No. 21-7471

IN THE SUPREME COURT OF THE UNITED STATES

JACQUES HERNES TELCY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the reduction of petitioner's sentence for a crack-cocaine offense pursuant to Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, did not automatically entitle him to file another motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence on a different count of conviction.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Telcy, No. 08-cr-60207 (Feb. 18, 2009)

Telcy v. United States, No. 10-cv-61934 (Oct. 15, 2010)

Telcy v. United States, No. 19-cv-61715 (July 12, 2019)

United States Court of Appeals (11th Cir.):

United States v. Telcy, No. 09-11088 (Jan. 21, 2010)

Telcy v. United States, No. 11-10137 (May 26, 2011)

In re Telcy, No. 13-14460 (Oct. 16, 2013)

In re Telcy, No. 16-11461 (Apr. 27, 2016)

In re Telcy, No. 19-11619 (May 29, 2019)

Telcy v. United States, No. 19-13028 (Oct. 8, 2019)

Telcy v. United States, No. 19-13029 (Dec. 10, 2021)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 20 F.4th 735. A prior order of the court of appeals (Pet. App. D1-D10) is unreported. The order of the district court (Pet. App. B1-B4) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 2021. A petition for rehearing was denied on February 16, 2022 (Pet. App. C1). The petition for a writ of certiorari was filed on March 11, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing 50 grams or more of cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006); possessing 500 grams or more of powder cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2006); using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). Judgment 1; see C.A. App. 19.* The district court sentenced petitioner to a term of life imprisonment on the crack-cocaine count; 235 months of imprisonment on the powder-cocaine and felon-in-possession counts, to be served concurrently to each other and to the life term; 60 months of imprisonment on the Section 924(c) count, to be served consecutively to the other terms of imprisonment; and ten years of supervised release. Judgment 2-3. The court of appeals affirmed. 362 Fed. Appx. 83.

In 2010, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. The district court denied the motion, 10-cv-61934 D. Ct. Doc. 5, at 8 (Oct. 15, 2010), and the court of appeals declined to issue a certificate of

* The court of appeals appendix is not consecutively paginated. This brief treats the appendix as if it were consecutively paginated, with the cover page as page one.

appealability, 11-10137 C.A. Order 1 (May 26, 2011). The court of appeals also denied two later requests for leave to file a second or successive Section 2255 motion. See 13-14460 C.A. Order 1-3 (Oct. 16, 2013); 16-11461 C.A. Order 1-2 (Apr. 27, 2016).

In 2019, the district court granted in part petitioner's motion for a sentence reduction under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, reducing his term of imprisonment on the crack-cocaine count from life to 235 months and reducing his term of supervised release from ten years to eight years. C.A. App. 46-47, 50-51. Petitioner then sought leave to file a second or successive Section 2255 motion challenging his sentence on the felon-in-possession count, which the court of appeals denied. Pet. App. D1-D10. Petitioner proceeded to file a Section 2255 motion in the district court without leave, which that court dismissed. Id. at B1-B4. The court of appeals affirmed. Id. at A1-A21.

1. In 2008, "[a]cting on a tip from a confidential informant," police officers in Broward County, Florida, "pulled [petitioner] over in an apartment complex parking lot and eventually searched his nearby apartment," where they found a loaded gun and drugs, including 69 grams of crack cocaine and 670 grams of powder cocaine. 362 Fed. Appx. at 84; see Presentence Investigation Report (PSR) ¶¶ 3-5, 8, 12. They also found "a digital scale * * * coated in cocaine residue," "sandwich bags,"

and a "'kilo press,' used to shape cocaine bundles." 362 Fed. Appx. at 85.

A grand jury in the Southern District of Florida charged petitioner with possessing 50 grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006); possessing 500 grams or more of powder cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (2006); using or carrying a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); and possessing a firearm and ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(e). Superseding Indictment 1-2. The case proceeded to trial, and the jury found petitioner guilty on all counts. Judgment 1.

Before trial, the government had filed a notice under 21 U.S.C. 851 of its intent to seek enhanced penalties for the two drug offenses based on petitioner's recidivism. See D. Ct. Doc. 51, at 1-2 (Nov. 12, 2008). At the time, Section 841(b)(1)(A) provided for a "mandatory term of life imprisonment" for any person who violated that provision "after two or more prior convictions for a felony drug offense have become final," 21 U.S.C. 841(b)(1)(A) (2006), and Section 841(b)(1)(B) provided for an enhanced penalty of "not * * * less than 10 years and not more than life imprisonment" for any violation of that provision committed after a prior conviction for at least one felony drug offense, 21 U.S.C. 841(b)(1)(B) (2006). The district court

determined that petitioner had three qualifying prior felony drug offenses and that each of his drug counts was therefore subject to an enhanced sentence. D. Ct. Doc. 92, at 1-2 & n.1 (Jan. 7, 2009).

The Probation Office separately determined that petitioner was subject to enhanced statutory penalties under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), for his felon-in-possession conviction. At the time, a criminal violation of 18 U.S.C. 922(g) was generally subject to a statutory maximum sentence of ten years of imprisonment and no statutory minimum sentence. 18 U.S.C. 924(a)(2) (2006). But ACCA provided (and continues to provide) for a statutory minimum sentence of 15 years for violations committed by defendants with at least "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1) (2006). The Probation Office identified three of petitioner's prior convictions as convictions that qualified under ACCA: two serious drug offenses and one violent felony, a conviction in Florida state court for "battery on a law enforcement officer." PSR ¶ 25.

At sentencing, petitioner did not object to the ACCA enhancement, and the district court agreed with the Probation Office that the enhancement applied. Sent. Tr. 4, 9-10. The court also agreed with the Probation Office's calculation that petitioner's offense level and criminal history yielded an advisory guidelines range of 188 to 235 months, subject to the mandatory term of life imprisonment on the crack-cocaine count.

Id. at 10; see PSR ¶ 80; see also Sentencing Guidelines § 5G1.1(b) (2008) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence."). The court sentenced petitioner to life imprisonment on the crack-cocaine count; concurrent terms of 235 months of imprisonment on the powder-cocaine and felon-in-possession counts; and a consecutive term of 60 months of imprisonment on the Section 924(c) count, all to be followed by ten years of supervised release. Sent. Tr. 12-13; see Judgment 2-3. The court of appeals affirmed. 362 Fed. Appx. 83.

2. In 2010, petitioner moved under Section 2255 to set aside, vacate, or correct his sentence on various grounds. The district court denied the motion, 10-cv-61934 D. Ct. Doc. 5, at 8, and the court of appeals declined to issue a certificate of appealability, 11-10137 C.A. Order 1.

In 2013 and 2016, petitioner requested permission under 28 U.S.C. 2255(h) to file a second or successive Section 2255 motion; the court of appeals denied both requests. 13-14460 C.A. Order 1-3; 16-11461 C.A. Order 1-2. Petitioner's 2016 request included an argument that he no longer qualified for the ACCA enhancement on the felon-in-possession count after this Court's decision in Johnson v. United States, 576 U.S. 591 (2015), which held that the residual clause of ACCA's definition of "violent felony," 18 U.S.C. 924(e)(1), is unconstitutionally vague.

Johnson, 576 U.S. at 596-597; see 16-11461 Pet. C.A. Appl. 9 (Apr. 1, 2016). The court of appeals found that argument "unavailing" in the circumstances of this case. 16-11461 C.A. Order 2.

Petitioner also filed several unsuccessful habeas corpus petitions collaterally attacking his conviction and sentence. See Telcy v. Breckon, No. 22-cv-34, 2022 WL 1485510, at *2-*4 (W.D. Mich. May 11, 2022) (dismissing one such petition and describing petitioner's extensive litigation history), appeal pending, No. 22-1460 (6th Cir. docketed May 24, 2022).

3. In 2019, petitioner moved to reduce his sentence under Section 404 of the First Step Act. D. Ct. Doc. 135, at 1-7 (Feb. 8, 2019). Section 404 permits a federal prisoner to seek a reduced sentence for a "covered offense," which Section 404(a) defines 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 of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." First Step Act § 404(a), 132 Stat. 5222; see Terry v. United States, 141 S. Ct. 1858, 1862-1864 (2021).

Petitioner contended that his crack-cocaine conviction qualified as a covered offense. D. Ct. Doc. 135, at 1-7. Petitioner was subject at the time of his offense to a mandatory term of life imprisonment under Section 841(b)(1)(A), based on the recidivist enhancement for having committed the offense after two prior felony drug convictions. 21 U.S.C. 841(b)(1)(A) (2006); see

pp. 4-5, supra. The Fair Sentencing Act modified the statutory penalties for such a violation: An offense involving the same amount of crack cocaine and a recidivist enhancement would now be subject to a statutory penalty range of "not * * * less than 10 years and not more than life imprisonment." 21 U.S.C. 841(b)(1)(B). The government agreed that petitioner's crack-cocaine conviction qualified as a covered offense but asked the district court to exercise its discretion to deny petitioner's motion or, alternatively, to reduce his sentence on that count to no less than 235 months. D. Ct. Doc. 137, at 1 (Feb. 22, 2019).

The district court issued an "Order" containing a written opinion, in which it granted in part and denied in part petitioner's Section 404 motion. C.A. App. 46-47 (capitalization altered; emphasis omitted). The court recognized that the Fair Sentencing Act had modified the statutory penalties for petitioner's crack-cocaine violation, but the court found that his guidelines range "remain[ed] the same." Id. at 47. After having "reviewed the [PSR] and having considered [the 18 U.S.C.] 3553(a) factors," the court exercised its discretion to reduce petitioner's sentence on the crack-cocaine count from life imprisonment to 235 months of imprisonment and to reduce his term of supervised release from ten years to eight years, while leaving "[a]ll other aspects of the sentence * * * the same." Ibid. The court found that "no further reduction would be appropriate"

and denied petitioner's requests for an evidentiary hearing or a "full resentencing hearing." Ibid.

The district court also issued an accompanying "Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)," in which it stated that the "previously imposed sentence of imprisonment (as reflected in the last judgment issued) of Life * * * is reduced to 235 months plus 60 months," and that the "supervised release is reduced to eight (8) years." C.A. App. 50 (capitalization altered; emphasis omitted). The court also cross-referenced the written-opinion order "entered [that] day," reported an unchanged guidelines range, and explained that the "First Step Act reduced a mandatory life sentence." Id. at 50-51. It also specified that "[e]xcept as otherwise provided, all provisions of the [original] judgment * * * shall remain in effect." Id. at 50.

Petitioner did not appeal.

4. Petitioner thereafter applied to the court of appeals for permission to file a second or successive Section 2255 motion, again seeking permission to raise his Johnson-based challenge to the ACCA enhancement on the felon-in-possession count. 19-11619 Pet. C.A. Appl. 7 (Apr. 29, 2019). The court determined that petitioner's "Johnson claim fails as a matter of law" and denied his application. Pet. App. D10; see id. at D1-D10.

Petitioner then proceeded to file another Section 2255 motion in the district court, raising his Johnson claim and a related

claim alleging ineffective assistance of trial counsel for failure to object to the ACCA enhancement. C.A. App. 59-60; see id. at 56-70. Petitioner maintained that his motion was "not second and successive," on the theory that the First Step Act proceedings had resulted in a "new judgment," for which this was his first Section 2255 motion. Id. at 66.

The district court rejected that theory and dismissed petitioner's motion as second-or-successive and unauthorized. Pet. App. B1-B4. The court "disagree[d]" that its prior order granting a limited sentence reduction under the First Step Act on one count of conviction "constitute[d] a new sentencing" or otherwise entitled petitioner to dispense with the statutory requirement to obtain authorization from the court of appeals before filing a second-or-successive Section 2255 motion -- permission that the court of appeals had already "properly denied." Id. at B3.

The district court also stated that petitioner's Johnson claim would fail on the merits, "[a]s the Eleventh Circuit [had] recognized in denying [his] latest request." Pet. App. B3. The court further observed that petitioner could not, in any event, show any prejudice with respect to the classification of his prior conviction for battery on a law enforcement officer as a qualifying "violent felony" for the ACCA enhancement, because petitioner also had a prior conviction for the Florida offense of "Resisting Arrest

With Violence," which "categorically qualifies as a violent felony under the elements clause." Ibid.; see PSR ¶ 41.

5. The court of appeals affirmed. Pet. App. A1-A21. The court accepted that a Section 2255 motion is not "second or successive if it challenges a 'new judgment' issued after the prisoner filed his first" such motion. Id. at A8-A9 (quoting Magwood v. Patterson, 561 U.S. 320, 323-324 (2010)). The court explained, however, that "not every new sentencing order necessarily constitutes a new judgment." Id. at A13. In particular, the court observed that new sentences imposed after "a plenary resentencing" generally had been held to result in a new judgment, but "mere sentence reduction[s]" had not. Ibid.

The court of appeals explained that the reduction of petitioner's sentence on one count of conviction under the First Step Act did not "constitute a new judgment" that would render petitioner's challenge to his sentence on another count non-successive. Pet. App. A20. The court observed that the limited sentence reduction that petitioner had received under the First Step Act was unlike the new judgment at issue in Magwood v. Patterson, supra. See Pet. App. A14-A18. In Magwood, a state court had entered a new judgment after a new, de novo resentencing, which this Court had found to allow for a new, non-successive federal collateral attack. See 561 U.S. at 328, 334-339. By contrast, the court of appeals explained, the Section 404 proceeding here was not "a plenary resentencing," but instead the

application of a limited grant of discretionary authority to impose a reduced sentence for certain crack-cocaine offenses. Pet. App. A17. The court of appeals emphasized that in a Section 404 proceeding, the district court "is without power to increase a movant's sentence," ibid. (emphasis omitted); the district court is not required to reconsider anew the Section 3553(a) factors, id. at A17-A18; and the defendant has no right to a hearing, id. at A18.

ARGUMENT

Petitioner renews his contention (Pet. 10-14) that his current, second-in-time Section 2255 motion is not a "second or successive" motion that requires certification under 28 U.S.C. 2255(h). That contention lacks merit, and the court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Petitioner also seeks review (Pet. 14-19) of what he styles as a second question concerning the relationship between Section 404 of the First Step Act and 18 U.S.C. 3582(c). That question is not properly presented as a separate issue in this case and, in any event, would not warrant review -- particularly because petitioner's theory is at odds with this Court's recent decision in Concepcion v. United States, 142 S. Ct. 2389 (2022). Further review is also unwarranted here because neither of the questions presented by petitioner is one whose resolution would make a practical difference to the proper

disposition of his case. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that petitioner's current Section 2255 motion is "second or successive" within the meaning of Section 2255(h). 28 U.S.C. 2255(h). The district court therefore lacked jurisdiction to entertain it because the court of appeals had not authorized its filing (and had in fact expressly declined to do so).

a. Before 1996, state and federal prisoners were statutorily permitted to file repetitive applications for post-conviction relief in the district court without obtaining prior judicial authorization. Such repetitive filings, however, were often summarily dismissed based on judge-made doctrines like "abuse of the writ." See, e.g., McCleskey v. Zant, 499 U.S. 467, 479-488 (1991). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, altered that practice by imposing "new restrictions on successive petitions," Felker v. Turpin, 518 U.S. 651, 664 (1996), by state and federal prisoners. Through those new limitations, Congress sought to "prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial resources, and promoting finality." Banister v. Davis, 140 S. Ct. 1698, 1707 (2020).

Today, a federal prisoner may not file a "second or successive" motion for post-conviction relief under Section 2255

unless he first obtains certification as required by Section 2255(h). Section 2255(h) incorporates by reference procedures specified in 28 U.S.C. 2244, which imposes parallel restrictions that apply to state prisoners seeking to file a second or successive application for federal habeas corpus. The certification requirement in Section 2244 is jurisdictional. Burton v. Stewart, 549 U.S. 147, 153 (2007) (per curiam).

The statutory phrase "second or successive" as used in AEDPA is a "term of art." Magwood v. Patterson, 561 U.S. 320, 332 (2010) (quoting Slack v. McDaniel, 529 U.S. 473, 486 (2000)). "Congress did not define the phrase," id. at 331, and this Court "has declined to interpret [it] as referring to all [applications for post-conviction relief] filed second or successively in time," Panetti v. Quarterman, 551 U.S. 930, 944 (2007). "In addressing what qualifies as second or successive, this Court has looked for guidance in two main places." Banister, 140 S. Ct. at 1705. First, the Court has consulted "habeas doctrine and practice" predating AEDPA. Ibid. Second, the Court has "considered AEDPA's own purposes" of reducing piecemeal litigation, conserving judicial resources, and preserving the finality of state and federal criminal judgments. Id. at 1706.

In Magwood v. Patterson, this Court addressed a second-in-time habeas petition filed by a state prisoner who had obtained relief from his death sentence -- but not the adjudication of his guilt of the underlying offense -- on his first federal habeas

petition. 561 U.S. at 326. The Court held that the prisoner's second-in-time petition after his resentencing was not "second or successive" within the meaning of AEDPA, thus permitting the prisoner to file his petition without appellate preauthorization. Id. at 323-324. The Court observed a new criminal judgment had intervened between the prisoner's petitions, which meant both that the second petition was the prisoner's "first application challenging that intervening judgment" and that it was the prisoner's first opportunity to obtain review of "new" claims of error arising from the resentencing, including a claim of ineffective assistance of counsel at the resentencing itself. Id. at 339 (emphasis omitted).

The second-in-time petition also contained a claim asserting that the sentencing court erred in relying on an aggravating factor for which the prisoner allegedly lacked fair notice at the time of his conduct. Magwood, 561 U.S. at 325, 328. Although that "fair-warning claim" could have been raised in the prisoner's first petition, the Court classified the claim as one addressing a "new" error committed at the resentencing proceeding, where the state court had relied again on the same aggravating factor. Id. at 339. The Court observed that "[a]n error made a second time is still a new error" and emphasized that the state court had "conducted a full resentencing and [had] reviewed the aggravating evidence afresh" before making the same alleged error again. Ibid.

b. The court of appeals faithfully applied the principles that this Court set forth in Magwood to find that petitioner's second-in-time Section 2255 motion -- which challenges only the sentence on a count different from the one that was the subject of his Section 404 sentence-reduction motion -- is an unauthorized second-or-successive motion over which the district court lacked jurisdiction. Pet. App. A8-A20. As the decision below explained, a Section 404 proceeding does not entail a "full resentencing." Id. at A17. Section 404 instead provides district courts only with limited authority "to reduce sentences," and "only in certain circumstances." Ibid. Among other things, Section 404 does not authorize a court to "increase a movant's sentence," as would be possible at a plenary resentencing, ibid.; it does not require a hearing at which the movant is present, see id. at A18; and it does not obligate a district court to reconsider the sentencing factors under Section 3553(a), id. at A17 -- as this Court recently confirmed in Concepcion v. United States, supra.

In this particular case, the district court "considered [the] 3553(a) factors" but declined to hold a hearing on petitioner's Section 404 motion. C.A. App. 47. The court also emphasized, in granting the motion in part and reducing petitioner's term of imprisonment and supervised release for his crack-cocaine conviction, that "[a]ll other aspects of the sentence remain the same." Ibid. The court of appeals correctly determined that such limited relief on one count of conviction "does not constitute a

new judgment for purposes of AEDPA's bar on second or successive habeas petitions," Pet. App. A20 -- particularly with respect to the term of imprisonment for the undisturbed felon-in-possession count of conviction that petitioner seeks to challenge in his present motion.

c. Petitioner contends (Pet. 12) that the district court's order on his Section 404 motion should be treated as a new judgment because "the 2019 order is the one that now authorizes the Bureau of Prison to confine [him] and for how long." That contention lacks merit. The court expressly specified that it was merely modifying the existing judgment and did not purport to replace it. See C.A. App. 50 (district court's order reducing petitioner's "previously imposed sentence of imprisonment (as reflected in the last judgment issued)" and stating that "[e]xcept as otherwise provided, all provisions of the judgment dated 02/17/2009 shall remain in effect") (emphasis omitted).

Furthermore, even if petitioner were correct in asserting that the orders issued by the district court in this case are the equivalent of a new criminal judgment, he would not be entitled to circumvent AEDPA's gatekeeping requirements. Indeed, Magwood's focus on new errors arising after the original judgment would have been entirely unnecessary if, as petitioner asserts (Pet. 11) the entry of an intervening criminal judgment were all that mattered. Magwood expressly disclaimed a holding under which a grant of postconviction relief would provide a new opportunity to

collaterally attack matters that were solely the subject of the original judgment. Observing that "[s]everal" courts of appeals had "held that a petitioner who succeeds on a first habeas application and is resentenced may challenge only the portion of a judgment that arose as a result of a previous successful action," Magwood, 561 U.S. at 342 n.16 (citation and internal quotation marks omitted), the Court reserved the question whether "a petitioner who obtains a conditional writ as to his sentence" (as the petitioner in Magwood had) is permitted "to file a subsequent application challenging not only his resulting, new sentence, but also his original, undisturbed conviction," id. at 342 (emphases omitted).

Petitioner does not identify any other sound basis for further review. Petitioner does not identify any other decision by a court of appeals addressing whether a Section 404 sentence reduction results in a new judgment for AEDPA purposes, let alone any conflict of authority on that question. In the analogous context of sentence reductions granted under 18 U.S.C. 3582(c)(2) on the basis of retroactive amendments to the Sentencing Guidelines, the courts of appeals to have considered the question have uniformly concluded that such reductions do not result in new judgments for AEDPA purposes. See Armstrong v. United States, 986 F.3d 1345, 1350-1351 (11th Cir. 2021); United States v. Quary, 881 F.3d 820, 822 (10th Cir. 2018) (per curiam); Sherrod v. United States, 858 F.3d 1240, 1242 (9th Cir. 2017); United States v. Jones, 796 F.3d

483, 485-487 (5th Cir. 2015); White v. United States, 745 F.3d 834, 836-837 (7th Cir. 2014).

2. Petitioner separately seeks review (Pet. i, 14-17) of a question concerning whether Section 3582(c) provides the appropriate framework for considering a motion under Section 404 of the First Step Act. Any such question would not be properly presented as a separate issue in this case, which does not arise from a Section 404 proceeding, but instead from the dismissal of petitioner's unauthorized second-or-successive Section 2255 motion (which in turn raises claims only about petitioner's original trial and sentencing). See pp. 9-12, supra. For the same reason, this case presents no occasion to address any of petitioner's complaints (Pet. 19) about the extent of the sentence reduction he received or the adequacy of the district court's explanation for the reduction. Petitioner, who was represented by counsel in the First Step Act proceedings, did not appeal from those proceedings.

Even if the question were squarely presented here, it would not warrant further review because petitioner's theory is effectively foreclosed by this Court's recent decision in Concepcion v. United States, supra, which was decided after the petition was filed. Petitioner contends (Pet. 15) that Section 404 motions "should not be covered by § 3582(c)." In Concepcion, however, the Court accepted that Section 3582(c)(1)(B) provides the appropriate framework for considering a Section 404 motion. 142 S. Ct. at 2402 n.5. Ordinarily, a district lacks authority to

"modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). But Section 3582(c) lists the exceptions to that general rule, including that "the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute." 18 U.S.C. 3582(c)(1)(B). Section 3582(c)(1)(B) thus functions, as the Court recognized in Concepcion, as "a gateway provision," under which a district court may modify a sentence under Section 404, subject to any "substantive or procedural limits" of Section 404 itself. 142 S. Ct. at 2402 n.5.

3. In any event, this case would not be a suitable vehicle in which to address either of the questions presented in the petition because neither one would make any difference to the outcome here. The court of appeals has repeatedly found that the underlying claim that petitioner seeks to present "fails as a matter of law." Pet. App. D10; see 16-11461 C.A. Order 2. Petitioner does not suggest any likelihood that the court of appeals, or the district court, would do otherwise if this Court were to resolve either of the questions presented in this petition in his favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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