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No. _____

ORIGINAL

Supreme Court, U.S.
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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

HUGO VILLARREAL-SOLIS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

Hugo Villarreal-Solis
Reg. No. 12952-180
FCI GILMER
P.O. BOX 6000
GLENVILLE, WV 26351

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

- I. WHETHER IT WAS ERROR FOR THE FIFTH CIRCUIT TO DENY SOLIS' MOTION FOR COMPASSIONATE RELEASE?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Solis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is unpublished and included in Solis' Appendix (Pet. App.) at A. The opinion of the district court's denial is unpublished and is included in Pet. App. at B. The opinion of the Court of Appeals Re-hearing En Banc denial is unpublished and included in Pet. App. at C.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment (1791) establishes the requirement that a trial for a major crime may commence only after an indictment has been handed down by a grand jury; protects individuals from double jeopardy, being tried and put in danger of being punished more than once for the same criminal act; prohibits punishment without due process of law, thus protecting individuals from being imprisoned without fair procedures; and provides that an accused person may not be compelled to reveal to the police, prosecutor, judge, or jury any information that might incriminate or be used against him or her in a court of law.

(v)

The Sixth Amendment (1791) provides several protections and rights to an individual accused of a crime. The accused has the right to a fair and speedy trial

by a local and impartial jury. Likewise, a person has the right to a public trial. This right protects defendants from secret proceedings that might encourage abuse of the justice system, and serves to keep the public informed. This amendment also guarantees a right to legal counsel if accused of a crime, guarantees that the accused may require witnesses to attend the trial and testify in the presence of the accused, and guarantees the accused a right to know the charges against them.

STATEMENT OF THE CASE

BACKGROUND:

In 2002, Solis was convicted by a jury of numerous offenses, including operating a continuing criminal enterprise; three counts of murder in furtherance of a continuing criminal enterprise; ten counts of possession with intent to distribute marijuana; two counts of conspiracy to use or carry a firearm and to commit murder during the course of a firearms offense; two counts of using and carrying a firearm in furtherance of a drug trafficking offense; three counts of murder during the course of a firearms crime; money laundering conspiracy; and four counts of money laundering. He was sentenced to life imprisonment, plus 420 months of imprisonment. All appeals and post-conviction motions were denied.

Thereafter, Solis filed a motion for Compassionate Release under 18 U.S.C. section 3582 which was docketed, the pro-se motion was modified to include ("COVID-19). BOP records show that Solis has fully exhaust administrative remedies in this case.

SUMMARY OF THE ARGUMENT

DISCUSSION

Before this Honorable Court is the dismissal of Solis' appeal in case number 21-50803. Solis respectfully petitions this Court for petitions for a writ of certiorari. Solis believes that the Panel's decision raises a question of exceptional importance.

Background: Solis, federal prisoner # 12952-180, appealed the district court's denial of a motion for compassionate release pursuant to 18 U.S.C. §

3582(c)(1)(A)(i) and of a motion asking the court to reconsider the denial of an earlier motion for compassionate release. He argued that he has shown several extraordinary and compelling reasons for relief and that the factors listed in 18 U.S.C. § 3553(a) favor a reduction in sentence.

The Court of Appeals held that the district court's contrary assessment of the § 3553(a) factors is a sufficient basis for its denial of the § 3582(c)(1)(A)(i) motion.

In its recitation of the facts of the case, the Panel either missed, or failed to acknowledge the relevant facts and case law.

At the outset, in his motion, Solis argued, that his case presents extraordinary and compelling circumstances because his sentence “was a product of misinterpretation of the law and under today’s sentencing scheme, the Court would not have authority to give him such a long and harsh sentence. The outcome of his case would clearly [be] different.” He identifies several defendants whose sentences for allegedly comparable crimes were far less than his.

A life sentence without the possibility of parole is substantial punishment. Moreover, it appears longer than at least some federal sentences imposed for murder.

For example, in *United States v. Antoine*, PWG-19-140, the defendant was involved in a drug trafficking organization in Baltimore and confessed to the intentional shooting and killing of an individual in relation to the drug conspiracy. He pleaded to one count of conspiracy to distribute controlled substances and one count of discharging a firearm resulting in death during and in relation to a drug

trafficking crime. *Id.* Although Antoine was the shooter, Judge Grimm imposed a total sentence of 270 months (22.5 years).

As Judge Blake recently observed, the average federal sentence for murder has declined in recent years. See *United States v. Bryant*, 95-202-CCB-3, 2020 WL 2085471, at *5 n.8 (D. Md. Apr. 30, 2020) (“According to statistics released by the United States Sentencing Commission for fiscal year 2018, the national average sentence for murder was 291 months, and the Fourth Circuit average was 327 months.”) (citing *United States v. Redd*, 444 F. Supp. 3d 717, 728 (E.D. Va. 2020)); United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2018, Fourth Circuit, available at (<https://www.ussc.gov/sites/default/files/pdf/research-andpublications/federal-sentencing-statistics/state-district-circuit/2018/4c18.pdf>), *aff’d*, *McCoy*, 981 F.3d 271. Indeed, the trend has continued since the time *Bryant* was decided: data from the United States Sentencing Commission reflects that in fiscal year 2020, the national average sentence for murder was 255 months, and the Fourth Circuit average was 271 months. See United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2020, Fourth Circuit, available at <https://www.ussc.gov/sites/default/files/pdf/research-andpublications/federalsentencing-statistics/state-district-circuit/2020/4c20.pdf>.

In addition, Solis avers that he “is highly unlikely to reoffend or pose any threat to the community.” In particular, he notes that he “has been a mentor to his fellow inmates since he has been committed to the BOP”. Further, he states that he “has never been involved in any violent incidents during his time of incarceration” and, moreover, he “has been actively participating in programs and seeking positive

change in prison.” As a result, Solis avers that “he has gained pro social skills and positive energy.” Further, he contends that he is “ready to be a productive member of society.”

Solis also reports: He has a very strong connection with his family and friends who are ready willing to help and assist him getting a job, if needed.

To be sure, rehabilitation alone cannot justify compassionate release. See Davis, 2022 WL 127900, at *1; 28 U.S.C. § 994(t). But, without question, the Court may consider Solis’s post-sentencing conduct to determine whether he has been rehabilitated during his term of imprisonment. See *Pepper v. United States*, 562 U.S. 476, 492 (2011) (recognizing that a defendant's post-sentencing conduct “provides the most-up-to-date picture of [a defendant's] ‘history and characteristics’”) (quoting 18 U.S.C. § 3553(a)(1)).

THE AFFECT OF THE FIRST STEP ACT

The Supreme Court has since issued its decision. *Concepcion v. United States*, ___ S Ct. ___, 2022 WL 2295029 (June 27, 2022). The question before the Supreme Court was whether a district court must consider intervening changes of law (such as changes to the Sentencing Guidelines) or changes in fact (such as behavior in prison) in adjudicating a First Step Act motion. *Concepcion*, 2022 WL 2295029, at *4. The Court held that if a defendant is eligible for a reduced sentence under Section 404(a), the district court must consider (i.e., acknowledge) intervening changes of law and fact brought to its attention by the defendant in deciding whether to grant a reduction. See *id.* at *4, *12. In other words, just as this Court must do in a post-Booker initial sentencing proceeding, it must acknowledge

nonfrivolous mitigation arguments raised by the defendant. The District Courts must consider intervening changes of law and fact when parties raise them.

In drafting this piece of legislation Congress recognized the long ongoing battle for prison reform due to the harshness of the federal sentences. Congress sought to allow the district courts to revisit sentences on a case by case basis and determine whether new facts and new laws, post facto, created “extraordinary and compelling” reasons to reduce a sentence, particularly in light of the insufferable restrictions of 28 U.S.C. Section 2244 (i.e. AEDPA). To cure this long lingering illness Congress carved out a form of “safety valve” for modifying sentences that was previously available via federal parole, which had been abolished.

Defendants that could not previously apply for relief based on changes in law such as Apprendi and Alleyne, which constituted a fundamental deprivation of a constitutional right, due, primarily, to the AEDPA, can now seek justice from the district courts.

The sum of these parts is that the Supreme Court’s ruling in *Concepcion v. United States* the district Courts now return to its pre-Comprehensive Crime Control Act status of again being empowered to modify sentences where it determines that “extraordinary and compelling” reasons exists. And, *Concepcion* makes clear that it is for the district court to determine on a case by case basis what it deems extraordinary and compelling reviewing any and all new facts and changes in law that have occurred since the initial sentencing and applying the Section 3553(a) factors to the new set of facts and circumstances.

The standard for adjudicating a motion under 18 U.S.C. Section 3582(c)(1)(A) is for the district court to “consider intervening changes in law or fact and use its [unfettered] discretion” to determine whether a sentence can be modified, *Concepcion v. United States*, *supra*.

DISCUSSION

When the dust settles, and the Court wades through the facts and legal propositions that have changed since the initial sentencing, the question will be whether these changes in law and fact constitute “extraordinary and compelling circumstances” sufficient to justify a modification of the sentence. See also, *Concepcion v. United States*, No. 20-1650, Slip Op. at 18 (U.S. June 27, 2022) (“[T]he First Step Act [does not] require a district court to make a point-by-point rebuttal of the parties’ arguments. All that is required is for a district court to demonstrate that it has considered the arguments before it.”). Thus, this Honorable Court should consider all facts and legal propositions that have changed since the initial sentencing. *United States v. Thatch*, No. 20-6364 (4th Cir. Jun. 30, 2022).

The court must balance Petitioner's rehabilitation efforts with his extremely serious criminal conduct, the need to punish him, the need to promote respect for the law, the need to protect society, and the need to deter others. Cf. *Concepcion v. United States*, No. 20-1650, 2022 WL 2295029, at *12 (U.S. June 27, 2022); *Pepper*, 562 U.S. at 480-81. The court also has considered Petitioner's potential exposure to COVID-19, his natural antibodies, his vaccine, his medical conditions, his age, and his release plan. *United States v. Taylor*, 4:14-CR-13-D (E.D.N.C. Jun. 27, 2022); and *United States v. Ward*, 5:11-CR-286-D (E.D.N.C. Jun. 28, 2022).

(i) Solis's murder convictions:

Solis argues that the murder violations charged him with aiding and abetting a murder, not substantive murder.

The jury was not instructed to apply section 1111 the guideline for first-degree murder. The Court ultimately concluded that there were "adequate factual bases" to support the cross-reference.

Accordingly, give the facts of this case and the case law stated herein, this Court should find Solis's life sentence to be "disproportionate to both the seriousness of the offense and to what Congress now deems appropriate for this kind of conduct." As the Supreme Court stated in *Concepcion*, the district court "may then consider post-sentencing conduct or non-retroactive changes in selecting or rejecting an appropriate sentence, with the properly calculated guidelines range as the benchmark". *Id.*

Before outlining all the changes in law and fact presented in Solis' reply it is necessary to note a critical change in the standard of review this court can now apply in-light-of the Supreme Court's holding in *Concepcion v. United States*, 557 US ____ (2022) which occurred after Solis had filed his renewed motion for compassionate release. There, the High Court clarified the purpose and scope of the FIRST STEP Act (FSA) ending a split in the Circuit Courts regarding the scope and depth of the lower court's discretion to grant motions under 18 U.S.C. Section 3582(c)(1)(A). The Court held that: "The First Step Act allows district courts to consider intervening changes in law or fact in exercising their discretion to reduce sentences." *Id.*, Slip Opinion, pp. 6 and 6-18. In sum, the Supreme Court's ruling

in *Concepcion v. States*, the district Courts now return to its pre-Comprehensive-Control Act status of again being empowered to modify sentences where it determines that “extraordinary and compelling” reasons exist, on a case-by-case basis. And, it allows the Court to make this determination based on what has occurred since the defendant’s initial sentencing. (e.g. *United States v. Pepper*, 562 US 476, 492 (2011)).

Against this backdrop we can now look to Solis’ arguments in his motion and the government’s failure to address these issues, and, more importantly, attempt to surmise why they failed to address them.

A review of Solis’ initial motion reveals that the gravamen of his argument is that since sentencing the law has changed to the point whereby his sentence “was a product of misinterpretation of the law and under today’s sentencing scheme the Court would have the authority to give him such a harsh punishment.”. Solis argued that “in this case the jury came back with a general verdict on the murder. Thus, it was the judge and not the jury that found 18 U.S.C. Section 1111 applied to this case. If sentenced today, Solis would not face a mandatory minimum sentence of life”.

The significant change in law here is that the jury was not instructed to apply Section 1111, the Guideline for first degree murder. The Court ultimately concluded that there was an “adequate factual basis” to support the cross reference. Given the facts of this case and the changes in case law, this Court under Section 3582(c)(1)(A) can find that Solis’ life sentence to be disproportionate both the seriousness of the offense and to what Congress no deems appropriate for this kind

of conduct. See, *Apprendi v. New Jersey*, 530 US 466 (2000) and *Alleyne v. United States*, 570 US 99 (2013). Thus, establishing new laws that were unavailable to Solis when he exercised his Sixth Amendment right to trial and was sentenced prior to these changes in law.

Solis's motion goes on to cite cases of similarly situated crimes and, more importantly, worse crimes that have been granted compassionate release, even prior to the Supreme Court's ruling in *Concepcion* which gave the district Courts unfettered discretion to do such. These cases cite murders, directly committed by the defendant but were adjudicated under compassionate release (18 U.S.C. 3582(c)(2)(A)) and granted based on the defendant's Section 3553(a) standards after he was incarcerated. (emphasis added).

Solis argued that; the sentence for murder has declined in recent years, and cited numerous cases. His point is proven by the recent case where a police officer killed George Floyd in a case of national interest and received a sentence of only 22 years (, this also supports that life is not the only sentence in a Federal murder case, contrary to the Government's position). Thus, Solis presented a significant "change in law" in his request. In addition, Solis argued that since his sentencing cases such as *Concepcion* holding that, "Courts are free to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." *Id.*

In sum, Solis' motion stated; "his conduct is not materially different from the cases he cited yet his sentence is far more severe, thus constituting "extraordinary and compelling" circumstances warranting a reduction from a life sentence."

The government's response does not address Solis' arguments and showing of the changes in law and facts since his initial sentencing, whatsoever, nor do they differentiate Solis from the cases he cited where compassionate release was granted to similarly situated defendants. This Court should take issue with the government's lack of a response and the government's dependence on this Court to overlook this absence, particularly in-light-of the new Supreme Court ruling in *United States v. Concepcion*, ante.

Next, the government's response relies on Solis' the Court's initial denial of Solis' compassionate release motion citing the Court's view of the Section 3553(a) factors and the application of "U.S.S.G. Section 1B1.13". Respectfully, the proper standard for applying the Section 3553(a) factors should be applied in conjunction with the defendant's post sentencing conduct. Otherwise, compassionate release motions would be an exercise in futility and none of the murder cases cited in Solis' initial motion, that were granted, would have gotten relief. Other than the "nature and circumstances of the offense" which, of course, cannot change, (Section 3553(a)(1) all other Section 3553(a) factors must be judged post-conviction. Compassionate release is a post-conviction adjudication. Thus, the total focus of the inquiry rests on whether the defendant is deserving and has made the attempt to rehabilitate him/herself after sentencing. Moreover, the Supreme Court in *Concepcion v. United States*, renders the restrictions of U.S.S.G. Section 1B1.13 inapplicable.

In his initial motion Solis presented numerous certificates and his progress reports. These documents serve as proof positive that since his sentencing, the history and characteristics of this defendant have substantially changed. These

accomplishments came despite serving many years in the most dangerous environment (i.e. U.S. Penitentiary). Statistics show that in 2019 there were 143 murders within the Federal Bureau of Prisons, mostly in the U.S. Penitentiary. The government's response makes no rebuttal to Solis' history and characteristics, post sentencing. The government also makes no rebuttal to the fact that Solis' age plays an important role in whether a defendant poses a danger to the community. Again, there is a plethora of statistics available that establish that defendants released in their 50's pose little to no danger to the community and the recidivism rate of those defendants is very, very low. Solis's age combined with his extensive rehabilitation makes the likelihood of him re-offending is remote. See, *United States v. Rodriguez*, 492, F Supp 3d at 315; and *United States v. Rios*, No 94-cr-112 (JBA), 2020 U.S. Dist. Lexis 230074, 2020 WL 7246440 at * 4 (D, Conn, Dec, 8, 2020). See also, Manzoor Qadar, convicted of murder for hire, and was granted time after serving only 20 years. *United States v. Qadar*, (EDNY 2021) Lexis 136980 July 22, 2021; and *United State v. Wilfredo Perez # 3:02cr7*, defendant was granted CR motion time served after 20 years, for a Murder for Hire conviction in the District of Connecticut Lexis 41040 March 4, 2021.

Furthermore, Immigration and custom Enforcement has placed a detainer on Solis See Detainer. Because he is subject to mandatory removal from the United States. If released Solis will be transferred to immigration detention and deported. This lessens any potential danger he may pose. *United States v. Barriga-Beltran*, No 19-cr-0116 (JS) 2021 U.S. Dist. Lexis 67786, WL 1299437, at *3 (EDNY, Apr, 7,

2021) (finding a defendant posed no danger because of immigration detainer), Rios 2020 U.S. Dist, Lexis 230074, 2020 WL, 7246440, at *5 (collecting cases where district courts modified life sentence for defendants who were set to be deported if released.)

In sum, Solis does understand the Court's reasoning in its initial denial (i.e. seriousness of the offense) and does not seek to downplay that factor in any way. However, Solis respectfully requests that the Court take a good look at the cases cited in his initial motion where defendants were granted compassionate release with materially similar circumstances and many cases of worse conduct. In those cases, the Court applied the Section 3553(a) factors in a post sentencing analysis to determine whether the defendant was then worthy of compassionate release. Solis would like the Court to consider the relief given to all of the similarly situated defendants. The Concepcion decision was issued after Solis had filed his initial compassionate release motion. Thus, had Concepcion been available and argued, this Court may have granted Solis Compassionate release considering the changes in law and fact, in conjunction with the age and medical condition of the defendant.

CONCLUSION

In sum, Concepcion v. United States, 142 S. Ct. 2389 (2022), has three holdings relevant here: (1) that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence; (2) that because district courts must consider nonfrivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes when parties raise them; and (3) that district court's ruling on

First Step Act motions bear the standard obligation to explain their decisions, and accordingly must give a brief statement of reasons to demonstrate that they considered the parties' arguments— including arguments pertaining to intervening changes in law or fact. This case should be remanded back to the district court in light of Concepcion. And, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Hugo Villarreal-Solis

Hugo Villarreal-Solis