district court, in a seven-page written order, declined to reduce petitioner's sentence. 2020 WL 1954016, at *1. The court acknowledged that petitioner was eligible for a reduction, but determined that a reduction in this case would not "be a sound use of [its] discretion." Ibid. In making that determination, the court considered the "factors in Section 3553(a)" and found that they "do not support a reduced sentence." Id. at *2. In

particular, the court emphasized that petitioner "is a career offender" with "an extensive criminal history, ranging from burglary, to felon in possession of a firearm, to distribution of drugs"; that he has "numerous cocaine-related convictions"; and that he was on supervised release for a prior crack offense at the time of this offense. Ibid. (footnotes omitted).

The district court also explained that while it was not obligated under circuit precedent to "consider a defendant's post-conviction conduct," 2020 WL 1954016, at *2 (citing United States v. Jackson, 945 F.3d 315, 321 (5th Cir. 2019), cert. denied, 140 S. Ct. 2699 (2020)), "[i]n any event," petitioner's arguments focusing on his disciplinary record and educational achievements in prison must "be weighed against the other circumstances of [petitioner] and his offense conduct," ibid. "Considering that here," the court determined that petitioner's "conduct does not warrant a sentencing reduction." Ibid.

c. The court of appeals affirmed in an unpublished, per curiam decision. Pet. App. 1-2. Petitioner contended, inter alia, that the district court "failed to * * * properly consider all the statutory sentencing factors" and failed to give a "sufficient explanation of its reasons for denying his motion." Ibid. Citing circuit precedent, the court of appeals rejected those contentions. Id. at 2 (citing United States v. Batiste, 980 F.3d 466, 477-479 (5th Cir. 2020), and United States v. Hegwood, 934 F.3d 414, 418 (5th Cir.), cert. denied, 140 S. Ct. 285 (2019)).

And it found that, in this case, petitioner "has not shown that the district court abused its discretion." Ibid.

ARGUMENT

Petitioner contends (Pet. 16-19) that, in exercising its discretion to decline to reduce his sentence under Section 404(b) of the First Step Act, the district court failed to give full consideration to the sentencing factors in 18 U.S.C. 3553(a) and did not provide an adequate explanation of its reasoning. Those contentions do not warrant this Court's review. The district court expressly considered the Section 3553(a) factors and explained its reasoning in a seven-page written order. The unpublished decision below, which found no abuse of discretion in the district court's order, is correct and does not conflict with any decision of this Court or another court of appeals. And no sound reason exists to hold the petition in this case pending the Court's decision in Concepcion v. United States, No. 20-1650. The petition for a writ of certiorari should therefore be denied.*

1. a. "'A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment' and may not be modified by a district court except in limited circumstances." Dillon v. United States, 560 U.S. 817, 824 (2010) (quoting 18

* The same questions are presented in the pending petition for a writ of certiorari in Carter v. United States, No. 21-5047 (filed July 6, 2021). The first question is presented in several pending petitions, including Houston v. United States, No. 20-1479 (filed Apr. 19, 2021), and Moyhernandez v. United States, No. 21-6009 (filed Oct. 15, 2021).

U.S.C. 3582(b)) (brackets omitted); see 18 U.S.C. 3582(c). Section 3582(c)(1)(B) creates an exception to that general rule of finality by authorizing a court to modify a previously imposed term of imprisonment "to the extent otherwise expressly permitted by statute." 18 U.S.C. 3582(c)(1)(B). Section 404 of the First Step Act, in turn, expressly permits a court that previously imposed a sentence for a "covered offense," as defined in the Act, 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." First Step Act § 404(b), 132 Stat. 5222 (citation omitted). Section 404 does not expressly permit the court to make any other changes to the previously imposed sentence, and it does not require a reduced sentence in any case. To the contrary, Section 404(b) states that the court "may" impose a reduced sentence for a covered offense, and Section 404(c) states that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." 132 Stat. 5222.

As the court of appeals correctly recognized, Pet. App. 2, the district court did not abuse its discretion in denying a Section 404 sentence reduction here. The district court acknowledged that petitioner has a "covered offense" as defined in Section 404(a) because he was previously sentenced for possessing with intent to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006); his offense was committed before August 3, 2010; and Section 2 of the Fair

Sentencing Act modified the statutory penalties for that offense by raising the amount of crack cocaine necessary to trigger Section 841(b)(1)(A) from 50 grams to 280 grams. See 2020 WL 1954016, at *2; see also First Step Act § 404(a), 132 Stat. 5222; Terry v. United States, 141 S. Ct. 1858, 1862-1863 (2021). Having determined that petitioner has a covered offense, the court then considered whether to exercise its discretion under Section 404(b) to reduce his sentence and declined to do so. 2020 WL 1954016, at *2.

The district court considered the "totality of the facts" in reaching that decision, focusing especially on petitioner's "'history and characteristics'" as a career offender with a lengthy criminal record, including "numerous cocaine-related convictions." 2020 WL 1954016, at *2 (quoting 18 U.S.C. 3553(a)(1)). Indeed, the court observed that petitioner committed the current offense "while on supervised release for distributing crack cocaine." Ibid. In light of that criminal history, the court determined that his "current sentence is needed 'to protect the public from further crimes.'" Ibid. (quoting 18 U.S.C. 3553(a)(2)(C)). And although it indicated that it was not required to do so, ibid. (citing United States v. Jackson, 945 F.3d 315, 321 (5th Cir. 2019), cert. denied, 140 S. Ct. 2699 (2020)), the court also expressly considered the evidence petitioner had submitted about his post-sentencing conduct, including "completing various courses in prison" and earning a GED. Ibid. But the court "weighed" that

evidence "against the other circumstances" and the "offense conduct" and ultimately determined that petitioner's case "does not warrant a sentencing reduction" under Section 404(b). Ibid.

b. Petitioner contends (Pet. 16-17) that the district court failed to adhere to this Court's precedents requiring a sentencing court to give "full" and "individualized" consideration to the factors set forth in Section 3553(a). Cf. Pet. 7-8 (calling the district court's order "perfunctory" and criticizing the court for using similar language in other orders). Those precedents addressed the role of the Section 3553(a) factors in the context of a plenary sentencing proceeding, rather than in the context of considering a discretionary sentence reduction under Section 404. See Gall v. United States, 552 U.S. 38, 43-44 (2007); Koon v. United States, 518 U.S. 81, 88-91 (1996); see also 18 U.S.C. 3553(a) (specifying factors "to be considered in imposing a sentence") (capitalization and emphasis omitted). And whether required to do so or not, the court did give individualized consideration to the Section 3553(a) factors before declining to grant petitioner's motion. See pp. 8-9, supra. Petitioner's dissatisfaction with the court's weighing of those factors in this particular case does not warrant further review. See Sup. Ct. R. 10.

Petitioner also contends (Pet. 17-18) that the district court failed to adequately explain its exercise of discretion. But the court issued a seven-page written decision discussing petitioner's

eligibility under Section 404(a) and the reasons the court found especially persuasive for declining to reduce his sentence under Section 404(b). Petitioner does not show that more was required under the circumstances. Even at a plenary sentencing proceeding, a district court is not required to pen a lengthy exegesis or to mechanically recite and reject each argument put forward by a defendant. See Rita v. United States, 551 U.S. 338, 357, 359 (2007) (explaining that "[s]ometimes the circumstances will call for a brief explanation," and that a judge need not "write more extensively" in those cases). And a court's obligations in a sentence-reduction proceeding like this one are, if anything, less exacting. See Chavez-Meza v. United States, 138 S. Ct. 1959, 1963-1968 (2018). Here, the court considered "the totality of the facts," including petitioner's arguments about his post-conviction conduct, 2020 WL 1954016, at *2, and reasonably explained why it was declining to grant any reduction. No more was required.

2. Petitioner asserts (Pet. 11-13) that the decision below implicates a division of authority within the courts of appeals on whether district courts are required or merely permitted to consider the Section 3553(a) factors when evaluating whether to grant a Section 404(b) sentence-reduction motion. That issue does not warrant the Court's review for the reasons stated in the government's brief in opposition in Houston v. United States, No. 20-1479 (filed July 21, 2021). See Br. in Opp. at 12-14, Houston,

supra.[1] And, in any event, the issue is not actually implicated here. As already explained, the district court expressly considered the Section 3553(a) factors, as both parties requested that it do. See pp. 8-9, supra. The process and result in this case would therefore have been no different in a circuit in which district courts are required to consider the Section 3553(a) factors in the context of a Section 404 motion. The district court already did what those circuits would have required it to do, and the Fifth Circuit reviewed the record and found no abuse of discretion. Pet. App. 2.

Furthermore, as petitioner acknowledges (Pet. 12 n.7), the Fifth Circuit has previously declined to resolve whether a district court is required to consider the Section 3553(a) factors in the context of a Section 404 motion. See United States v. Whitehead, 986 F.3d 547, 551 n.4 (2021) ("While consideration of the pertinent § 3553(a) factors certainly seems appropriate in the [First Step Act] resentencing context, we have left open whether district courts must undertake the analysis.") (emphasis omitted); see also Jackson, 945 F.3d at 322 n.8 (reserving the question). And contrary to petitioner's suggestion (Pet. 12), the court of appeals' decision in this case did not itself resolve that issue. The decision did not directly address the issue -- nor did it have reason to, because the issue is academic in this case, due to the

[1] We have served petitioner with a copy of the government's brief in opposition in Houston.

district court's actual consideration of the Section 3553(a) factors. In any event, the decision below is unpublished and would not bind a future panel.

3. Petitioner also asserts (Pet. 13) that the decision below conflicts with decisions of the Fourth and Sixth Circuits regarding the "degree of explanation required for Section 404 rulings." That contention lacks merit. Petitioner fails to demonstrate any conflict on that issue, let alone a conflict that would warrant this Court's review. Even setting aside that the unpublished decision below did not purport to establish any general rule about the degree of explanation a district court must give, the Fourth and Sixth Circuit decisions that petitioner cites do not show that those circuits would have required elaboration beyond the seven-page written order here.

In United States v. McDonald, 986 F.3d 402 (2021), the Fourth Circuit considered three appeals by defendants who had moved for reductions of their respective sentences under Section 404. Id. at 412. All three defendants had, "despite lengthy prison terms, * * * utilized the resources and programming they could access in prison to work toward rehabilitation." Ibid. In each case, the district court used a pre-printed standard form, in which the district court "checked the box for 'granted'" and "reduced [the defendant's] term of supervised release by * * * one year." Id. at 403-404. But, in each case, the district court declined to alter the defendant's term of imprisonment, without "provid[ing]

any reasoning for its decision." Id. at 404 (emphasis added); see also id. at 412. In those circumstances, the Fourth Circuit took the view that it could not "provide a meaningful review of the district court's order." Ibid. It accordingly "vacate[d] the orders of the district court and remand[ed] [the] cases with instructions to provide explanations for the re-sentencings." Ibid.

In United States v. Williams, 972 F.3d 815 (6th Cir. 2020), a district court declined, in its discretion, to reduce a defendant's term of imprisonment under Section 404. Id. at 816. In its order, the court had expressly "consider[ed] the 18 U.S.C. § 3553(a) sentencing factors" and had determined that the defendant's within-Guidelines sentence "'remain[ed] sufficient and necessary to protect the public from future crimes of the defendant, to provide just punishment, and to provide deterrence.'" Ibid. But the district court had not "address[ed] [the defendant's] argument about his post-conviction conduct" -- i.e., that "his good conduct in prison warranted a reduced sentence." Ibid. On appeal, a divided panel of the Sixth Circuit recognized that "[t]he district court need not respond to every sentencing argument," id. at 817, but vacated the district court's order and "remand[ed] the case for further consideration of [the defendant's] good-conduct argument," noting that the district court had failed to "mention[] [his] argument regarding his post-

conviction conduct" and the record did not otherwise shed light on the court's reasoning on that argument. Ibid.

In contrast to the orders at issue in McDonald and Williams, the district court in this case expressly acknowledged and discussed petitioner's arguments about his purported rehabilitation in prison, including by citation to the portion of petitioner's brief advancing those arguments. See 2020 WL 1954016, at *2 & n.22 (noting that petitioner "points to his completing various courses in prison -- including earning his GED -- and having 'the continued support of his family' as justification for a reduced sentence"). The court then explained that "these characteristics would need to be weighed against the other circumstances," including petitioner's "offense conduct." Ibid. After considering that whole picture, the court determined that petitioner's post-conviction conduct "does not warrant a sentencing reduction." Ibid. Nothing in McDonald or Williams suggests that the Fourth or Sixth Circuit, respectively, would have remanded for additional explanation here.

4. On September 30, 2021, after the petition for a writ of certiorari was filed in this matter, this Court granted certiorari in Concepcion v. United States, No. 20-1650. The petition in that case framed the question presented as "[w]hether, when deciding if it should 'impose a reduced sentence' on an individual under Section 404(b) of the First Step Act of 2018, 21 U.S.C. § 841 note, a district court must or may consider intervening legal and factual

developments." Pet. at I, Concepcion, supra (No. 20-1650) (Concepcion Pet.). Resolution of that question would not affect the disposition of this case, and the Court should accordingly deny the petition here without awaiting the decision in Concepcion.

To the extent that the Court's decision in Concepcion might bear on either of the questions presented here, it would make no difference to the result. As discussed above, the district court considered the Section 3553(a) factors, and its explanation of its decision was more than adequate. And to the extent that petitioner's conduct in prison since his original sentence might be considered an "intervening * * * factual development[]" (Concepcion Pet. I) implicated by Concepcion, the district court here expressly considered it irrespective of whether the court was required to do so, and found it insufficient, "weighed against the other circumstances," to justify a favorable exercise of the court's discretion, 2020 WL 1954016, at *2. No further review of the court's discretionary determination is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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