No. _____

IN THE

Supreme Court of the United States

HIKING DUPRE,
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

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QUESTION PRESENTED

Whether this Court should grant certiorari, vacate the Fifth Circuit's judgment, and remand for reconsideration in light of this Court's recent decision in *Concepcion v. United States*?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Hiking Dupre*, No. 2:04-cr-00028, U.S. District Court for the Eastern District of Louisiana. Judgment entered March 13, 2020 (1a-5a).
- *United States v. Hiking Dupre*, No. 20-30191, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 2, 2022 (6a-13a). Petition for Panel Rehearing denied November 29, 2022 (14a).

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On Petition for Writ of Certiorari
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PETITION FOR WRIT OF CERTIORARI

Petitioner Hiking Dupre respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

JUDGMENT AT ISSUE

A two-judge majority of a Fifth Circuit panel affirmed the district court's denial of Mr. Dupre's sentence reduction motion on November 2, 2022. That decision, as well as the underlying district court ruling, are attached hereto as the Appendix.

JURISDICTION

The Fifth Circuit issued its decision on November 2, 2022 (6a-13a). Mr. Dupre filed a timely petition for rehearing in the Fifth Circuit, which was denied on November 29, 2022 (14a). This petition is being filed within 90 days after that denial, pursuant to Sup. Ct. Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution states, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

18 U.S.C. § 3553(a) provides, in relevant part:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—
> >
> > > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > >
> > > (B) to afford adequate deterrence to criminal conduct;
> > >
> > > (C) to protect the public from further crimes of the defendant; and
> > >
> > > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> >
> > (3) the kinds of sentences available;
> >
> > (4) the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .;
> >
> > (5) any pertinent policy statement . . . issued by the Sentencing Commission . . .;
> >
> > (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
> >
> > (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(b)(1) provides, in relevant part:

> Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

Section 404(b) of the First Step Act of 2018 provides, in relevant part:

> A court that imposed a sentence for a covered offense may, on motion of the defendant . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

INTRODUCTION

Nearly two decades ago, Hiking Dupre was sentenced to 20 years of imprisonment for possessing with intent to distribute at least 5 grams of cocaine base, resulting in an aggregate sentence of 25 years due to an 18 U.S.C. § 924(c) conviction. That sentence constituted a 6.5-year upward variance from his already harsh Guidelines range of 130-to-162 months, which was driven by the disproportionately severe offense level that the Guidelines applied to crack-related offenses at the time. Following a series of retroactive Guideline amendments and the First Step Act's retroactive application of the Fair Sentencing Act's statutory changes, Mr. Dupre's Guidelines range plummeted to 41-to-51 months.

Mr. Dupre moved for a sentence reduction under the First Step Act. Despite his eligibility, the district court denied any relief. In explaining its decision, the court relied on a series of "bare arrests" listed in his Presentence Investigation Report—information it was constitutionally prohibited from considering at his original sentencing under clear, longstanding Fifth Circuit precedent. The district court did not address any of Mr. Dupre's mitigating arguments, did not acknowledge the dramatically lowered Guidelines range, and failed to explain why a sentence that now constitutes a nearly *16-year upward variance* from the Guidelines remains necessary.

Mr. Dupre challenged the district court's denial on appeal, arguing that it legally erred by relying on bare arrest records to deny him relief and abused its discretion by failing to consider the § 3553(a) factors or adequately explain its decision. Mr. Dupre also argued that the erroneous consideration of bare arrest

records led the court to factually err in concluding that his criminal history "reflects a propensity for violence."

Notably, the government never argued that the court's consideration of bare arrests was permissible, arguing only that Mr. Dupre could not satisfy a heightened "plain error" standard that did not apply. Moreover, while Mr. Dupre's appeal was pending, this Court decided *Concepcion v. United States*, 142 S. Ct. 2389 (2022). Through *Concepcion*, this Court abrogated Fifth Circuit precedent governing the framework of First Step Act proceedings and held for the first time that district courts are required to consider intervening changes of law and/or fact raised by parties and demonstrate that they considered the arguments in explaining their decisions. *See id.* at 2396, 2404-05. Mr. Dupre filed a letter pursuant to Fed. R. App. P. 28(j) to notify the Fifth Circuit panel assigned to his appeal about *Concepcion*.

In a 2-to-1 panel decision, the Fifth Circuit affirmed the district court's denial of Mr. Dupre's sentence reduction based solely on the majority's conclusion that the characterization of his criminal history was not clearly erroneous. The majority did not address Mr. Dupre's assertion of *legal* error in the district court's consideration of his bare arrest records, which the dissenting judge believed necessitated remand. Nor did the panel address Mr. Dupre's other claims of procedural error. The panel also did not mention, much less discuss, this Court's recent decision in *Concepcion*. Mr. Dupre filed a timely petition for panel rehearing requesting that the court address his unresolved claims, particularly in light of *Concepcion*'s holding, but the panel denied his petition.

Considering the Fifth Circuit's failure to address multiple claims for relief raised in Mr. Dupre's appeal and the impact of this Court's decision in *Concepcion* on those claims, this Court should grant certiorari, vacate the Fifth Circuit's judgment, and remand for reconsideration of his unresolved claims in light of *Concepcion*.

STATEMENT OF THE CASE

In 2004, a jury convicted Hiking Dupre of: possessing with intent to distribute 5 grams or more of cocaine base ("crack") within 1,000 feet of a playground, in violation of 21 U.S.C. §§ 841(a)(1) and 860 (Count 1); carrying or using a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(c) (Count 2); and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g) (Count 3). The charges stemmed from law enforcement's discovery of approximately 9 grams of crack and a gun on Mr. Dupre's person during a *Terry* stop. The government also established that Mr. Dupre had two prior drug possession convictions. Thus, at the time, Mr. Dupre's conviction on Count 1 carried a minimum statutory penalty of 120 months of imprisonment, pursuant to the then-applicable version of 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 851.

At Mr. Dupre's original sentencing in 2005, he faced an advisory Guidelines range of 130 to 162 months for his drug conviction (Count 1).[1] That range derived from an offense level of 28, which was based on the 9-gram quantity of crack, and

[1] Mr. Dupre's § 922(g) conviction carried a statutory maximum sentence of 120 months, and his § 924(c) conviction carried a mandatory, consecutive sentence of 60 months.

Mr. Dupre's criminal history category of V, which was driven by nonviolent offenses he committed when he was 17 and 18 years old. The district court determined that his criminal history was underrepresented because the Guidelines did not account for juvenile offenses he committed when he was between 13 and 16—specifically, juvenile convictions for aggravated assault (13 years old), resisting an officer (15 years old), and illegal firearm possession (13 and 16 years old). The court thus found it appropriate to vary upward from the Guidelines by 6.5 years, imposing a sentence of 240 months for Mr. Dupre's nonviolent drug conviction on Count 1. Combined with his mandatory, consecutive 60-month sentence for his § 924(c) conviction on Count 2, his resulting aggregate sentence was 300 months (25 years) of imprisonment.

Following Mr. Dupre's sentencing, the U.S. Sentencing Commission retroactively amended the Guideline applicable to crack offenses three times, sequentially reducing the offense level and resulting Guidelines range applicable to Mr. Dupre's convictions. The first amendment in 2008 reduced his Guidelines range to 110-to-137 months; the second amendment in 2011 reduced it to 51-to-63 months; and the third amendment in 2014 reduced it to 41-to-51 months. However, on each occasion, the Guidelines range for his drug conviction on Count 1 remained restricted by the statutory minimum of 120 months.

Mr. Dupre moved for sentence reductions pursuant to 18 U.S.C. § 3582(c)(2) in response to each retroactive amendment. Despite his eligibility, the district court denied each motion, maintaining his 25-year sentence. In denying Mr. Dupre's first § 3582(c)(2) motion in 2008, the court stated only that "[t]he difference in the

guidelines would not have resulted in a different sentence at the time of sentencing." In denying Mr. Dupre's second and third motions, the court cited his disciplinary record in prison. Due to the statutory minimum of 10 years that continued to apply during those proceedings, the district court's denials resulted in Mr. Dupre's sentence reflecting an upward variance of 10 years from his new Guidelines range, compared to the previously imposed variance of 6.5 years.

In December 2018, Congress enacted the First Step Act of 2018. Section 404 of the First Step Act gave sentencing courts the discretion to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." *See* First Step Act of 2018 ("FSA"), § 404(b). The Act defined "covered offense" 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 . . . that was committed before August 3, 2010." FSA, § 404(a). Relevant to Mr. Dupre's case, the Fair Sentencing Act increased the drug quantity threshold for the statutory penalty provision in 21 U.S.C. § 841(b)(1)(B) from 5 grams to 28 grams. As a result, his conviction now is subject to the statutory penalties in 21 U.S.C. § 841(b)(1)(C), eliminating the mandatory minimum that previously applied and reducing his Guidelines range from 120 months to 41-to-51 months.

Mr. Dupre again requested a sentence reduction from the district court, this time pursuant to Section 404 of the First Step Act. In support of his motion, he explained that his current sentence is now significantly higher than his applicable Guidelines range, representing a much larger variance than at his original

sentencing or previous modification proceedings. While the court originally imposed a 6.5-year upward variance from the advisory Guidelines range, his sentence now reflects more than twice that—a staggering 189-month, or *nearly 16-year*, upward variance. In response to the court's prior concerns about his disciplinary record in prison, Mr. Dupre highlighted the fact that he had not been cited for an infraction in nearly two years and noted that he was already punished with additional incarceration for his more serious infractions, losing good time credit (as well as various privileges) each time. Finally, Mr. Dupre urged the court to consider his age, reduced likelihood of recidivism, and positive post-conviction conduct, including his continued efforts toward earning his GED, completion of a drug education program, and completion of numerous vocational training and educational courses.

On March 13, 2020, the district court denied Mr. Dupre's motion entirely, declining to grant any reduction of his sentence. Its primary reason was its conclusion that his criminal history was "extensive" and "reflects a propensity for violence and drug activity." However, in support of that characterization, the court cited not only Mr. Dupre's prior convictions as a juvenile and adult (six in total), but also twelve bare arrest records that were listed in his Presentence Investigation Report (PSR).[2] Critically, the "bare" arrests were the only possible support for the court's characterization of his criminal history as reflecting "a propensity for violence,"

[2] The "bare" arrest records listed in the PSR stated only of the date and alleged offense for which Mr. Dupre was arrested, with no description of the circumstances or factual allegations underlying the arrest. Each of the arrests indicated that charges were refused or dismissed or that the dispositions were simply "unavailable."

because only one of his adjudicated offenses—an aggravated assault committed nearly 30 years ago, when he was 13 years old—arguably involved violence. His other convictions were for drug or gun possessions, theft, and resisting or fleeing from officers, and all of the adult convictions were accounted for in the calculation of his Guidelines range. In contrast, Mr. Dupre's bare, unadjudicated arrests involved allegations of more serious and violent offenses, including battery, armed robbery, and second-degree murder.

The district court did not address any of Mr. Dupre's arguments about his positive post-conviction conduct, the relative staleness of his disciplinary infractions, and the significantly larger variance that his sentence now reflects compared to the currently applicable Guidelines range. It also did not explain why his criminal history and prison infractions warranted a nearly 16-year upward variance from his current Guidelines range. Mr. Dupre timely appealed the district court's judgment.

On appeal, Mr. Dupre argued that the district court abused its discretion by relying on his bare arrest records to deny him a sentence reduction. In support of that argument, he cited Fifth Circuit precedent explicitly prohibiting the consideration of bare arrests in determining the appropriate sentence for a criminal defendant. *See, e.g.*, *United States v. Foley*, 946 F.3d 681, 686 (5th Cir. 2020) ("[W]e have routinely held that it is improper for the district court to rely on a 'bare' arrest record in the context of sentencing following a criminal conviction."); *United States v. Johnson*, 648 F.3d 273, 277-78 (5th Cir. 2011) (explaining that the Fifth Circuit has "long recognized that an arrest, without more, is quite consistent with innocence").

Mr. Dupre separately argued that the district court's *legal* error in considering his bare arrest records contributed to an independent, *factual* error—namely, the district court's clearly erroneous assessment of his criminal history as reflecting a "propensity for violence." Additionally, Mr. Dupre argued that the district court independently abused its discretion by: (1) failing to adequately explain its denial of his motion, particularly in light of his dramatically lowered Guidelines range, and (2) failing to consider the § 3553(a) factors, including the Guidelines range, applicable policy statements, and new mitigating information.

Notably, the government never disputed that consideration of Mr. Dupre's bare arrest records was prohibited and thus improper. Instead, it urged a heightened plain error standard of review—a standard that the Fifth Circuit correctly determined did not apply—and argued only that Mr. Dupre could not show "clear or obvious" error because the Fifth Circuit had not addressed this prohibition in the context of sentence modification proceedings. Moreover, the government did not attempt to argue that any error in the court's consideration of the bare arrest records was harmless—a heavy and, in this case, impossible burden that would have required proof beyond a reasonable doubt that the error had *no effect* on the district court's decision. *See Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Woods*, 440 F.3d 255, 257-58 (5th Cir. 2006); App'x at 12a-13a (Dennis, J., dissenting).

The Fifth Circuit panel ultimately affirmed the district court's judgment in a 2-to-1 decision. The majority did not address Mr. Dupre's argument that the district court *legally* erred by relying on his bare arrest records to deny relief, nor did it

address his independent arguments regarding the district court's failure to consider the § 3553(a) factors and adequately explain its decision. Instead, the majority affirmed based solely on its conclusion that the district court did not clearly factually err in its characterizations of Mr. Dupre's criminal history (8a-10a). Judge James Dennis dissented from the majority decision, agreeing with Mr. Dupre "that the district court abused its discretion by impermissibly relying on bare arrest records to deny him a reduction" and stating that he would have vacated the judgment and remanded the case (11a).

Mr. Dupre filed a timely petition for panel rehearing based on the majority's failure to address his claim of legal error arising from the district court's consideration of his bare arrest records, as well as the panel's failure to address his other, independent grounds for relief. With respect to the district court's failure to consider the § 3553(a) factors and inadequate explanation, Mr. Dupre emphasized that those issues were particularly important given this Court's recent holding in *Concepcion*. The court denied his rehearing petition on November 29, 2022.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT CERTIORARI, VACATE THE FIFTH CIRCUIT'S JUDGMENT, AND REMAND FOR RECONSIDERATION IN LIGHT OF *CONCEPCION V. UNITED STATES*.

When the district court denied Mr. Dupre's sentence reduction motion in 2020, the prevailing Fifth Circuit precedent precluded "plenary sentencing" in First Step Act proceedings and instead required the district court to "decide[] on a new sentence by placing itself in the time frame of the original sentencing[.]" *United States v. Hegwood*, 934 F.3d 414, 415, 419 (5th Cir. 2019). Under *Hegwood* and its progeny,

the district court was not "obligated to consider" Mr. Dupre's rehabilitative efforts or any other changes of fact or law since his original sentencing hearing. *See United States v. Jackson*, 945 F.3d 315, 321 (5th Cir. 2019); *see also United States v. Whitehead*, 986 F.3d 547, 551 (5th Cir. 2021) (rejecting an argument that the district court failed "to appreciate [the movant's] post-sentencing growth" because circuit precedent held "that the district court was not required to consider it"). Thus, the district court's order denying Mr. Dupre relief did not address or reflect any consideration of his positive post-conviction conduct or other supporting arguments, citing only his disciplinary records in prison while ignoring his rehabilitative efforts and other mitigating information.

While Mr. Dupre's appeal was pending, this Court decided *Concepcion* and expressly abrogated the framework set forth in *Hegwood*. In *Concepcion*, this Court made clear that courts are bound by the same constitutional limitations that apply at original sentencing hearings when they are considering sentence modifications. *See Concepcion*, 142 S. Ct. at 2400 ("The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution."); *id.*at 2401 n.4 (describing the constitutional limitations on district court discretion as being "the feature common to" initial sentencings and sentence modification proceedings); *id.*at 2401 n.5 ("The consistent historic norm is that a district court can consider any information in crafting a new or modified sentence, subject to congressional or constitutional limits."). The Court also held for the first time that district courts *must*

consider intervening changes of law and/or fact when a party raises them in a First Step Act proceeding and also "bear the standard obligation to. . . demonstrate that they considered the parties' arguments." *Id.* at 2402-04.

This Court's new precedent in *Concepcion* directly impacted the three issues that the Fifth Circuit failed to address in Mr. Dupre's appeal—namely, (1) the district court's legally erroneous consideration of bare arrest records, (2) its failure to consider all of the relevant § 3553(a) factors, and (3) its failure to adequately explain its decision to deny Mr. Dupre any relief. As Judge Dennis observed in his dissent, the majority's affirmance of Mr. Dupre's sentence reduction denial improperly endorses the consideration of bare arrest records in First Step Act proceedings (11a). That endorsement directly conflicts with *Concepcion*, as the Fifth Circuit has long held that the Constitution's due process requirement prohibits consideration of bare arrest records at sentencing. *See, e.g.*, *Foley*, 946 F.3d at 686; *Johnson*, 648 F.3d at 277-78; *United States v. Windless*, 719 F.3d 415, 420 (5th Cir. 2013). This Court made clear in *Concepcion* that the same constitutional protections and limitations apply in First Step Act proceedings.

With respect to the remaining two issues, *Concepcion* overhauled the prior Fifth Circuit precedent that governed the district court's consideration and resolution of Mr. Dupre's motion. The district court's order did not acknowledge, much less discuss, the mitigating arguments raised by Mr. Dupre, and its denial kept in place a sentence that is now nearly 16 years longer than the top of Mr. Dupre's Guidelines range without referencing the relevant range or providing a justification for that

significant variance. Despite the clear impact of *Concepcion* on these issues, the Fifth Circuit did mention the case at all in its decision and, instead, elected to disregard Mr. Dupre's multiple claims of procedural error.

For these reasons, this Court should grant certiorari, vacate the Fifth Circuit's judgment, and remand for resolution of Mr. Dupre's unaddressed claims of legal error in light of *Concepcion*, as it has done in other cases. *See, e.g.*, *United States v. Johnnie Sims* (20-30294); *United States v. Rahsaan Johnson* (21-30459).[3]

CONCLUSION

Hiking Dupre respectfully requests that this Court grant certiorari, vacate the Fifth Circuit's judgment, and remand with instructions that the Fifth Circuit reconsider Mr. Dupre's unresolved claims in light of *Concepcion*.

Respectfully submitted,

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[3] Although Mr. Dupre notified the Fifth Circuit of the intervening *Concepcion* decision, there is no indication that the panel actually considered and applied that new precedent in rendering its judgment, making a GVR order appropriate. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 170 (1996) ("[W]e have never held lower court briefing to bar our review and vacatur where the lower court's order shows no sign of having applied the precedents that were briefed.").