

No. 21-6426

IN THE SUPREME COURT OF THE UNITED STATES

LEE DALE WHITE, 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. 9-13) that the court of appeals erred in affirming the denial of his motion for 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 February 2010, following a guilty plea, petitioner was convicted of conspiring to distribute and to possess with intent to distribute 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 846. C.A. Record on Appeal (ROA) 16, 24. The district court sentenced petitioner to 120

months of imprisonment, to be followed by five years of supervised release. Id. at 25-26. Petitioner did not appeal.

On February 1, 2017, petitioner completed his term of imprisonment and began serving his term of supervised release. Pet. App. B1. On November 30, 2017, petitioner was arrested by state police for unlawfully possessing cocaine, marijuana, and firearms -- offenses that also violated the terms of his federal supervised release. C.A. ROA 113. On September 9, 2019, after petitioner admitted the violations, the district court revoked his supervised release and imposed a term of imprisonment of 24 months. Id. at 43-44; see Pet. App. B1-B2.

In 2020, petitioner moved for a discretionary sentence reduction under Section 404 of the First Step Act. Pet. App. B2. The district court denied the motion after finding petitioner ineligible. Id. at D1. Petitioner appealed, and the government moved for a limited remand to allow the district court to reconsider. Gov't C.A. Remand Mot. 2-4. The court of appeals granted the government's motion. Pet. App. C1.

On remand, the district court found petitioner to be eligible under Section 404 but declined to grant any sentence reduction. Pet. App. B1-B5. The court stated that it "would impose the same 24-month revocation sentence" even if it "re-sentenced [petitioner] under the First Step Act," given "the seriousness" of petitioner's violation. Id. at B4. The court also reasoned that

petitioner's 24-month term of imprisonment is below his advisory Sentencing Guidelines range under current law and also below the statutory maximum term of imprisonment that would have applied at his revocation proceedings had Section 2 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, been in effect at the time of his initial offense. Pet. App. B4.

Petitioner again appealed, and the court of appeals granted the government's motion for summary affirmance in a per curiam order. Pet. App. A1-A2. Petitioner's only claim on appeal was that his 24-month term of imprisonment was substantively unreasonable. Pet. C.A. Supp. Br. 2, 9-11. The court observed that, as petitioner had acknowledged, his claim was "foreclosed by [the court's] caselaw." Pet. App. A2 (citing United States v. Batiste, 980 F.3d 466, 479-480 (5th Cir. 2020)).

2. Petitioner contends (Pet. 9) 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. 9-13. That question 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 (Pet. 11) as reflecting his preferred “reasonableness review.” Compare Pet. 11-12, with Williams Br. in Opp. 14-15. 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 terminological. See id. at 15-17. Finally, the atypical supervised-release posture of this case may complicate this Court’s review.

3. On September 30, 2021, this Court granted certiorari in Concepcion v. United States, No. 20-1650 (argued Jan. 19, 2022), to address whether a district court considering a Section 404 motion is required to consider any intervening legal or factual

¹ We have served petitioner with a copy of the government’s brief in opposition in Williams. The same question is presented in Finley v. United States, No. 21-6190 (filed Nov. 2, 2021), and this Court recently denied review of a similar issue in Forbes v. United States, No. 21-5634 (Jan. 10, 2022).

developments since the offender's original sentence, other than the amendments made by Sections 2 and 3 of the Fair Sentencing Act. The petition in this case was filed on November 22, 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 that the court already expressly considered. See Pet. App. B4 (district court's order on remand addressing petitioner's post-sentencing conduct and current statutory and guidelines ranges). 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 without awaiting the decision in Concepcion.²

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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