

NO. 19-8036

IN THE SUPREME COURT OF THE UNITED STATES

ODIS LEE JACKSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Sup. Ct. R. 44.2, petitioner Odis Lee Jackson respectfully petitions this Court to grant rehearing of its April 20, 2020, order denying certiorari and to grant his petition for a writ of certiorari, based on an intervening circumstance of substantial effect, *i.e.*, new federal circuit court opinions from the Fourth and Seventh Circuits that disagree with the Fifth Circuit's resolution of the important statutory interpretation questions raised by Section 404 of the First Step Act of 2018, PL 115-391, 132 Stat 5194 (Dec. 21, 2018). As grounds for this petition, petitioner states the following:

Mr. Jackson was sentenced nearly two decades ago to mandatory life in prison for non-violent drug offenses committed in June 2002. His role in the offenses was to serve as a lookout. Congress has since recognized that penalty as unfair and too harsh and, under current law, a life sentence is no longer mandatory. Section 404 of the First Step Act, enacted on December 21, 2018, presented Mr. Jackson with his first opportunity to seek relief from his life sentence.

The district court denied his Section 404 motion without a hearing, without notice that there would be no hearing, without an updated presentence report, and without giving Mr. Jackson the opportunity to present information about his seventeen years of good, post-sentencing conduct. On appeal, the Fifth Circuit affirmed the district court's truncated procedures as "blameless" for two reasons. First, that court had previously held in *United States v. Hegwood*, 934 F.3d 414 (5th Cir.), *cert. denied*, 140 S. Ct. 285 (2019), that the First Step Act is akin to a limited sentence modification under 18 U.S.C. § 3582(c)(2).

Second, the court held that nothing in Section 404 of the First Step Act requires a court to hold a hearing or consider post-sentencing conduct. Yet Section 404 authorizes a district court to “impose,” not just “modify” a sentence, and Section 404 indicates that a district court must conduct “a complete review of the motion on the merits.”

In light of the foregoing, Mr. Jackson’s March 16, 2020, petition for a writ of certiorari presented the following questions:

- I. What procedures does Section 404 of the First Step Act require a district court to follow when conducting its statutorily required “complete review of the motion on the merits”?
- II. Does the First Step Act authorize a court to “impose” a reduced sentence in accordance with such statutes as 18 U.S.C. §§ 3553(a) and 3582(a), or does it only authorize a court to “modify” a sentence under 18 U.S.C. § 3582(c)?

Since this Court entered its order denying Mr. Jackson’s petition for a writ of certiorari, two federal circuit courts—the Fourth and Seventh Circuits—have issued published opinions disagreeing with how the Fifth Circuit’s resolved these important questions of statutory interpretation. In *United States v. Chambers*, ___ F.3d ___, No. 19-7104, 2020 WL 1949249 (4th Cir. Apr. 23, 2020), the Fourth Circuit expressly disagreed with the Fifth Circuit’s *Hegwood* decision. The Fourth Circuit observed that the Fifth Circuit in *Hegwood* had compared Section 404(b) of the First Step Act to 18 U.S.C. § 3582(c)(2), “the stricter mechanism by which prisoners modify sentences after” amendments to the United States Sentencing Guidelines. *Chambers*, 2020 WL 1949249, at

*5. The Fourth Circuit further explained that the Fifth Circuit in *Hegwood* had relied on this Court’s opinion in *Dillon v. United States*, 560 U.S. 817 (2010), which interpreted the stricter § 3582(c)(2) mechanism. *Chambers*, 2020 WL 1949249, at *5. But the Fourth Circuit found that comparison unpersuasive because “the strictures of § 3582(c)(2) are irrelevant to § 3583(c)(1)(B), under which First Step Act motions are brought.” *Chambers*, 2020 WL 1949249, at *5. Rather than following *Hegwood* and its reliance on *Dillon*, the Fourth Circuit “look[ed] to the First Step Act itself, which expressly allows a court to ‘impose’ a reduced sentence, and not just to ‘reduce’ it.” *Chambers*, 2020 WL 1949249, at *5.

A few days after the Fourth Circuit issued *Chambers*, the Seventh Circuit expressly agreed with the Fourth Circuit, and implicitly disagreed with the Fifth Circuit, by holding that a First Step Act Section 404(b) motion for a sentence reduction is not governed by the strictures of § 3582(c)(2). *United States v. Shaw*, ___ F.3d ___, No. 19-2067, 2020 WL 2029258, at *7 (7th Cir. Apr. 28, 2020). The Seventh Circuit recognized that “[t]he First Step Act is a novel statute.” *Id.*

The Seventh Circuit further disagreed with the Fifth Circuit as to how a district court should handle post-sentencing conduct. Both the Seventh and Fifth Circuits recognized that the First Step Act says nothing about this topic. *See Shaw*, 2020 WL 2029258, at *6 (“Nothing in the First Step Act prevents the district court from taking [post-sentencing conduct] into consideration.”); *United States v. Jackson*, 945 F.3d 315, 321-22 (5th Cir. 2020). But the circuits diverged in how to interpret that absence. To the Seventh Circuit,

that absence meant that a defendant “may . . . present evidence of his post-sentencing conduct in support of a reduced sentence” and “a court may look to § 3553(a)’s familiar framework when assessing whether to impose a reduced sentence.” *Shaw*, 2020 WL 2029258, at *7. Quoting from this Court’s decision in *Pepper v. United States*, 562 U.S. 476 (2011), the Seventh Circuit observed that post-sentencing conduct is “‘plainly relevant to [the statutory sentencing factors] and may ‘critically inform a sentencing judge’s overarching duty under § 3553(a) to “impose a sentence sufficient, but not greater than necessary,” to comply with the sentencing purposes set forth in § 3553(a)(2).’”” *Shaw*, 2020 WL 2029258, at *6 (quoting *Pepper*, 562 U.S. at 504). The Seventh Circuit ultimately found the district court’s “summary holding that it would not reduce [the] sentence even if [the defendant] were eligible” to be inadequate because the record did not demonstrate that the district court had actually considered the defendant’s arguments, including his argument about his good post-sentencing conduct. *Id.* The circuit remanded for the district court to conduct the statutorily required ““complete review”” of the defendant’s motion. *Id.* at *8 (quoting First Step Act, Sec. 404(c)).

In stark contrast, the Fifth Circuit held in petitioner’s case that a district court evaluating a Section 404(b) motion is not required to consider post-sentencing conduct. *Jackson*, 945 F.3d at 321. The Fifth Circuit reached that conclusion by relying on *Hegwood*, and its cabining of a Section 404 motion to the confines of a § 3582(c)(2) sentencing modification proceeding. *See id.*

Because these new published decisions disagreeing with the Fifth Circuit constitute an “intervening circumstance[] of a substantial . . . effect,” Sup. Ct. R. 44.2, petitioner requests that the Court grant rehearing of the order denying his petition and grant his petition.

CONCLUSION

For the foregoing reasons, petitioner Odis Lee Jackson respectfully requests that this Court grant rehearing of its April 20, 2020, order denying certiorari and to grant his petition for a writ of certiorari.

Date: May 14, 2020

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

A handwritten signature in cursive script, reading "Kat Shephard", written in dark ink.

KATHRYN SHEPHARD