

No. 21-7478

IN THE SUPREME COURT OF THE UNITED STATES

DERRICK JEROME 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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 5-14) that the district court erred in granting in part and denying in part 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 2009, following a jury trial, petitioner was convicted on one count of conspiring to distribute five kilograms or more of powder 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, and two counts of distributing powder cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2006).

Judgment 1. The district court sentenced petitioner to 292 months of imprisonment, to be followed by 10 years of supervised release.

Judgment 2-3. The court of appeals affirmed. 592 F.3d 866. In 2016, the district court reduced the term of imprisonment to 262 months based on a retroactive amendment to the Sentencing Guidelines. D. Ct. Doc. 441 (Mar. 17, 2016); see 18 U.S.C. 3582(c) (2).

In 2019, petitioner moved for a reduction of his sentence under Section 404 of the First Step Act. D. Ct. Doc. 444, at 1 (May 2, 2019). The district court denied the motion, concluding that petitioner had not been convicted of a "covered offense" as defined in Section 404(a) and was thus ineligible for a Section 404 sentence reduction. D. Ct. Doc. 457, at 4-5 (July 26, 2019). The court of appeals reversed, explaining that petitioner's conspiracy conviction was, in fact, a "covered offense." 998 F.3d 843, 845 (citation omitted). On remand, the district court granted petitioner's Section 404 motion in part and reduced his sentence to the statutory minimum term of 240 months. Pet. App. B1-B13. Petitioner appealed, challenging the extent of the reduction. Id. at A1. The court of appeals summarily affirmed. Ibid.

2. The petition for a writ of certiorari principally contends that the district court was required to reduce petitioner's sentence by more than 22 months and that the court's order denying him the "full resentencing" to which he claims to be

entitled violated due process. Pet. 11; see Pet. 5-11. Those contentions lack merit and do not warrant further review. By its plain terms, Section 404 of the First Step Act makes any sentence reduction granted under that provision discretionary, not mandatory. Section 404(b) provides that a court "may * * * impose a reduced sentence" for a covered offense, § 404(b), 132 Stat. 5222, and Section 404(c) confirms that "[n]othing" in Section 404 "shall be construed to require a court to reduce any sentence," § 404(c), 132 Stat. 5222.

To the extent that the petition also challenges (Pet. 10-14) the district court's calculation of petitioner's advisory Sentencing Guidelines range, that challenge also does not warrant further review. The court determined that petitioner's offense level was 38 under the version of the Guidelines in effect at his 2009 sentencing. Pet. App. B6. The court then determined that petitioner's offense level would be 36 "[t]oday," ibid., and it relied on that lower figure to calculate an advisory guidelines range for purposes of adjudicating petitioner's Section 404 motion, see id. at B8. In doing so, the court additionally explained that the advisory guidelines range was cabined by the statutory-minimum sentence of 240 months, based on a recidivist enhancement that was not affected by Sections 2 and 3 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. See Pet. App. B8-B11.

Petitioner identifies no error in those determinations. The district court was not required, as petitioner appears to contend (Pet. 11), to use the drug quantity of 50 grams in calculating his advisory guidelines range. The court instead permissibly, and correctly, relied on its sentencing-stage finding that petitioner's conspiracy offense involved a higher quantity of drugs -- "677.52 grams of powder cocaine and 13.3 kilograms of crack cocaine," Pet. App. B2 -- while noting that petitioner had presented "[n]o evidence * * * indicating he was in fact responsible for less," id. at B6.

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. The petition in this case was filed on March 22, 2022, and does not press any argument that implicates the question presented in Concepcion. It is therefore unnecessary to hold the petition here pending the Court's decision in Concepcion.

To the extent that petitioner at one point raised an argument that might implicate Concepcion, he no longer presses that argument. The district court rejected petitioner's argument that his Section 404 motion must be evaluated in light of certain

changes to federal drug sentencing made by Section 401 of the First Step Act, explaining that those changes are "not * * * retroactive" and therefore do not affect petitioner's statutory minimum sentence. Pet. App. B8. Petitioner did not renew that argument on appeal, see Pet. C.A. Br. 8, and he does not attempt to renew it in this Court. And because the other issues raised in the petition do not implicate the question presented in Concepcion, the Court should deny the petition without awaiting the decision in that case.*

Respectfully submitted.

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