

No. 21-6190

IN THE SUPREME COURT OF THE UNITED STATES

JOE LEWIS FINLEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 7-11) 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 2003, following a guilty plea, 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)(iii) (2000) and 18 U.S.C. 2. Judgment 1. The district court sentenced petitioner to 327 months of imprisonment,

to be followed by five months of supervised release. C.A. E.R. 9. Petitioner did not appeal.

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. B1. In a one-page order, the court stated that, "after considering the 18 U.S.C. § 3553(a) sentencing factors, including [petitioner's] criminal history, public safety issues, offense conduct or relevant conduct, and the post-sentencing conduct, the [c]ourt decline[d] to reduce [petitioner's] current term of imprisonment." Ibid. (emphasis omitted).

The court of appeals granted the government's unopposed motion for summary affirmance in a per curiam order. Pet. App. A1-A2. Petitioner's sole claim on appeal was that the district court had "fail[ed] to adequately explain its reasons for denying" his Section 404 motion, but petitioner acknowledged -- and the court of appeals agreed -- that such a claim was foreclosed by circuit precedent. Id. at A2 (citing United States v. Baptiste, 980 F.3d 466, 479 (5th Cir. 2020)); see Pet. C.A. Br. 6-7.

2. Petitioner contends (Pet. 7) that the district court's denial of his motion for a discretionary sentence reduction under Section 404 of the First Step Act is "subject to review for

substantive reasonableness," and that the court of appeals erred insofar as it did not conduct such a review. See Pet. 7-11. Petitioner's sole claim of error on appeal, however, was that the district court did not adequately explain its decision, see Pet. C.A Br. 6, and the court of appeals did not address any argument in this case about substantive reasonableness. This Court's "traditional rule * * * precludes a grant of certiorari" on a question that "'was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted). That traditional rule precludes a grant of certiorari here.

In any event, the question presented does not warrant further review for the reasons stated in the government's brief in opposition in Williams v. United States, 142 S. Ct. 397 (2021). See Br. in Opp. at 9-17, Williams, supra (No. 20-8316) (Williams Br. in Opp.).¹ The defendant in Williams relied on the same asserted division of authority that petitioner invokes here, including the same three decisions that petitioner describes as reflecting his preferred "reasonableness review." Pet. 9-10 (citing United States v. Collington, 995 F.3d 347 (4th Cir. 2021); United States v. White, 984 F.3d 76 (D.C. Cir. 2020); and United States v. Boulding, 960 F.3d 774 (6th Cir. 2020)); see Williams Br. in Opp. 14-15 (discussing Collington, White, and Boulding).

¹ We have served petitioner with a copy of the government's brief in opposition in Williams. A similar issue is presented in Forbes v. United States, No. 21-5634 (filed Sept. 1, 2021).

As the government explained in its brief in opposition in Williams, however, none of those decisions establishes that a district court's discretionary denial of a Section 404 sentence reduction would be reviewed for substantive reasonableness in those circuits, and thus none suggests that a case like this one would come out any differently in any other court of appeals. See Williams Br. in Opp. 13-15. And even with respect to review of a district court's grant of a Section 404 sentence reduction, any difference in approach among the courts of appeals appears to be largely semantic. See id. at 15-17.

3. On September 30, 2021, this Court granted certiorari in Concepcion v. United States, No. 20-1650 (oral argument scheduled for Jan. 19, 2022), to address whether a district court considering a Section 404 motion is required to consider any intervening legal and factual developments since the offender'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. The petition in this case was filed on November 2, 2021. Petitioner does not assert that this case implicates the question at issue in Concepcion, and it does not. It is therefore unnecessary to hold the petition here pending the Court's decision in Concepcion.

In particular, petitioner does not contend that the district court in this case should have considered any additional intervening legal or factual developments, unrelated to the Fair

Sentencing Act, beyond those the court already expressly considered. See Pet. App. B1 (district court's statement that it had considered "the post-sentencing conduct"). Petitioner instead challenges only the standard of review applied by the court of appeals. Accordingly, the Court's resolution of the question presented in Concepcion would not affect the result here, and the Court should deny the petition here without awaiting the decision in Concepcion.²

Respectfully submitted.

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JANUARY 2022

² The government waives any further response to the petition unless this Court requests otherwise.