NO. 21-7270

IN THE SUPREME COURT OF THE UNITED STATES

KARO BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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Mr. Brown is serving a 480-month sentence of imprisonment. At the time of his conviction he was 24 years old. In a little more than two years he will have been in federal custody for half of his life. In his attempt to gain a sentence reduction pursuant to section 404 of the First Step Act of 2018 Brown presented the district court with changes in the law, sentence recalculations, factual issues affecting those calculations, and post-sentencing rehabilitative conduct. The district court denied his request for reduction relying on a different guideline calculation without consideration of the legal standards and additional factual considerations the district court's alternate sentencing decisions implicated.

I. The district court failed to properly apply intervening legal and factual changes.

The government incorrectly claims the district court appropriately denied Mr. Brown's request for a sentence reduction, and the question of what was required is merely academic because the district court already fulfilled its obligations under *Concepcion*. *Memo of U.S. in Opposition* at 3-5. Neither is supported by the record. The Court should hold Mr. Brown's petition pending decision of *Concepcion* after which a decision to grant, vacatur, and remand should be made.

First, the district court relied on a mistaken belief that Brown had been convicted of murder conspiracy supporting a maximum sentence of life. He had not in fact been convicted of a murder conspiracy. Pet. App. 29a. Instead, the government had charged three types of activities related to murder a one of two patterns of activity. Pet. App. 21a. The jury had not returned a verdict specific to the acts comprising the pattern of activity for which it found Mr. Brown guilty. The district court's factual conclusion, that Brown had been convicted of a murder conspiracy, in determining Brown's section 404 motion, impacted the court's analysis of whether to reduce the sentence because it affected the applicable guideline and statutory maximum.

The district court's additional finding that Brown had been convicted of a murder conspiracy meant the court chose which of the three New York state offenses Brown had been found when there was no such finding by the jury. This selection is evident in the court's insistence that Brown still faced a life sentence, "Defendant's murder conspiracy still carrie[d] a maximum penalty of life

imprisonment." Pet. App. 12a-13a, n. 3. In fact, only two of the three New York offenses carried a life sentence. *Compare* NYPL §125.25 *and* NYPL §105.17 *with* NYPL §§125.25; 110.00 *and* NYPL §70.00.

At the original sentencing the district court used the pattern of racketeering involving drug activity to guide its sentencing decisions. Pet. App. at 44a-46a; 75a-76a. As a result of that original sentencing decision, the question of the particularity of the jury determination was not at issue. The propriety of that part of the verdict or its impact on a sentence was not addressed in the district court nor on appeal because it was not relied upon by the district court. Pet. App. 49a. It was not until the district court decided to deny Brown's sentence reduction under section 404 in part because a maximum life sentence still applied that an *Apprendi* issue arose. *United States v. Nguyen*, 255 F.3d 1335 1343 (11th Cir.2001) (vacating sentence above 20-year maximum for RICO violation where the jury did not find the predicate act supporting a life sentence).

The Sixth Amendment prohibits a court from punishing a defendant based on an essential fact not specifically found by the jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ("any fact that increases the penalty for a crime beyond the statutory prescribed maximum must be submitted to the jury, and proved beyond a reasonable doubt"); *Blakely v. Washington,* 542 U.S. 296, 304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment ... and the judge exceeds

his proper authority .") To maintain the statutory life sentence the district court had concluded Brown had been found guilty of agreeing to two or more acts of NY murder in the second degree, NYPL §125.25 or a NY conspiracy to commit a Class A felony with a minor, NYPL §105.17. The jury had not made that explicit finding beyond a reasonable doubt, Pet. App. at 29a, which is why Brown objected to the district court finding on appeal. This intervening Sixth Amendment issue, legal and factual decision by the district court and upheld by appellate court allowed the court to maintain the statutory maximum life sentence based upon a belief that Brown had been convicted of a NY murder conspiracy when he had not.

Not only was a specific jury determination lacking, the verdict also was ambiguous as to which two offenses the jury found Brown had agreed. There was no means to determine which specific acts the jury had found Brown had agreed a conspirator would conspire to commit. Pet. App. 29a. Brown's statutory sentence under the pattern of racketeering acts involving murder had another basis for application of the lesser statutory sentence of 20 years applied. *See United States v. Fisher*, 58 F.3d 96, 99 (4th Cir.), *cert. denied*, 516 U.S. 927, 116 S.Ct. 329, 133 L.Ed.2d 229 (1995) (finding the rule of lenity "requires the sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should apply.").

The district court's failing to recognize the Sixth Amendment issue after switching the offense conduct guiding sentencing from drug activities to murder conspiracy, contributed to an equally lacking assessment of the sentencing

guidelines and the sentencing factors of 18 U.S.C. §3553(a). The district court proceeded through its sentencing decisions under the belief that a life sentence still applied as the maximum statutory and guideline sentence. The maximum sentence of life would have been barred by the correctly applied statutory maximum of 20 years for a state murder offense with a sentence of less than life. *See* U.S.S.G. § 5G1.1(a).

Moreover, the passing references of the court further revealed the court's sole focus on the life sentence, and the offense conduct committed more than twenty years ago rather than all the information submitted in support of the reduction and that information's relevancy to the sentencing factors of §3553(a). The district court merely acknowledged Brown's post-sentencing conduct and characteristics without fully factoring them into its analysis, *see United States v. Williams*, 943 F.3d 841, 844 (8th Cir. 2019) ("A district court 'may consider evidence of a defendant's postsentencing rehabilitation at resentencing.' ") (*quoting Pepper v. United States*, 562 U.S. 476, 504 (2011)); *see also United States v. White*, 984 F.3d 76, 90–91 (D.C. Cir. 2020) ("We strongly concur in the court's holding that 'the district court is authorized to consider post-sentencing conduct.' ... In a case with a record of this complexity, we think it is especially important that the District Court consider the section 3553(a) sentencing factors[.]" (cleaned up) (*quoting United States v. Hudson*, 967 F.3d 605, 613 (7th Cir. 2020).

Brown had submitted significant information about his rehabilitation including accomplishments in Bureau of Prisons programming over fifteen years,

vocational training certifications, mentorship of other inmates, completion of rigorous cognitive behavioral programs, letters of support and lack of disciplinary infraction in the past eight years. The court's response was to calculate an incorrect guidelines sentence, and note his "post-sentencing rehabilitative efforts" untethered from his propensity to reoffend or current risk to the public. See *Pepper v. United States*, 562 U.S. 476, 491 (2011) ("[E]vidence of postsentencing rehabilitation may be highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing.").

II. **The district court's mistakes require vacatur and remand**.

The courts, district and appellate, did not assess the motion for reduction accurately and with full consideration of the sentencing factors of 18 U.S.C. §3553(a) and his post-sentencing conduct without a correct understanding of the offense conduct guiding the statutory maximum and sentencing guidelines.[1] If this Court finds that intervening legal and factual developments are required in considering motion for reduction of sentence under section 404 of the First Step Act, then a correct assessment of the guidelines is also required as it was impacted by those additional legal and factual findings affecting the decision of whether to reduce the sentence. *See Molina-Martinez v. United States* 578 U.S. 189, 198, 136 S.Ct. 1338, 194 L.Ed.2d 444 (2016) (The Guidelines inform and instruct the district court's determination of an appropriate sentence"). *See also Peugh v. United States*,

[1] Whether or not the district court is required to consider 18 U.S.C. §3553(a) factors in a question presented in another pending petition before the Court, *Moyhernandez v. United States,* No. 21-6009.

569 U.S. 530, 544, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013) (recognizing a court's sentencing guidelines calculation as the "lodest[ar]" of every sentence fashioned).

Relying on *United States v. Moore*, the appellate panel found the First Step Act did not require "any particular procedures" of the district court in its review, "except for those changes that flow from sections 2 and 3 of the Fair Sentencing Act of 2010." Pet. App. 3a. Mr. Brown's appeal was decided under a standard in which the district court need not consider intervening legal developments or updated Guidelines and facts when resentencing under the First Step Act. The government argues that the district court did consider all that may become relevant under *Concepcion,* but the district court did not and the consideration that it did give was perfunctory at best (sentencing factors and post-sentencing conduct) or erroneous at worst (sentencing guideline calculation). Any expansion of those procedures by this court under *Concepcion* would affect Brown's request to the courts for a sentence reduction. A decision "requiring" review and consideration of intervening legal and factual developments injects a legal obligation upon the district courts and appellate courts ensuring consistency and transparency of a court's decision to reduce or decline the reduction. An expansion of the district court's discretion and the review of that discretion may invoke a different result for Mr. Brown. His request is not merely academic, but instead awaits a decision that may guide the courts' discretion and impose obligations that may impact the determination of a request for reduction. An assessment and decision best suited to the lower courts. *See e.g., United States v. Davis*, 407 F.3d 162, 165 (3d Cir. 2005) (finding that

remanding to the district court for determination a sentence after *Booker* error ensured uniform treatment of defendants on direct appeal, "fostering certainty in the administration of justice and efficient use of judicial resources.")

Holding this petition until *Concepcion* ensures the intent of Congress is fulfilled in providing Brown the opportunity for a sentence reduction while ensuring the integrity of the review for such reduction. *See e.g., United States v. Johnson,* 26 F.4th 726, 737 (6th Cir. 2022) ("Courts can now reduce long sentences in cases like Johnson's because Congress determined that shorter periods of incarceration sufficiently reflect and account for the dangerous, high-caliber nature of the crimes that those statutes now cover. First Step Act of 2018, Pub L. No. 115-391, § 404(a), 132 Stat. 5194; Fair Sentencing Act of 2010, Pub L. No. 111-220, §§ 2–3, 124 Stat. 2372."). If Concepcion imposes certain requirements standardizing section 404 proceedings or if the standard takes a similar "middle of the road" approach as to what a court "may" consider, Mr. Brown should be afforded the ability to have his request for reduction assessed under the newly established standard or assessed correctly according to the otherwise application legal standards and relevant facts.

III. Conclusion

The petition for a writ of certiorari should be held pending this Court's decision in *Carlos Concepcion v. United States*, No. 20-1650, and then should be disposed of as appropriate in light of that decision and the arguments submitted.

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Respectfully submitted,
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