No. 21-7270

IN THE SUPREME COURT OF THE UNITED STATES

KARO BROWN, 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 IN OPPOSITION

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Petitioner contends (Pet. 17-23) that the district court erred in denying 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 2004, after a jury trial, petitioner was convicted of conspiring to engage in a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Judgment 1. The district court sentenced him to 480 months of imprisonment, to be followed by four years of supervised release. Judgment 2-3. The court of appeals affirmed. 214 Fed. Appx. 57. The district court later

denied motions for sentencing relief under 18 U.S.C. 3582(c) and 28 U.S.C. 2255. Pet. App. 3a.

In 2019, petitioner moved for a reduction of his sentence under Section 404 of the First Step Act. D. Ct. Doc. 1104, at 1 (Dec. 17, 2019). The district court concluded that petitioner's racketeering-conspiracy conviction was for a "covered offense" under Section 404(a), and thus deemed him eligible for a sentence reduction, notwithstanding that the underlying pattern of racketeering activity had involved both the distribution of 50 grams or more of cocaine base (crack cocaine) and other non-drug offenses. Pet. App. 9a-11a. But the court "decline[d] to exercise its discretion to reduce [petitioner's] sentence." Id. at 14a.

The district court emphasized that the jury had specifically found that petitioner's pattern of racketeering activity "involved multiple acts of murder," Pet. App. 12a; that, even under current law, his advisory Sentencing Guidelines range would be 360 months to life in light of his "murder-related racketeering activity," id. at 13a; and that his criminal record "includes a long history of serious violent crime," including "violent threats to a police officer and his family," and "demonstrates a callous disregard for human life," id. at 13a-14a. The court acknowledged that petitioner had "made positive efforts toward his personal improvement" while in prison. Id. at 14a. But "after considering the nature of [petitioner's] conduct and the sentencing factors

set forth at 18 U.S.C. § 3553(a)," the court determined that a sentence reduction was not warranted. Ibid.

The court of appeals affirmed in a summary order. Pet. App. 1a-4a. In finding no abuse of discretion, the court of appeals observed that the district court had "considered the section 3553(a) factors and post-sentencing legal and factual developments" before denying petitioner's motion. Id. at 4a.

2. Petitioner nevertheless contends that the district court erred in denying his Section 404 motion without first considering "intervening legal developments bearing on [his] sentence." Pet. 19; see Pet. 17-23. As just discussed, however, the district court did "consider[] * * * post-sentencing legal and factual developments." Pet. App. 4a; see id. at 12a-14a. And even if its consideration had included some fact-bound error -- which petitioner has not shown -- the decision below would not warrant this Court's review.

In particular, petitioner errs in arguing (e.g., Pet. 5, 15, 18-21) that this Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), constituted an intervening legal development that the district court failed to consider at his Section 404 proceeding. Apprendi predated petitioner's indictment, conviction, and sentencing and therefore is not an "intervening" development. Pet. 19. Furthermore, the jury itself found beyond a reasonable doubt that petitioner conspired to commit a pattern of racketeering activity that included multiple acts "involving

murder, attempted murder, or conspiracy to commit murder," and the district court's reliance on that finding for purposes of calculating the guidelines range would not violate Apprendi. Pet. App. 29a; see id. at 3a, 6a. Finally, because the jury found that petitioner's drug-related racketeering activity involved a drug quantity (1.5 kilograms of crack) for which the statutory-maximum sentence remains the same under current law, his focus on the statutory-maximum sentence that his murder-related racketeering activity would have yielded (Pet. 21) is beside the point. See Pet. App. 29a-30a; 18 U.S.C. 1963(a); see also 21 U.S.C. 841(b)(1)(A)(iii) (2012); 21 U.S.C. 841(b)(1)(A)(iii) (2006).

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 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. Petitioner contends (Pet. 14-16) that this case presents the same question as Concepcion and should be held for the Court's decision in that case. But the district court here already considered the intervening legal and factual developments that petitioner invoked. See Pet. App. 3a. The question whether the court was required to do so is therefore academic, and it is unnecessary to hold this petition pending the Court's decision in Concepcion.

As the court of appeals observed, the district court considered "the [Section] 3353(a) factors" as well as "post-sentencing legal and factual developments," including the current Guidelines, even though circuit precedent did not require the district court to do so. Pet. App. 4a; see id. at 12a-14a (district court's consideration of "the current Guidelines," the "sentencing factors set forth at [Section] 3553(a)," and petitioner's evidence of post-sentencing rehabilitation efforts). The district court thus already considered intervening developments before declining to reduce petitioner's sentence, and the court of appeals found no abuse of discretion. Id. at 4a. Accordingly, this Court's resolution of the question presented in Concepcion will not affect the result here, and the Court should deny the petition without awaiting the decision in Concepcion.*

Respectfully submitted.

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