No. 21-7473

IN THE SUPREME COURT OF THE UNITED STATES

ANTWOYN TERRELL SPENCER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

MAHOGANE D. REED
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court erred in denying petitioner's motion for a discretionary sentence reduction under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

United States v. Spencer, No. 07-cr-174 (Jan. 13, 2009) (judgment in criminal case)

United States v. Spencer, No. 07-cr-174 (July 26, 2019) (order denying motion under Section 404 of the First Step Act)

United States Court of Appeals (8th Cir.):

United States v. Spencer, No. 09-1196 (Jan. 21, 2010) (affirming in direct appeal)

United States v. Spencer, No. 19-2685 (May 27, 2021) (reversing and remanding denial of Section 404 motion)

Supreme Court of the United States:

In re Spencer, No. 20-7733 (May 17, 2021) (dismissing petition for writ of mandamus)

Spencer v. United States, No. 20-7890 (June 1, 2021) (denying petition for writ of certiorari)

Spencer v. United States, No. 21-5474 (Oct. 12, 2021) (denying petition for writ of certiorari)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-7473

ANTWOYN TERRELL SPENCER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is not published in the Federal Reporter but is available at 2022 WL 897941. An earlier opinion of the court of appeals is reported at 998 F.3d 843. The opinion of the district court (Pet. App. B1-B8) is not published in the Federal Supplement but is available at 2021 WL 5449284. An earlier opinion of the district court is available at 2019 WL 3369794.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2022. The petition for a writ of certiorari was filed on March

7, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of conspiring to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006) and 21 U.S.C. 846; attempting to possess with intent to distribute approximately eight kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006) and 21 U.S.C. 846; and money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i) (2000) and 18 U.S.C. 2. Judgment 1. The district court sentenced petitioner to 324 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3. The court of appeals affirmed. 592 F.3d 866.

In 2019, petitioner filed a motion for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. D. Ct. Doc. 443 (Apr. 15, 2019). The district court denied the motion. 2019 WL 3369794. The court of appeals reversed and remanded, 998 F.3d 843, and this Court denied certiorari, 141 S. Ct. 2715 (No. 20-7890); 142 S. Ct. 369 (No. 21-5474). On remand, the district court again denied petitioner's Section 404 motion, Pet. App. B1-B8, and the court of appeals summarily affirmed, id. at A1.

1. For nearly a decade, petitioner was the leader of a drug-trafficking and money-laundering organization that distributed more than 200 kilograms of powder cocaine and more than 50 kilograms of crack cocaine in the Minneapolis area. Presentence Investigation Report (PSR) ¶ 28; see PSR ¶¶ 12-27; 09-1196 Gov't C.A. Br. 1-6. Petitioner was ultimately arrested in 2007 during the execution of a search warrant at his residence, where police recovered a loaded handgun. PSR ¶ 26. In 2007, a grand jury in the District of Minnesota charged petitioner with multiple offenses arising from the conspiracy, including one count of conspiring to distribute five kilograms or more of cocaine and 50 grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006) and 21 U.S.C. 846. Indictment 1.

The case proceeded to trial, and the jury found petitioner guilty on the conspiracy count, as well as one count of attempting to possess with intent to distribute eight kilograms of cocaine and one count of money laundering. Judgment 1. The Probation Office determined that petitioner was responsible for at least 56.6 kilograms of crack cocaine and 213.4 kilograms of powder cocaine. PSR ¶ 28. At sentencing, the district court adopted those drug-quantity findings and calculated petitioner's advisory Sentencing Guidelines range to be 324 to 405 months. Sent. Tr. 14-15, 17. The court sentenced petitioner to 324 months of imprisonment, to be followed by ten years of supervised release. Id. at 17-18; Judgment 2-3.

The court of appeals affirmed. 592 F.3d 866. As relevant here, the court rejected petitioner's challenge to the district court's drug-quantity findings at sentencing, explaining that those "careful determinations" were based on the trial testimony and were "not clearly erroneous." Id. at 882. In 2011, the district court denied petitioner's pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, and both the district court and the court of appeals denied a certificate of appealability. D. Ct. Doc. 363, at 3-7 (Apr. 15, 2011); 11-2319 C.A. Judgment 1 (Oct. 25, 2011). The district court later denied four additional pro se filings as unauthorized second or successive Section 2255 motions. D. Ct. Doc. 377, at 1-6 (Aug. 16, 2011); D. Ct. Doc. 389, at 1-5 (Jan. 10, 2012); D. Ct. Doc. 397, at 1-3 (Feb. 17, 2012); D. Ct. Doc. 406, at 1-3 (July 26, 2012); see 28 U.S.C. 2255(h).

In August 2012, the district court denied yet another unauthorized second or successive Section 2255 motion. See D. Ct. Doc. 408, at 1-3 (Aug. 17, 2012). Citing petitioner's "extensive record of frivolous" and "abusive" filings, the court also barred petitioner from future filings without prior approval. Id. at 2. Petitioner nonetheless continued to collaterally attack his conviction. See Spencer v. Watson, No. 17-cv-3999, 2019 WL 296780, at *2 (D. Minn. Jan. 22, 2019) (noting that "[p]etitioner's filings did not stop" after the district court's August 2012 order, and that petitioner "repeatedly filed habeas corpus petitions

attacking the validity of his conviction" in the districts in which he was confined, including the Southern and Central Districts of Illinois).

2. In 2019, petitioner filed a pro se motion for a reduced sentence under Section 404 of the First Step Act. D. Ct. Doc. 443. Section 404 permits a defendant to seek a reduced sentence for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222; see Terry v. United States, 141 S. Ct. 1858, 1862-1864 (2021). The government opposed petitioner's request, arguing in relevant part that he lacked an eligible "covered offense" because he had conspired to distribute both crack and powder cocaine, and the statutory penalties for conspiring to distribute powder cocaine had not been modified by Sections 2 or 3 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. See D. Ct. Doc. 449, at 10 (May 9, 2019).

The district court agreed with the government that petitioner lacked an eligible "covered offense" and denied his Section 404 motion on that basis. 2019 WL 3369794, at *2-*3. The court of appeals reversed and remanded. 998 F.3d 843.* In its view,

* During the appeal, petitioner filed a petition for a writ of mandamus from this Court, seeking an order requiring the court of appeals to decide the case forthwith. 20-7733 Pet. for

petitioner's conviction for conspiring to distribute crack and powder cocaine is a "covered offense" because the Fair Sentencing Act modified the statutory penalties associated with the crack-cocaine object of the conspiracy. Id. at 845-846. Petitioner filed two petitions for writs of certiorari seeking his immediate release from custody, which this Court denied. 141 S. Ct. 2715 (No. 20-7890); 142 S. Ct. 369 (No. 21-5474).

3. On remand, the district court exercised its discretion to decline to grant petitioner's Section 404 motion. Pet. App. B1-B8. The court explained that, notwithstanding petitioner's eligibility for a sentence reduction under Section 404, the court had "wide discretion to consider several factors" in determining whether to grant one, "including the 18 U.S.C. § 3553(a) factors, post-sentencing rehabilitation, the sentencing court's drug quantity finding, and other considerations." Id. at B5. The court observed that petitioner had been found at sentencing to be responsible for 213.4 kilograms of powder cocaine and 56.6 kilograms of crack cocaine and that "[n]o evidence has been presented indicating he was in fact responsible for less." Id. at B5-B6. Based on those amounts, the court determined that, even taking into account the changes made by the Fair Sentencing Act,

---

Writ of Mandamus 1. Citing Supreme Court Rule 39.8, this Court denied petitioner leave to proceed in forma pauperis and dismissed the petition. 141 S. Ct. 2661 (No. 20-7733); see Sup. Ct. R. 39.8 (stating that the Court may deny leave to proceed in forma pauperis if the Court determines that a "petition for an extraordinary writ is frivolous or malicious").

petitioner's advisory guidelines range would still be 324 to 405 months. Id. at B6. "In other words," the court explained, "because of the quantity of drugs [petitioner] was responsible for, even if the Fair Sentencing Act had been in effect when [he] committed the offenses, his guideline range would have been the same." Id. at B6-B7. And "[a]fter a review of all other relevant considerations," "including the [Section] 3553(a) factors," the court found "no basis" for reducing petitioner's existing 324-month sentence below the bottom of the guidelines range. Id. at B7.

4. After the district court's decision on remand, petitioner filed what he styled as a petition for a writ of mandamus in the court of appeals. See 21-3728 C.A. Pet. for Writ of Mandamus 1-2. The court of appeals construed the petition as a notice of appeal and summarily affirmed. Pet. App. A1.

ARGUMENT

The court of appeals correctly affirmed the district court's denial of petitioner's motion for a discretionary sentence reduction under Section 404 of the First Step Act. The court of appeals' unpublished summary affirmance does not conflict with any decision of this Court or another court of appeals. Petitioner's contention (Pet. 6-7) that the district court erred in calculating his advisory guidelines range lacks merit and would not warrant further review in any event. And this Court's recent decision concerning Section 404, Concepcion v. United States, No. 20-1650

(June 27, 2022), does not provide any basis for further review, because this case does not implicate the question the Court resolved in Concepcion. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 6-7) that the district court erred in calculating his advisory guidelines range on the theory that the court should have calculated that range based on the drug quantities that were necessarily found by the jury in convicting him of the conspiracy count -- i.e., at least five kilograms of powder cocaine and at least 50 grams of crack cocaine. Petitioner appears to further contend (Pet. 7-8) that this Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), obligated the district court to use those drug quantities in calculating his advisory guidelines range. Those contentions lack merit.

In Apprendi, this Court held that any fact, other than the fact of a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[] and proved beyond a reasonable doubt." 530 U.S. at 490. Apprendi did not, however, upset judges' broad discretion to consider facts that might bear on selecting an appropriate sentence "within the range prescribed by statute." Id. at 481 (emphasis omitted); see Dillon v. United States, 560 U.S. 817, 828 (2010). A judge may therefore make findings of fact at sentencing -- including the drug quantity involved in an offense -- to inform its selection of a sentence within the range of statutory penalties

authorized by the verdict (or guilty plea). See United States v. Booker, 543 U.S. 220, 233 (2005). As the Court has made clear, a judge may also, in particular, rely on judicial findings of fact in order to calculate the defendant's guidelines range under the federal Sentencing Guidelines, which are now advisory rather than binding. See ibid.; see also id. at 245.

The district court correctly applied those principles in denying petitioner's Section 404 motion. The court relied on its prior drug-quantity findings -- 213.4 kilograms of powder cocaine and 56.6 kilograms of crack cocaine -- only to calculate the guidelines range that petitioner would face "[t]oday, after application of the Fair Sentencing Act and the First Step Act." Pet. App. B6. In doing so, the court properly recognized that it may rely on "fact[s] beyond what the jury found" in making guidelines calculations. Id. at B6 n.2. And the 324-month guidelines-range sentence that the court selected was within the statutory maximum penalty authorized by the jury's verdict -- both at the time the sentence was imposed and today, taking into account the changes made by the Fair Sentencing Act. Compare 21 U.S.C. 841(b)(1)(A)(ii) and (iii) (2006) (prescribing maximum term of imprisonment of "life" for a violation of Section 841 involving at least five kilograms of powder cocaine or at least 50 grams of crack cocaine), with 21 U.S.C. 841(b)(1)(A)(ii) and (iii) (prescribing same maximum term of imprisonment of "life" for a violation of Section 841 involving at least five kilograms of

powder cocaine or at least 280 grams of crack cocaine); cf. 21 U.S.C. 846.

Petitioner does not identify any legal error in the district court's drug-quantity findings or its reliance on those findings for guidelines purposes at petitioner's Section 404 proceeding. And any fact-bound disagreement with the district court's specific findings -- which the court of appeals affirmed on direct appeal, see 592 F.3d 866, 881-882 -- would not warrant further review.

2. The petition in this matter was filed on March 7, 2022, after this Court had granted certiorari in Concepcion v. United States, supra, but before the Court's decision in that case on June 27, 2022. The Court's decision in Concepcion has no relevance to the Apprendi-based argument in the petition, and the Court should therefore deny the petition rather than granting, vacating, and remanding in light of Concepcion.

In Concepcion, the Court explained that a district court adjudicating a motion under Section 404 "may consider other intervening changes" in law or fact, beyond just the changes made by Sections 2 and 3 of the Fair Sentencing Act, in considering whether to grant a reduced sentence for an eligible covered offense and the extent of any such reduction. Slip op. 2. A district court adjudicating a Section 404 motion cannot "recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act," but after properly calculating that benchmark, it "may then

consider postsentencing conduct or nonretroactive changes in selecting or rejecting an appropriate sentence." Id. at 14 n.6. The Court emphasized that the First Step Act "does not compel courts to exercise their discretion to reduce any sentence," id. at 2, and that courts are obligated to consider intervening changes of fact or law only if raised by the parties -- and even then, only to an appropriately limited extent, see id. at 16-18.

Here, the district court applied the approach that this Court subsequently endorsed in Concepcion. The district court recognized that it had "wide discretion" under circuit precedent to consider information that might inform its exercise of discretion, including the Section 3553(a) factors and "post-sentencing rehabilitation." Pet. App. B5 (citing United States v. Robinson, 9 F.4th 954, 959 (8th Cir. 2021) (per curiam)); cf. Concepcion, slip op. 6 n.2 (characterizing the Eighth Circuit as having adopted the "may consider" approach in United States v. Harris, 960 F.3d 1103 (2020), cert. denied, 141 S. Ct. 1438 (2021)). The court specifically considered the advisory guidelines range that petitioner would have faced "[t]oday," Pet. App. B6, and petitioner's Section 404 motion did not identify any other purportedly relevant intervening legal or factual developments since his original sentencing, see D. Ct. Doc. 443, at 3-4. Apprendi, which was decided nine years before petitioner's 2009 sentencing, is not such a development.

After giving appropriate consideration to the arguments and evidence before it, the district court ultimately saw "no basis" for reducing petitioner's sentence and declined to do so. Pet. App. B7. That decision was reasonable and well within the court's "particular discretion" under Section 404. Concepcion, slip op. 17. Further review in this Court or the court of appeals is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

MAHOGANE D. REED
Attorney

JULY 2022