

No. 21-5634

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL D. FORBES, PETITIONER

v.

UNITED STATES OF AMERICA

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

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 12-14) that the court of appeals erred in affirming the denial of a discretionary sentence reduction under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. The petition for a writ of certiorari should be denied.

1. In July 2004, following a jury trial, petitioner was convicted of, inter alia, possessing with the intent to distribute and distributing 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1); discharging a firearm in connection with a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(iii); and conspiring to distribute 50 grams or more

of crack cocaine, in violation of 21 U.S.C. 841 (2000) and 21 U.S.C. 846. See Pet. App. 2a, 8a; 10/29/04 Judgment 1. The district court sentenced petitioner to 600 months of imprisonment, to be followed by five years of supervised release. 10/29/04 Judgment 2-3. On direct appeal, the court of appeals vacated petitioner's sentence in light of United States v. Booker, 543 U.S. 220 (2005). 164 Fed. Appx. 251, 253-254. The district court imposed the same sentence on remand. 4/19/06 Judgment 2-3. The court of appeals affirmed, 258 Fed. Appx. 417, and this Court denied a petition for a writ of certiorari, 552 U.S. 1267.

In 2019, petitioner moved for a sentence reduction pursuant to Section 404 of the First Step Act, 132 Stat. 5222. The district court determined that petitioner was statutorily eligible for such a reduction but exercised its discretion to decline to reduce his sentence. Pet. App. 7a-19a. After considering "the [18 U.S.C.] 3553(a) sentencing factors" and petitioner's "relevant postsentencing conduct," the court concluded that "the goals of sentencing require that [petitioner's] 600-month sentence remain intact." Id. at 13a-14a. The court explained that "the driving force" behind petitioner's original sentence "was not the quantity of drugs trafficked," but instead petitioner's "violent nature, his incorrigible criminality, and the danger he poses to the public." Id. at 14a; see id. at 14a-16a. The court found that "[t]hese same concerns remain today," id. at 16a, noting that petitioner has been disciplined by prison officials multiple times

in the last several years, see id. at 16a-17a, and that petitioner has given "no indication of remorse" or "any sympathy for the many he has hurt," id. at 17a-18a. In light of petitioner's "serious criminal conduct," "acts of extreme violence and cruelty," lack of "remorse," and "pattern of recidivism" while in prison, the court found that petitioner "continues to present a danger to the public" and that his current sentence remains appropriate. Id. at 18a.

The court of appeals affirmed in an unpublished decision. Pet. App. 1a-4a. It determined that the district court had "permissibly declined to exercise its discretion to reduce [petitioner's] sentence" after discussing "numerous relevant factors" under Section 3553(a) -- including that petitioner "began the criminal enterprise for which he is currently incarcerated mere months after he was paroled for a manslaughter conviction," "engaged in numerous violent acts," and "refused to express remorse." Id. at 4a.

2. The sole question presented in the petition is whether a court of appeals should review the discretionary denial of a sentence reduction under Section 404(b) of the First Step Act for reasonableness. Pet. i. The court of appeals, however, expressly stated that it "need not decide" the applicable standard of review because it found "no error in the District Court's analysis." Pet. App. 2a n.1.

In the body of the petition, petitioner additionally argues (Pet. 12-14) that this Court should grant review to consider

whether district courts must -- as opposed to may or should -- expressly consider the Section 3553(a) factors at a sentence-reduction proceeding under Section 404(b). That issue is outside the scope of the question presented in the petition, and, in any event, it would 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 (July 21, 2021). See Br. in Opp. at 12-14, Houston, supra (No. 20-1479).<sup>1</sup>

Moreover, the issue is not actually implicated here. By petitioner's accounting (Pet. 14), the Third Circuit already requires district courts to consider the Section 3553(a) factors at Section 404(b) sentence-reduction proceedings; the district court in fact considered those factors here, Pet. App. 16a-18a; and the court of appeals found "no error in the District Court's discretionary determination that a sentence reduction was not warranted," id. at 4a. Petitioner does not explain how addressing any division of authority on whether courts may or must consider the Section 3553(a) factors in this context would make any difference to the process or result in this case.

3. 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

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<sup>1</sup> We have served petitioner with a copy of the government's brief in opposition in Houston.

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.

As discussed above, the district court here considered the Section 3553(a) factors, providing detailed reasons for leaving petitioner's current sentence in place. 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 court expressly considered that conduct and found that it weighed against any reduction of petitioner's sentence. See Pet. App. 16a-17a (listing seven disciplinary infractions, including for fighting, "[i]n the past four years alone"). No further review of the court's discretionary determination is warranted.<sup>2</sup>

Respectfully submitted.

ELZABETH B. PRELOGAR  
Solicitor General

NOVEMBER 2021

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<sup>2</sup> The government waives any further response to the petition until so ordered by the Court.