

No. 21-6009

IN THE SUPREME COURT OF THE UNITED STATES

JOSE MOYHERNANDEZ, AKA YINDO, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES

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Petitioner contends (Pet. 17-31) that the court of appeals erred in holding that a district court is not required to consider the factors set forth in 18 U.S.C. 3553(a) before denying a defendant's motion for a discretionary reduction of sentence under Section 404(b) of the First Step Act of 2018, Pub. L. No. 111-220, 132 Stat. 5222. This Court has granted review in Concepcion v. United States, No. 20-1650 (Sept. 30, 2021), to address a related question -- namely, whether a district court considering a Section 404(b) motion is required to consider any intervening legal and factual developments since the defendant's original sentence, other than the amendments made by Sections 2 and 3 of the Fair

Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 -- and the decision in Concepcion could conceivably bear on the question presented here. And while a petition presenting the Section 3553(a) question should nevertheless be denied if the record makes clear that the district court considered the Section 3553(a) factors in any event, see, e.g., Br. in Opp. at 18-19, Bates v. United States, No. 21-5348 (Nov. 3, 2021), the record here lacks sufficient clarity on that point. The petition should therefore be held pending the decision in Concepcion and then disposed of as appropriate in light of that decision.*

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

NOVEMBER 2021

* The government waives any further response to the petition unless this Court requests otherwise.