

No. 23 - 7308



IN THE
SUPREME COURT OF THE UNITED STATES

Jesse Vasquez — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jesse Vasquez Reg. No. 46542-112

(Your Name)

USP Victorville, PO Box 3900,

(Address)

Adelanto, CA 92301

(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. The question presented here is whether the District Court abused its discretion or erred when Mr. Vasquez qualified for a sentence reduction, he asked for in two ways under 18 U.S.C. 3582(c)(1)(A) and 404(b) of crack cocaine under the First Step Act of 2018?
2. The question presented here did the District Court rule wrong in ruling opposite the Supreme Court ruling in *Concepcion v. United States*, and stood silent on the 404 crack cocaine and didn't consider the 3553(a) factors at all, *Concepcion*, 142 S.Ct. 2389 (2022)?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at Ninth Circuit, No. 23-1214; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at 8:07-cr-00202-DOC-1; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was December 15, 2023.

[] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 28, 2024, and a copy of the order denying rehearing appears at Appendix _____.
[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.
[]

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

[] For cases from **state courts:**

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.
[]

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.
An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.
[]

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Step Act of 2018 Makes Retroactive The Fair Sentencing Act's Reduction Penalties And Changes the Requirements for Recidivism Enhancements to Drug Sentences.

In 2018, Congress enacted the First Step Act., Pub. L. No. 115-391, 404, 132 Stat. 5194 (2018)(“First Step Act” or “Act”), which made retroactive the Fair Sentencing Act’s lowered statutory penalties for crack-cocaine offenses. Section 404 has three provisions that define the scope of available relief.

Section 404(a) defines eligibility in terms of a “covered offense”:

(a) DEFINITION OF COVERED OFFENSE--In this section, the term “covered offense” means a violation of a Federal criminal statute, the statutory penalties for which modified by section 2 or 3 of the Fair Sentencing Act 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.

First Step Act. 404(a)

Section 404(b) describes the relief available to with covered offenses:

(b) DEFENDANT’S PREVIOUSLY SENTENCED,--

A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, 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.

First Step Act, 404(b).

Finally, section 404(c) sets certain limitations on relief:

(c) LIMITATIONS.--No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section

to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

First Step Act, 404(c). IN particular, the Act disqualifies defendants who previously had a sentence imposed or reduced under the Fair Sentencing Act's new, more lenient penalties for crack-cocaine offenses, or who had already had a First Step motion denied on the merits. Id. Section 404(c) also makes clear that a sentence reduction is discretionary. Id.

Section 404 was not the only relevant change enacted by the First Step Act. A separate provision of Act, Section 401, changed the kind of prior convictions that trigger increased mandatory minimum for drug offenses. As noted above, at the time of Mr. Vasquez sentencing in 2010, the mandatory minimum applicable to his case was increased from ten years to life upon the district court's finding that he had at least two "prior convictions for felony drug offense." See 21 U.S.C. 841(b)(1)(A) (2007). The First Step Act replaced the term "felony drug offense" with the terms "serious drug felony" and "serious violent felony". See First Step Act, 401(a); 21 U.S.C. 802(57)-(58), 841(b)(1)(A)(2018). Considering these new definitions, Mr. Vasquez's two convictions under California Health and Safety Code 11350 would not trigger any increase in the applicable mandatory minimum today because they are not serious drug felonies. Section 11350 prescribes simple possession of a controlled substance, but the term "serious drug felony" only covers trafficking type offenses. See 21 U.S.C. 802(57)-(58)(2018)(defining serious drug

felony be reference to 18 U.S.C. 924(e)(2)); 18 U.S.C. 924(e)(2)(A)(limiting the definition to offenses involving manufacturing, distributing, or possession with intent to manufacture, or distribute, a controlled substance); see also United States v. Smith, 482 F.Supp. 3d 1218, 1227 (M.D.C. Fla. 2020)(explaining why prior convictions for simple possession offenses no longer increase mandatory minimum after the First Step Act).

Mr. Vasquez lone conviction for a controlled substance would not qualify as a "serious drug felony" either. An offense is not a serious drug felony unless it is punishable by at lesat 10 years imprisonment, and Section 11350 is now a misdemeanor under California Law. The statutory maximum is 365. 21 U.S.C. 802(57) (58)(2018)(incorporating definition in 18 U.S.C. 924(e) into term "serious drug felony"); 18 U.S.C. 924(e)(2)(A)(ii)(defining a qualifying offense as one "for which a maximum term of imprisonment of ten years or more is prescribed by law"); Cal. Health and Safety Code 11351 (describing penalty for possession of controlled substance for sale as two, three, or four years).

Thus, today Mr. Vasquez would not be looking at a mandatory life sentence. Indeed, under the First Step Act, no one faces a life mandatory minimum sentence for a drug offense that does not result in death, and not one of his two prior convictions would have served to enhance his sentence above the baseline applicable to the jury's drug quantity findings.

STATEMENT OF THE CASE

Federal drug laws require imposition of a mandatory minimum sentence for offense involving certain drug types and quantities. Those mandatory minimums are ratcheted even higher when a defendant has qualifying prior convictions. Petitioner, Jesse Vasquez, received a life mandatory minimum sentence in 2010 at a time when federal drug penalties were as harsh as they have been in recent history. But in the fifteen years since he was sentenced, Congress has taken several steps to ameliorate the harsh penalty scheme that drove Mr. Vasquez's sentence. And its latest legislation, the First Step Act, paved a way for some individuals sentenced under prior regimes to benefit from those changes. The questions presented here is whether Mr. Vasquez qualified for a reduced sentence under the First Step Act. 3582(c)(1)(A) and 404.

In Mr. Vasquez's case, the government charged, and the jury found, that he conspired to traffic a 10-year mandatory minimum quantity of both crack cocaine and methamphetamine. Because he had a prior drug-related convictions--one for simple possession offenses, and one offense involving a minuscule amount of cocaine--that 10-year mandatory minimum was increased to mandatory life.

In 2010, the Fair Sentencing Act (FSA) lowered the applicable penalties for many crack-cocaine offenses, but it did not apply to defendants sentenced before its effective date, a group that included Vasquez. But in 2018, the First Step Act made the FSA's reduced penalties retroactive, and created a vehicle for some individuals whose cases involved crack cocaine to seek a reduced sentence.

Mr. Vasquez moved for such a reduction, but, in the government's view, he faced two barriers. First, threshold eligibility for retroactive relief under the First Step Act depended on proof of a "covered offense": "a violation of [law], the statutory penalties for which were modified by [the FSA]." The government argued below that, regardless of the FSA's effect on the crack-cocaine portion of the conspiracy, Mr. Vasquez was still subject to a life mandatory minimum on the methamphetamine object of conspiracy, and that the FSA had therefore not modified the statutory penalties applicable to his offense. But five circuits have since held that similar multi-drug conspiracies are covered offenses so long as the statutory penalty for any one of the objects of the conspiracy was modified by the Fair Sentencing Act. This Court should say so too.

The government also agreed that Mr. Vasquez had a covered offense, the district court would be prohibited from imposing any sentence other than life because of the Methamphetamine. This conclusion, too, is wrong. In sentence modification proceedings, the district court can consider changes in law that occurred since sentence was originally imposed, except to the extent that Congress has forbidden it. Among the changes in law since Mr. Vasquez 2010 sentencing is one enacted in a separate provision of the First Step Act, a provision that redefined which prior convictions increase mandatory minimums so that the definition now excludes all of Mr. Vasquez's prior convictions. And the text of that provision of the First Step Act states that it applies in any case where there is a sentence that is not yet imposed. Precisely the situation an individual is in once the district court finds that he has a covered

offense. The district court had the authority to apply the prior conviction amendment in the context of this crack-cocaine retroactivity motion. And once those prior conviction enhancements are no longer on the table Mr. Vasquez's mandatory minimum is only ten years. Because the court exercised its discretion under a misapprehension of its authority, remand is required. But even if this were not true as a general matter, it would be here.

REASONS FOR GRANTING THE PETITION

Mr. Vasquez moves for a sentence reduction under the First Step Act, and the District Court denied relief. On September 28, 2022 Mr. Vasquez moved pro se for a sentence reduction under 3582 (c)(1)(A). That section 401 of the First Step Act. He argued that the changes effected by the First Step Act authorized the district court to reduce his sentence below life. His argument proceeded in two steps. First, he argued he was eligible for a sentence reduction because his offense of conviction was a "covered offense---" "a violation of a Federal criminal statute, the statuoy penalties for which were modified by [the FSA]." Because he satisfied the threshold eligibility requirement, the district court was empowered to reduce his sentence under Section 404 of the First Step Act. The District Court said nothing.

In imposing a new sentence under Section 404, Mr. Vasquez argued, the district court could apply Section 401 of the Act, the provision that altered the definition of qualifying prior convictions. Applying Section 401, in Mr. Vasquez's view, would mean that the district court had discretion to impose a sentence less than life, because his prior convictions were not qualifying prior offenses under the First Step Act. (Id.) Mr. Vasquez asked the court to find that he was eligible for a sentence less than life, and convene a hearing where he could be heard as to appropriate (non-life) sentence to impose. The government agrees that Mr. Vasquez would not be sentenced today to life but the government opposed the motion for a reduced sentence. In the government's view, Mr. Vasquez's multi-drug conspiracy was not a covered offense because the statutory

penalties for that count as a whole were not lowered by the FSA. The government argued that both before and after the FSA, the statutory penalty for one object of the drug conspiracy--the distribution of 500 grams of a mixture or substance or substance containing methamphetamine, or 50 grams of actual methamphetamine--was 10 years, enhanced to life upon the finding of two prior convictions. Thus, the ultimate statutory penalty that applied to Mr. Vasquez conviction was not reduced by the FSA.

As to the sentencing factors in 18 U.S.C. 3553(a), the government didn't argue on them factors and never did a full analysis of the 3553(a) factors. Though it did not conduct a full analysis, the government posited that Mr. Vasquez's mandatory sentence would not be life, and that the law today doesn't endorse or demand a life sentence. And would be reduced to something less than life. (Id.) The government stopped short of arguing that a life sentence would be appropriate, if that matter were one within the district court's discretion.

The district court summarily denied the motion "[f]or the reasons stated in the Government's Opposition." This timely appeal followed. This Court didn't appoint counsel.

Mr. Vasquez is eligible for a reduced sentence under the First Step Act. First, he meets the threshold requirement of a covered offense. Section 404(a) defines a covered offense as a violation of law, the statutory penalties for which were modified by the Fair Sentencing Act. Mr. Vasquez satisfies this requirement because the statutory penalty applicable to the crack-cocaine related object of his conspiracy was modified by the Fair Sentencing Act. Nothing

in the text of Section 404(a) limits covered offense only to those cases in which the FSA lowered the ultimately controlling statutory penalty, and the Court should not add to the text what Congress did not see fit to include. This is the unanimous view of the five circuits that have addressed the question, and this Court should not deviate from it.

Because Mr. Vasquez has a covered offense, the district court could "impose a reduced sentence." And as the Supreme Court recently clarified, a court deciding whether to impose a new sentence under the First Step Act can consider changes in the law or facts that are relevant to its decision, unless doing so is prohibited by congressional mandate or constitutional requirement. Applying that test here, the district court could consider Section 401's amendments to 851 prior conviction enhancement in the context of this crack retroactivity motion. Congress did not direct otherwise; Section 401's retroactivity provision states that the amendment "shall apply" to offenses committed before the enactment date "if a sentence for the offense has not been imposed" as of that date. Mr. Vasquez has a sentence that has not yet been imposed: it is the sentence that the crack retroactivity provision authorizes the district court to impose in the context of this motion.

None of the prior convictions alleged in this case are qualifying offenses under the Section 401's amended definition. Rather, than a life mandatory minimum, then, the applicable mandatory minimum is ten years. Because the district court believed it had no authority to impose a sentence less than life, it abused its discretion. The case should be remanded for the district court to

re-exercise its discretion to impose a reduced sentence under a prior view of its authority because this court was obligated to consider non-frivolous arguments, but stood silent when Mr. Vasquez brought a motion under 404 crack cocaine.

While this case was pending, the Supreme Court decided *Concepcion v. United States*, 142 S.Ct. 2389 (2022). *Concepcion* has three holdings relevant here. First, *Concepcion* 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." *Id.* at 2404. Second, *Concepcion* held that because district court's must "consider non-frivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes of law. *Id.* at 2396. And, third, *Concepcion* held 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." The district court said nothing. Nothing even on arguments including ones that pertained to intervening changes of law or fact. *Id.* at 2404.

Concepcion's first holding conflicts with the decision in *United States v. Kelley*, 962 F.3d 470 (9th Cir. 2020). *Kelley* held that the "First Step Act...does not authorize the district court to consider other legal changes," outside of Sections 2 and 3 of the Fair Sentencing Act, "that may have occurred after the defendant committed the offense." *Id.* at 475. *Concepcion* held otherwise, instructing 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." 142 S.Ct. at 2404 (emphasis added). On this issue, Concepcion abrogates Kelley, and we apply Concepcion, not Kelley. Cf. Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003)(en banc).

Applying Concepcion's principles here, the district court erred. Vasquez raised intervening legal and factual changes to support the sentence reduction that he requested. He cited, for instance, his prison good behavior and consequent lack of prison discipline, his post-conviction rehabilitation," and the fact that were he sentenced today, he would be subject to a statutory sentence range of 0 to 10 years and a sentencing guideline range of 216 to 360 months, both far shorter than life he received at his original sentencing. The First Step Act required the district court both to consider these non-frivolous arguments and to prove that it had done so by providing a "brief statement of reasons." Concepcion 142 S.Ct. at 2404. Instead, the district court denied the motion.

CONCLUSION

Because the District court never ruled on the 404 crack cocaine issue when the Supreme Court in Concepcion v. United States, 142 S.Ct. (2022), has 3 holdings that the district court never ruled on in which the issues were none frivolous and are meritorious.

Respectfully submitted,

4-1-2024.

Jesse Vasquez