No. _____

In the
Supreme Court of the United States

VICTOR J. ORENA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Concepcion v. United States, – U.S. –*, 142 S. Ct. 2389, 2404 213 L. Ed. 2d 731 (June 27, 2022), this Court held that the First Step Act "allows district courts to consider intervening changes in law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." This Court also held in *Concepcion*, 142 S. Ct. at 2400, that "[T]he 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."?

Consistent with this Court's decision in *Concepcion*, in considering a First Step Act motion for a reduction in sentence, brought under 18 U.S.C. § 3582(c)(1)(A), does a district court have the authority to consider, either as "extraordinary and compelling circumstances" or in evaluating relevant sentencing factors under 18 U.S.C. § 3553(a), intervening changes in facts, arising or discovered since the defendant's original sentencing, that undermine findings in the original pre-sentence report and that are, therefore, directly relevant to the district court's consideration of the appropriate sentence to impose at the time the defendant's First Step Act motion is before the court?

PARTIES TO THE PROCEEDINGS

Petitioner, Victor J. Orena was the defendant-appellant below.

Respondent, United States of American was the plaintiff-appellee below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

1. *United States of America v. Victor J. Orena*, No. 21-2747, 2nd Cir. (Nov. 17, 2022) (affirming denial of motion for imposition of a reduced sentence under the First Step Act).
2. *United States of America v. Victor J. Orena*, No. 1:92-cr-351-1-ERK, E.D.N.Y. (Oct. 27, 2021) (denying motion for imposition of a reduced sentence under the First Step Act).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Victor J. Orena respectfully petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet.App.1a-10a) is reported at 48 F.4th 61 (2d Cir. 2022). The opinion of the United States District Court for the Eastern District of New York (Pet.App.21a-29a) is unreported.

JURISDICTION

The order and judgment of the court of appeals was entered on November 17, 2022. Pet.App.30a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582(c)(1)(A) provides:

(c) Modification of an imposed term of imprisonment. The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without

conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) [18 USCS § 3553(a)] to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) ... a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g) [18 USCS § 3142];

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission ....

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

(a) Factors to be considered in imposing a sentence. 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—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g) [18 USCS § 3742(g)], are in effect on the date the defendant is sentenced; or ...

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g) [18 USCS § 3742(g)], is in effect on the date the defendant is sentenced.[;]

(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.

INTRODUCTION

In *Concepcion v. United States*, 142 S. Ct. 2389, 2404, 213 L. Ed. 2d 731, 750 (2022), this Court held that "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act."

Even prior to *Concepcion*, courts around the country emphasized that under the First Step Act, Congress intended for the so-called "compassionate release" provision, codified at 18 U.S.C. § 3582(c)(1)(A) "to provide a 'safety valve' that allows for sentence reductions" to any defendant "when there is not a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction." *United States v. McGee*, 992 F.3d 1035, 1046, *quoting United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020). *See also*, *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021) (and cases listed therein).

This Court wrote in *Concepcion* that,

> "[I]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained. Nothing in the First Step Act

> contains such a limitation. Because district courts are always obligated to consider nonfrivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes when parties raise them." *Concepcion*, 142 S. Ct. at 2396.

This Court made clear that any limitation on a district court's discretion to consider changes in facts or the law since the initial conviction and sentencing when considering a modification of sentence must be "expressly" stated by Congress or in the Constitution. *Id*. at 2398.

The district court in the instant case held that in evaluating the Petitioner's First Step Act motion for reduction of sentence, pursuant to 18 U.S.C. § 3582(c)(1)(A), it was prohibited from in any way considering intervening facts, including exculpatory and impeachment evidence now in the public domain, that contradict findings in his original thirty-year old pre-sentence report. The district court held that intervening facts which go to the accuracy of the conviction or original sentencing findings cannot be considered in evaluating whether a reduction of sentence is appropriate through a First Step Act motion under 18 U.S.C. § 3582(c)(1)(A). (PetApp.15a, n.4).

The Second Circuit affirmed, expressly holding that Congress intended for 28 U.S.C. § 2255 to provide the kind of limitation on a district court's discretion that this Court contemplated in *Concepcion*, such that a district court has no authority, in the context of a First Step Act "compassionate release" sentence reduction motion pursuant to 18 U.S.C. §

3582(c)(1)(A), to consider any facts arising since the original sentencing that contradict the original pre-sentence report fact-finding, either as "extraordinary and compelling circumstances" or in balancing the sentencing factors under 18 U.S.C. § 3553(a). (Pet.App.9a, n.5).[1]

The lower court's decision is irreconcilable with this Court's holding in *Concepcion*, reflects a profound split of authority among the circuits on this important question, and is wrong. This Court must intervene and make clear that its holding in *Concepcion* applies in full force to allow the consideration of intervening facts which call into question the continued viability of earlier sentencing factors, when a district court is considering a First Step Act motion under 18 U.S.C. 3582(c)(1)(A) and resolve the circuit split. This case provides the perfect vehicle to do so in a timely fashion. Such motions are being adjudicated in courts around the country every day and under the current scenario, a district court's understanding of its authority to consider intervening changed facts depends entirely on what court is considering the First Step Act motion. That is constitutionally untenable. *Compare e.g., United States v. Ruvalcaba*, 26 F.4th 14, 21-22 (1st Cir. 2022) (rejecting the argument that the habeas statutes, including 28 U.S.C. § 2255, represent an "extratextual limit" on the facts related to sentencing errors or the conviction that a district court can consider under 18 U.S.C. § 3582(c)(1)(A); the First Step Act represents a

[1] The government admitted during oral argument below, that there is nothing in the statutory language of 18 U.S.C. § 3582 that supports its position that intervening facts of this nature cannot be considered in connection with a sentencing under a First Step Act motion. *Oral Argument at 14:17.*

"paradigm shift" with respect to such motions); *United States v. Trenkler*, 47 F.4th 42 (1st Cir. 2022) (18 U.S.C. § 3582(c)(1)(A) serves as a "safety valve" and 28 U.S.C. § 2255 does not foreclose the district court's consideration of any set of facts of circumstances that have arisen since the conviction and sentence); *United States v. Ford*, 2023 U.S. Dist. LEXIS 17102, *11-*12 2023 WL 1434302 (D. Kan., February 1, 2023) (rejecting the argument that in evaluating a motion under 18 U.S.C. § 3582(c)(1)(A), a court's authority is limited by § 2255).

STATEMENT OF THE CASE

1. Petitioner, Victor J. Orena, 88 years old, has been continuously incarcerated in connection with this case for three decades, since his initial appearance on April 1, 1992 [ECF# 7]. He suffers from a multitude of serious physical and mental health conditions, including advanced Dementia/Alzheimer's disease, serious heart ailments, and other rapidly progressing ailments. He is delusional and does not know who he is or where he is, as his medical records unequivocally reflect. He cannot self-care and requires a full-time aide.

The following are some of the documented serious medical conditions from which he suffers: Alzheimer disease, diabetes, abdominal aortic aneurysm with recent increase in size, hypertension, hyperlipidemia, benign prostatic hyperplasia, glaucoma, gastroesophageal reflux disease, osteoarthritis, degenerative joint disease in both hands and knees, anemia, complete atrioventricular block, and pacemaker use. He is housed in an inpatient medical unit due to dementia-related behavior. Aside from leaving the inpatient unit to attend religious services

and visits accompanied by an inmate companion, he generally remains on the unit, as he is unable to find his way back and is vulnerable to engaging in behaviors that place him at risk of falling. He uses a wheelchair, again with the assistance of an inmate companion. He is at "high risk" of falling. He requires assistance with his activities of daily living, spends the majority of his time in bed or a wheelchair, and receives a significant amount of redirection and reorientation. He is in a "debilitated medical condition" under BOP Policy Statement 5050.50 Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g), section 3(b). [ECF#1864 sealed].

Under the Sentencing Guidelines, Mr. Orena's condition is deemed "terminal." Note 1.(A)(I) of the Commentary to U.S.S.G. § 1B1.13 (2018).

The lower courts acknowledged that his medical condition fully meets the criteria for "extraordinary and compelling circumstances" under 18 U.S.C. § 3582(c)(1)(A)(i). (Pet.App.13a-14a). He has a perfect institutional record for the entire thirty years he has been incarcerated, helped others before the onset of his medical conditions, and the Bureau of Prisons has assigned him its lowest possible risk for dangerousness. [ECF#1864-2; Pet.App.9a].

On July 13, 2021, after exhausting all administrative remedies, Mr. Orena filed a First Step Act motion for reduction of sentence under 18 U.S.C. § 3582(c)(1)(A), based on his terminal medical condition, his perfect institutional record over the thirty years of his incarceration, his service to others

while in prison, and the BOP assignment of the lowest possible risk of dangerousness. [ECF#1864].

2. Once a motion under § 3582(c)(1)(A), as modified by the First Step Act, is filed, the statute and case law have made clear the analytical framework:

To qualify for a reduction of the sentence on compassionate release grounds, defendants must show: (1) that they have fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on [their] behalf, (2) that "extraordinary and compelling reasons" warrant a reduction in the term of imprisonment; (3) that these reasons outweigh the factors set forth in section 18 U.S.C. § 3553(a) to the extent that they are applicable; and (4) that a sentence reduction is consistent with applicable policy statements issued by the Sentencing Commission. § 3582(c)(1)(A); *see also, United States v. Thrower*, 495 F. Supp. 3d 132, 137-138 (E.D.N.Y. 2020); *United States v. Cato*, 2020 U.S. Dist. LEXIS 175554, 2020 WL 5709177, at *3 (E.D.N.Y. Sept. 24, 2020). "Even if a defendant carries this burden, district courts have broad discretion in deciding whether to grant or deny a motion for a sentence reduction." *Cato*, *Id*.

In determining what constitutes "extraordinary and compelling reasons," a district court has "discretion" to consider "the full slate" of arguments that defendants present to support a sentence reduction. *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020). "The only statutory limit on what a court may consider to be extraordinary and compelling is that '[r]ehabilitation . . . alone shall not be considered an extraordinary and compelling reason.'" *Id*.

Even if extraordinary and compelling reasons exist, they must outweigh the 18 U.S.C. § 3553(a) factors to warrant sentence reduction. *Id*. § 3553(a). *United States v. Thrower*, 495 F. Supp. 3d 132, 137-138 (E.D.N.Y. 2020).

Mr. Orena, of course, recognizes that the district court retains broad discretion in its evaluation of the "extraordinary and compelling circumstances" and the § 3553(a) factors; but in the instant case, the district court never engaged in any consideration of the material intervening factual changes from the time of the thirty-year old pre-sentence report, because it found that it had no authority to consider them. (Pet.App.15a, n.5). That cannot be reconciled with this Court's decision in *Concepcion*. *See Concepcion*, 142 S. Ct. at 2405 ("The First Step Act does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it, but it does require the court to consider them.").

3. In response to Mr. Orena's First Step Act motion, the government urged the district court to deny the requested relief by finding that factors under 18 U.S.C. § 3553(a) outweighed the "extraordinary and compelling circumstances." It argued that Mr. Orena was not only responsible for the murder charged in the indictment against him, but that as the acting boss of the Colombo crime family he was responsible for multiple deaths in the so-called internecine war within the family, among other things. [ECF#1865].

The government's submission was based entirely on a pre-sentence report and sentencing order from the time of the conviction, thirty years ago, notwithstanding that it well knew that since that

time extraordinary exculpatory and impeachment facts had surfaced which directly undermined the findings in the thirty-year old pre-sentence report ("PSR") and the corresponding assertions in its opposition to Mr. Orena's First Step Act motion. All of the intervening changed facts were omitted from its submission, even though these exculpatory intervening facts were all in the record and the public domain. [ECF#1865]. Even worse, many of the intervening facts that cast doubt on the original pre-sentence report findings exposed outrageous government misconduct by the same prosecutorial office now seeking to exploit the original findings it knew had been undermined by the development of the intervening facts. [ECF#1869].

Moreover, the government was not satisfied with just omitting all of those facts and urging the district court to deny the motion based entirely on the trial record and PSR, as if there were nothing that had transpired in the 30 years since that undermined the integrity of the original PSR findings. Government counsel affirmatively represented to the district court that: "The reasons behind Orena's life sentence are no less true today than they were at the time of his sentencing" and they urged the court to deny the motion based on the factors set out at 18 U.S.C. § 3553(a) [ECF#1865 at 14-15].

4. In his reply, Mr. Orena pointed out to the district court that the government's opposition entirely ignored the unprecedented record of governmental misconduct in this case that had surfaced in the intervening years that reflected extraordinary and compelling changed facts regarding the original PSR findings. He detailed what those facts were, supported by hundreds of pages of documents

[ECF#1869 and exhibits]. Government counsel omitted any reference whatsoever to the many volumes of books and other written materials in the public domain, exposing the outrageous misconduct in this case that casts great doubt on the integrity of the rendition of facts set out in the thirty year old sentencing order and pre-sentence report. [*Id*.]

Mr. Orena asked the district court to consider all of the evidence of intervening material facts already in the record and the public domain when considering the pending First Step Act motion, with regard both to the "extraordinary and compelling circumstances" prong and the § 3553(a) prong. [*Id*.].

Mr. Orena argued that it was not at all fair for the district court, in the context of a First Step Act motion for reduction of sentence, to rely on facts in a thirty year old pre-sentence report and sentencing order and not consider intervening facts, when it is beyond dispute that fully developed intervening facts undercut the integrity of the findings in those earlier documents (findings based in large part on government misconduct which the government now seeks to exploit once again). [ECF#1869; Hearing Tr., October 13, 2021]. This Court in *Concepcion*, 142 S. Ct. at 2398, expressly rejected the approach of a district court placing "itself in the time frame of the original sentencing ..." rather than considering intervening changed facts or law.

As he argued before the Second Circuit, whether or not the intervening facts would be sufficient to support vacating the sentence under a § 2255 motion was an entirely separate question. No matter the answer to that question, the intervening facts were sufficient to at least give rise to some "lingering

doubt" sufficient to require the district court to consider the continued applicability of original PSR as an accurate reference for evaluating the § 3553(a) sentencing factors or to consider these intervening facts as "extraordinary and compelling circumstances under 18 U.S.C. § 3582(c)(1)(A)(i). (2d Cir. Oral Argument at 19:21; 20:00) *See e.g., United States v. Fernandez*, 2022 U.S. Dist. LEXIS 209086, *11, 2022 WL 17039059 (S.D.N.Y., Nov. 17, 2022). Mr. Orena confirmed at all times that he was not seeking, through his First Step Act motion, to challenge or set aside his conviction; rather he was seeking a reduction in sentence based on the "extraordinary and compelling circumstances" presented and a balancing with the § 3553(a) factors based on the current information, including the intervening facts that undermine the original pre-sentence report findings on which the government was asking the district court to reply. [ECF#1869; Oral Argument at 3:53; 9:07; 9:50; 9:58; Orena Reply Brief at 10, 23, 24].

The Intervening Changes in Facts the District Court Wrongly Found It Had No Authority to Consider Under 18 U.S.C. § 3582(c)(1)(A):

5. The intervening material facts that directly undermine the thirty-year old pre-sentence report on which the district court exclusively relied and which it found it had no authority to deviate from, were already in the record in this case from post-conviction proceedings and related cases and were in the public domain. These facts began to surface almost immediately after Mr. Orena's sentence, and flowed from the revelation that throughout the time period of the events on which his conviction was based, the lead FBI agent in the case, Devecchio, had a corrupt relationship with a vicious mob killer, Scarpa, and the

government knew about it and concealed it from Mr. Orena and it was Devecchio and Scarpa who fomented a "war," not Mr. Orena.

The intervening facts and materials Mr. Orena asked the district court to consider as "extraordinary and compelling circumstances" and under § 3553(a) [ECF##1869-1 thru 1869-5], included the following:

A. Since the time of Mr. Orena's conviction, his prosecution and the prosecution of the so-called Colombo War cases have been exposed as the single most corrupt prosecution in the history of our criminal justice system.[2]

B. In 2005, the FBI cited the corrupt relationship in this case in creating new guidelines for interacting with cooperating witnesses. https://oig.justice.gov/sites/default/files/archive/special/0509/chapter3.htm (See especially Section III. D. and Case Study 2).

C. The lead FBI agent, Devecchio, was indicted for multiple murders directly related to these cases.

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[2] https://www.newyorker.com/magazine/1996/12/16/the-g-man-and-the-hit-man?irclickid=wJ4VAl1VpxyORwmwUx0Mo38QUkBWXDzxQyJWRU0&irgwc=1&source=affiliate_impactpmx_12f6tote_desktop_Bing%20Rebates%20by%20Microsoft&utm_source=impact-affiliate&utm_medium=2003851&utm_campaign=impact&utm_content=Logo&utm_brand=tny

https://nypost.com/2007/01/14/gangland-g-man-sent-rat-into-trap/

Peter Lance, *Deal With the Devil, The FBI's Secret Thirty-Year Relationship with a Mafia Killer* (Morrow 2013).

https://www.nytimes.com/2006/03/30/nyregion/exfbi-agent-accused-of-role-in-four-organized-crime-killings.html

http://www.usa-the-republic.com/items%20of%20interest/Win_At_All_Cost/Switching_sides.htm

Devecchio was exposed as having picked sides and he celebrated murders, while providing information to Scarpa in order to facilitate the murders.

D. Chief Judge Sifton of the United States District Court for the Eastern District of New York characterized the government's conduct in withholding evidence of the corruption attending this prosecution as a "reprehensible" and a "myopic withholding of evidence."[3]

E. When the corruption evidence finally was discovered and juries heard it, defendant after defendant in the so-called Colombo war prosecutions was acquitted, including Mr. Orena's own sons. *See United States v. Orena et al.*, 93 cr 1366 (ERK); *see also* ECF#1869-1.

F. In 2016, Eastern District of New York Judge Edward Korman found that FBI agent Devecchio clearly was providing information to Scarpa to facilitate the murders he was committing. https://www.nydailynews.com/new-york/nyc-crime/brooklyn-judge-fbi-agent-aided-mob-hits-article-1.2488378

G. A New York state judge described much worse in *People v. Devecchio*, 2007 N.Y. Misc. LEXIS 7827, *4-*4 (Kings Co. Sup. Ct., Nov. 1, 2007).

H. Devecchio has since openly admitted knowing that Scarpa was committing murders while on the street acting as his informant. https://www.youtube.com/watch?app=desktop&v=btQkfCyd6Lw

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[3] *See United States v. Theodore Persico, Jr. et al.*, CR-92-0351 (CPS), Memorandum and Order of February 18, 1997.

See also, ECF#1869-2 - *Report of the Special District Attorney In the Matter of the Investigation of Linda Schiro* by Judge (ret.) Leslie Crocker Snyder.

I. One of the primary factors driving the district court's decision on the § 3553(a) factors was the murder for which Mr. Orena was convicted. [ECF##1865 at 2; 1876 at 6]. Among the intervening facts that have since been discovered is a previously withheld FBI 302 reflecting a statement by a top echelon FBI informant advising the government that someone else committed the murder having nothing to do with Mr. Orena and that Orena would have been against it. [ECF#1869-4].

J. This same top echelon informant has since given a statement that while he worked as an informant, he was given free rein to kill, including the 12 Colombo war murders attributed to Mr. Orena in the PSR and relied on by the district court. [ECF##1829; 1830-1 sealed; Pet.App.16a]. https://www.nydailynews.com/news/crime/colombo-crime-fam-hit-man-frankie-blue-eyes-sparaco-lied-killed-fbi-informant-article-1.956248

The lower court refused to consider a single one of these extraordinary and compelling facts that undermine the integrity of the thirty year old PSR narrative it relied on in denying Mr. Orena's First Step Act motion.

6. At no time ever has Mr. Orena even suggested that his First Step Act motion could be a vehicle for attacking or setting aside the conviction in this case. Indeed, he expressly advised the Second Circuit that he made no such argument and sought no such relief; rather he simply was asking the court to exercise its authority to consider material intervening facts in the

context of "extraordinary and compelling circumstances" and its evaluation of the § 3553(a) sentencing factors, as this Court's decision in *Concepcion* requires. [*See e.g.*, Orena Reply Brief at 10; 23; 24; Oral Argument at 3:53; 9:07; 9:50; 9:58; 19:51; 20:00; 20:24; 20:30].

7. The district judge rejected Mr. Orena's request, fully credited the facts in the thirty year old PSR and sentencing order, and expressly found that it did not have the authority, in the context of a First Step Act motion, to consider the evidence Mr. Orena adduced reflecting intervening facts directly relevant to the historic "facts" on which the court was relying. (Pet.App.15a, n.4).

It denied Mr. Orena's First Step Act motion based on the historic facts, without considering any intervening fact that demonstrated the inaccuracy of the facts on which it relied regarding Mr. Orena and his conduct. [Pet.App.15a, n.4; 16a]. The district judge held that he was without the authority to consider any intervening facts and had to assume the accuracy of the thirty year old PSR [*Id.*].

8. The Second Circuit affirmed the district court on June 15, 2022; however, that decision was withdrawn and superseded on August 31, 2022, by the Opinion on rehearing that Mr. Orena asks this Court to review. (Pet.App.1a-10a).

In its Opinion on rehearing, the Second Circuit affirmed the district court's holding that when considering a First Step Act motion for reduction of sentence under 18 U.S.C. § 3582(c)(1)(A), the district court must assume "the legitimacy of (the movant's) conviction and the accuracy of the Presentence Investigation Report" and does not have the

discretion to consider arguments challenging the same when balancing § 3553(a) factors. Rather any facts that call into question the validity of the conviction or the accuracy of the presentence report can only be brought through a motion under 28 U.S.C. § 2255 or § 2241. (PetApp.3a, 6a, 8a).

The Second Circuit held that 28 U.S.C. § 2255 is a constraint imposed by Congress, within the meaning of this Court's decision in *Concepcion*, that bars a court from considering changes in the law or the facts vis a vis § 3553(a) factors, when considering a First Step Act motion for reduction of sentence, if those intervening facts question the continued accuracy of a presentence report. (Pet.App.9a, n5).

Finally, the Second Circuit held that it did not need to address the argument as to whether such intervening changes in facts constitute "extraordinary and compelling circumstances" for purposes of a First Step Act motion for reduction of sentence, because the district court found that the medical conditions constituted "exceptional and compelling circumstances." (Pet.App.7a, n.3).

The lower court denied further panel and *en banc* rehearing on November 17, 2022. (Pet.App.20a).

REASONS FOR GRANTING THE WRIT

I. This Court must resolve the split of authority on the question presented.

The government argued on rehearing below that this Court's decision in *Concepcion* only applies to First Step Act motions brought under 18 U.S.C. § 3582(c)(1)(B) and not to motions under 18 U.S.C. §

3582(c)(1)(A).[4] The government is wrong. The split of authority between Seventh Circuit and other Circuits on the threshold question of whether the decision in *Concepcion* is limited to First Step Act motions under 18 U.S.C. § 3582(c)(1)(B) or apply as well to First Step Act motions under 18 U.S.C. § 3582(c)(1)(A) must be resolved.[5] It affects every district court in the country, called upon to decide First Step Act motions every day.

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[4] Government Rehearing Petition Response at 6, citing *United States v. King*, 40 F.4th 594 (7th Cir. 2022). *See also, United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021); *United States v. Brock*, 39 F.4th 462 (7th Cir. 2022); *United States v. Peoples*, 41 F.4th 837 (7th Cir. 2022).

[5] *See e.g.*, *United States v. Lawson*, 2022 U.S. Dist. LEXIS 121974, *21, n.11; *40 (D. D.C., July 11, 2022) (Bates, J.) (citing *Concepcion* in the context of a motion under 18 U.S.C. § 3582(c)(1)(A)); *United States v. Johnson*, 2022 U.S. Dist. LEXIS 129168, *19-*20 (D. D.C., July 21, 2022) (Same and emphasizing the need to give full effect to § 3582(c)(1)(A)); *United States v. Barron*, 2022 U.S. Dist. LEXIS 117275, *8, n.2 (D. D.C. July 1, 2022); *United States v. Juhala*, 2022 Dist. LEXIS 136137, *12 (D. S.D., July 29, 2022) (applying *Concepcion* in analyzing § 3582(c)(1)(A) motion); *United States v. Wright*, – F.4th –, 2022 U.S. App. LEXIS 21011, *15 (9th Cir., July 29, 2022) (applying *Concepcion's* requirement that all reasons for action taken on a First Step Act motion much be explained, in the context of a § 3582(c)(1)(A) motion); *United States v. Roberts*, 2022 U.S. Dist. LEXIS 126053, *9-*10 (E.D.N.C., July 15, 2022) (applying *Concepcion* in the context of a § 3582(c)(1)(A) motion); *United States v. Best*, 2022 U.S. Dist. LEXIS 118131, *9 (E.D.N.C., July 6, 2022) (referring to Concepcion in considering a § 3582(c)(1)(A) motion). There are 12 other cases from the Eastern District of North Carolina to the same effect. *See also, United States v. Gutierrez*, 2022 U.S. Dist. LEXIS 120160, *7, n.26 (D. Kan., July 7, 2022); *United States v. Dewberry*, 2022 U.S. Dist. LEXIS 12015, *10, n.43 (D. Kan., July 7, 2022); *United States v. Arriola-Perez*, 2022 U.S. App. LEXIS 18256 (10th Cir. July 1, 2022).

There is now a mature, clear split of authority among the Circuits as to whether, after this Court's decision in *Concepcion*, a district court has the authority to consider intervening changes in facts that undermine or cast doubt on original findings with respect to the conviction or original PSR findings in the context of a First Step Act under 18 U.S.C. § 3582(c)(1)(A). This Court must now resolve this very important and frequently arising question. It goes directly to the "safety valve" the First Step Act intended to have 18 U.S.C. § 3582(c)(1)(A) serve.

The Second Circuit purported to rely on decisions from two other Circuits in support of its conclusion that changes in facts related to the crime of conviction or sentencing findings made at the time of the original sentencing can only be raised through a motion under 28 U.S.C. §§ 2255 or 2241 and that those vehicles reflect congressionally imposed constraints against a district court's authority to consider the same as either "extraordinary and compelling circumstances" or relevant factors to consider and balance under 18 U.S.C. § 3553(a) in the context of a First Step Act motion under 18 U.S.C. § 3582(c)(1)(A). (Pet.App.8a). However, those cases both pre-date *Concepcion* and, therefore, are not informative.

The cases that have addressed this issue since *Concepcion* show a clear, mature, and irreconcilable split of authority which this Court must immediately resolve. The failure to resolve it now, literally means that the disposition of a First Step Act motion, often in need of immediate resolution, will be decided one way or the opposite way, solely depending on the Circuit in which it is filed. That is an untenable situation concerning a fundamental and vitally important matter and must be resolved through this

case. It provides the perfect vehicle, squarely addressing and isolating the question.

The First and Ninth Circuits provide the most definitive post-*Concepcion* rejection of the Second Circuit's holding in this case that 28 U.S.C. § 2255 provides a bar to a district court considering intervening changes in facts that undermine or challenge the continuing accuracy of findings made at a defendant's original sentencing. *See United States v. Trenkler*, 47 F.4th 42 (1st Cir. 2022); *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022); *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022).

Both cases, in reliance on the principle established in *Concepcion* 142 S. Ct. at 2396, 213 L. Ed. 2d 731 (2022) that "[I]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion is restrained" fully support Mr. Orena's argument that the district court abused its discretion by finding it had no authority to consider intervening facts that undermined information in the 30-year old PSR that the court relied on in denying Mr. Orena's First Step Act motion.

Specifically, they both expressly reject the Second Circuit's holding that 28 U.S.C. § 2255 is the exclusive mechanism for presenting such intervening facts and presents the kind of Congressional or Constitutional constraint that this Court referred to in *Concepcion*, 142 S. Ct. at 2396. *Trenkler*, 47 F.4th at 48; *Ruvalcaba*, 26 F.4th at 25-26; *Chen*, 48 F.4th at 1101.

The First and Ninth Circuits have emphasized that § 2255 and a First Step motion are distinct, independent vehicles with different scopes and

different purposes. The former focuses on the "legality" and "validity" of a conviction and provides for vacatur as the remedy. The latter is addressed to the court's discretion as to whether to exercise leniency based on a current individualized review of the defendant's circumstances and a court is to take a "holistic" evaluation, considering "extraordinary and compelling circumstances" in the aggregate. The First Step Act provides a "safety valve" that § 2255 does not and cannot provide. *Trenkler*, *Id.* at 48; *Ruvalcaba*, *Id.* at 27-28. *See also, United States v. Malone*, 57 F.4th 167, 171, 177 (4th Cir. 2023) (court can consider whether long sentence was unduly harsh and unjust under § 3582(c)(1)(A));[6] *United States v. West*, 2022 WL 16743864, *4, *5-*6 (E.D. Mich., November 7, 2022) (§ 2255 and First Step Act motions have different purposes and scopes; very purpose of § 3582(c)(1)(A) is to reopen final judgments and reevaluate facts)[7]; *United States v. Ford*, 2023 U.S. Dist. LEXIS 17102; 2023 WL 1434302 (D. Kan., February 1, 2023) (wholly rejects argument that § 2255 constrains authority under First Step Act); *United States v. Carlton*, 2022 U.S. Dist. LEXIS 211831, 2022 WL 1710406 (S.D.N.Y., Nov. 22, 2022), *Reconsideration denied*, 2023 U.S. Dist. LEXIS 14533 (S.D.N.Y., Jan. 27, 2023) (considers arguments that original sentence was unusually harsh and unjust

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[6] The decision in *Malone* is difficult to reconcile with the Fourth Circuit's early *post-Concepcion* decision in *United States v. Ferguson*, 55 F.4th 262 (4th Cir. 2022) which appears to categorically support the decision in the instant case. *Id.* at 271.

[7] Pre-*Concepcion* jurisprudence in the Sixth Circuit on the issues here appears to be quite unsettled. *Compare, United States v. Hunter*, 12 F.4th 555, 567 (6th Cir. 2021) with *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021).

and sentencing court's confusion as "extraordinary and compelling circumstances under § 3582(c)(1)(A))[8]

In *United States v. Ferguson*, 55 F.4th 262, 271 (4th Cir. 2022), the Fourth Circuit purports to identify the split of authority on whether habeas statutes bar consideration under a First Step Act motion or intervening facts that relate to the original conviction or sentence as being the First Circuit against the majority of all other circuits; but that clearly is not accurate and almost every case it cites pre-dates *Concepcion*. It is accurate that the D.C. Circuit and the Seventh Circuit appear to be aligned with the Second Circuit. *See United States v. Jenkins*, 50 F.4th 1185, 1202 (D.C. Cir. 2022) (but see Judge Ginsburg's dissent); *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021). The Fifth and Eleventh Circuits also appear to be aligned with the Second Circuit on this issue. *See United States v. Mollica*, 2022 U.S. Dist. LEXIS 204160, 2022 WL 16838031 (N.D. Ala., Nov. 9, 2022); *United States v. Ellwood*, 2022 WL 14810101 (E.D. La., Oct. 26, 2022). But the First and Ninth clearly split from those circuits and as the district court cases cited above indicate, there is reason to believe that the Sixth and Tenth Circuit are contrary to the decision in the instant case as well.

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[8] Curiously, this decision, from a district court within the Second Circuit, post-dates the Second Circuit's decision in the instant case, but comes to the opposite conclusion and is impossible to reconcile with it. *See also*, *United States v. Fernandez*, 2022 U.S. Dist. LEXIS 209086, 2022 WL 17039059 (S.D.N.Y., Nov. 17, 2022) (Intervening facts challenging validity of conviction raised sufficient "disquiet" for the court to constitute "exceptional and compelling circumstances" for relief under § 3582(c)(1)(A).

The questions presented here arise in cases across the country every day and this Court should act immediately to resolve the split of authority.

II. The Second Circuit's Decision is Wrong and is Irreconcilable with this Court's Decision in *Concepcion* and the question at issue are important.

This Court in *Concepcion* set out certain fundamental principles directly relevant here.

For example, the Court wrote the following:

> "The question in this case is whether a district court adjudicating a motion under the First Step Act may consider other intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison) in adjudicating a First Step Act motion."
>
> "The Court holds that they may. It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained. Nothing in the First Step Act contains such a limitation. Because district courts are always obligated to consider nonfrivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes when parties raise them."

Concepcion v. United States, 142 S. Ct. at 2396.

The Court also wrote:

> "The Court therefore holds that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." "It follows, under the Court's sentencing jurisprudence, that when deciding a First Step Act motion, district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments. It is well established that a district court must generally consider the parties' nonfrivolous arguments before it."

Concepcion v. United States, 142 S. Ct. at 2404.

As the Court further clarified, "The First Step Act does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it, but it does require the court to consider them." *Concepcion v. United States*, 142 S. Ct. at 2405.

The Court in *Concepcion* emphasized the presumption in sentencing, whether for the initial sentencing or any subsequent modification of sentence proceedings, in favor of full discretion for the district court judge. The Court wrote:

> "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion." K. Stith & J. Cabranes, Fear of Judging: Sentencing

> Guidelines in the Federal Courts 9 (1998) (Stith & Cabranes). Federal courts historically have exercised this broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. Such discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence." *Concepcion v. United States*, 142 S. Ct. 2389, 2398.
>
> Congress, in the First Step Act, simply did not contravene this well-established sentencing practice. Nothing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion.

Concepcion v. United States, 142 S. Ct. 2389, 2400-2401.

Notwithstanding his extraordinary and compelling terminal health conditions, Mr. Orena's undisputedly unblemished institutional record for the 30 years of his incarceration, and a finding by the Bureau of Prisons that he presents the lowest level of risk for dangerousness [ECF#1864-2], the district court denied relief based on facts it drew exclusively from Mr. Orena's presentence report and sentencing

order from more than thirty years ago [Pet.App.1a-10a].

In affirming, the Second Circuit based it decision on two fundamentally erroneous premises - (1) that Mr. Orena seeks to attack his conviction with his § 3582 motion and (2) that since he already established that his medical conditions constitute "extraordinary and compelling circumstances," the newly discovered evidence he seeks to introduce cannot also constitute "extraordinary and compelling circumstances." [Pet.App.11a-19a]

At no time and in no manner did Mr. Orena's First Step Act motion raise a challenge to his underlying conviction or seek any relief whatsoever with respect to the conviction; it was solely a First Step Act motion seeking a reduction in sentence. This point has been made repeatedly with supporting record references; yet the Second Circuit inexplicably continued to erroneously characterize the relief sought.

In *United States v. Trenkler*, 47 F.4th 42 (1st Cir. 2022), the court addressed the argument Mr. Orena has been making, including the exact distinction Mr. Orena has made at all times between attempting to use a § 3582 motion to attack the conviction versus using it to introduce intervening facts that undermine the facts relied on in a pre-sentence report regarding the sentence imposed.

The Court in *Trenkler* expressly rejected the government's argument that a compassionate release motion that asks the court to rely on facts relevant to the integrity of the conviction necessarily transforms the motion into a habeas motion; rather it held that such facts can qualify as extraordinary and compelling circumstances that are relevant to the

"individualized review of a defendant's circumstances" which might, in the court's discretion, permit a sentence reduction. *Trenkler*, *Id*. at 48. That is the purpose of the "safety valve" provided by § 3582 and the "narrow exception to the general rule of finality in sentencing" that it provides. *Id*.

The Second Circuit's erroneous premise is extraordinarily unfair, is contrary to the record, and does a grave injustice to the presentation of the important issues raised in this case.

There is no cognizable principle of law, arising under the First Step Act or from any other source that would promote the use of thirty-year old sentencing-related findings, subsequently exposed as false and as the product of government misconduct, to support the denial of a sentence reduction motion. The result is to insulate them from being exposed as false by the true facts (a change in the operative facts, to put it in *Concepcion* terms) when considering both "extraordinary and compelling" circumstances, the § 3553(a) factors mandated for consideration and balancing of the two under the First Step Act through 18 U.S.C. § 3582(c)(1)(A).

The subsequently uncovered true facts are independently relevant to the extraordinary and compelling circumstances and to the § 3553(a) factors considered by the district court and it is a complete perversion of justice to hold that in the context of a sentence reduction motion - with respect to either prong or a balancing of the two prongs - that it is within a district court's discretion to rely on demonstrably false "facts" in a thirty-year old presentence report and sentencing order, but outside its discretion to consider any evidence that the "facts"

he is relying on have since been proven false. That is the exact scenario this case presents. The First Circuit in *Trenkler* and the other cases cited above that split from the Second Circuit (as well as the district court cases cited above within the Second Circuit) recognized the exact argument Mr. Orena makes here and determined that such evidence must be considered.

The decision below cannot survive this Court's decision in *Concepcion* and any concept of the fair application of the First Step Act under any subsection.

The decision in *Concepcion* requires a remand to the district court with instructions that the court has within its discretion, the ability to consider the subsequent factual developments in the context of the "extraordinary and compelling circumstances" prong, in the context of its evaluation of the sentencing factors under 18 U.S.C. § 3553(a), and in its balancing of the two mandated considerations under 18 U.S.C. § 3582(c)(1)(A).

The court of appeals' decision also erred in another material regard. It acknowledged that Mr. Orena argued that the district court had discretion to consider the intervening facts in both the context of its consideration of "extraordinary and compelling circumstances" under § 3582 and in its weighing of the § 3553(a) factors under the First Step Act motion. However, it advised that it would disregard the argument that such new facts should be considered under the "extraordinary and compelling circumstances" prong because the district court already had found extraordinary and compelling circumstances from Mr. Orena's medical condition.

[Pet.App.7a, n.3]. There is no basis for limiting the "extraordinary and compelling circumstances" prong to type of fact. This Court clearly decided that district courts have authority to consider all facts, simple and complex in the context of "extraordinary and compelling circumstances" and they should be considered in their aggregate. *Ruvalcaba*, 26 F.4th at 27-28.

As Mr. Orena argued in his briefs and at oral argument, the fact that the district court found extraordinary and compelling circumstances from his terminal medical conditions does not obviate the need to consider whether the remarkable evidence that has come forward since Mr. Orena's 30-year-old pre-sentence report, revealing extraordinary corruption in this prosecution and casting real doubt on the findings in the pre-sentence report on which the district court based its decision to deny a reduction in sentence under the First Step Act. The two are not mutually exclusive and had the district court understood that it had the authority to consider the new intervening facts under the extraordinary and compelling circumstances prong perhaps it would have done so, weighed them heavily in its evaluation, and used them to outweigh its concerns under the § 3553(a) factors.

CONCLUSION

The issue before the Court in this case is both simple and straightforward. It is whether a district court has the discretion when evaluating and balancing "extraordinary and compelling circumstances" and sentencing factors under 18 U.S.C. § 3553(a), in the context of a First Step Act motion for sentence reduction filed pursuant to 18

U.S.C. § 3582(c)(1)(A), to consider facts uncovered since the original sentencing, that directly contravene and rebut facts in the original pre-sentencing investigation report on which the government has asked the district court to rely in its evaluation/balancing and on which the district court did rely in denying relief. In short, Mr. Orena asked the Court to consider him as he stands before the court today.

The issue here is particularly significant because the bulk of the facts ascertained since the original 30 year-old presentence report were material exculpatory facts the Government unlawfully withheld from Mr. Orena.

Moreover, they were "facts" going well beyond the crime of conviction that the district court heavily relied on in imposing the original sentence and for its commentary in its sentencing order, and it is that commentary on which the district court here relied in denying the motion for sentence reduction. Indeed, in opposing Mr. Orena's motion for sentence reduction, the government urged and ultimately convinced the district court to rely on the 30 year-old false "facts," knowing that they had since been demonstrably proven to be untrue (and that the true facts had been unlawfully withheld), thereby successfully seeking to exploit their own outrageous misconduct in this case. The district court relied on those 30 year-old false "facts," at the government's urging, while finding it had no discretion to consider the relevant, exculpatory facts that have come to light since that presentence report and sentencing order and that rebut the "facts" on which it relied. [Pet.App.15a, n.4].

The decision below cannot be reconciled with this Court's decision in *Concepcion*. The judgment of the Second Circuit must be reversed and this case must be remanded for further consideration consistent with *Concepcion.*

For the reasons stated the petition for certiorari should be granted.

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