No. 20-5264

IN THE SUPREME COURT OF THE UNITED STATES

LAKENTO BRIAN SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to conduct an in-person hearing before granting petitioner's motion for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

United States v. Smith, No. 06-cr-32 (Nov. 8, 2006) (judgment)

Smith v. United States, No. 13-cv-302 (July 11, 2013) (order denying motion under 28 U.S.C. 2255)

Smith v. United States, No. 16-cv-590 (May 27, 2016) (order transferring unauthorized second or successive Section 2255 motion to the court of appeals)

Smith v. United States, No. 17-cv-583 (June 29, 2017) (same)

United States v. Smith, No. 06-cr-32 (June 18, 2019) (order granting reduction of sentence)

United States Court of Appeals (6th Cir.):

United States v. Smith, No. 06-2525 (Dec. 26, 2007) (affirming on direct appeal)

Smith v. United States, No. 13-2080 (May 23, 2014) (denying certificate of appealability)

In re Smith, No. 14-1503 (Nov. 14, 2014) (denying motion for leave to file second or successive Section 2255 motion)

In re Smith, No. 16-1664 (Sept. 6, 2016) (same)

In re Smith, No. 16-1703 (Sept. 6, 2016) (same)

In re Smith, No. 17-1776 (Dec. 8, 2017) (same)

United States v. Smith, No. 19-1724 (May 6, 2020) (affirming reduction of sentence)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 958 F.3d 494. The order of the district court (Pet. App. 11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2020. The petition for a writ of certiorari was filed on July 30, 2020. 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 Western District of Michigan, petitioner was convicted of conspiring to distribute and to possess with intent to distribute 500 grams or more of powder cocaine and 50 grams or more of cocaine base (crack cocaine), in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(iii), and (b)(1)(B)(ii) (2000) and 21 U.S.C. 846; possessing with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2000); possessing with intent to distribute 500 grams or more of powder cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(ii) (2000); and possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). Pet. App. 2a; Judgment 1. He was sentenced to the then-mandatory term of life imprisonment. Pet. App. 3a; Judgment 2. The court of appeals affirmed. 510 F.3d 641.

Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255, which the district court dismissed as untimely. 2013 WL 3490662. The court of appeals declined to issue a certificate of appealability. 13-2080 C.A. Doc. 16 (May 23, 2014). The court also declined to grant any of petitioner's several requests to file a second or successive Section 2255 motion. See Pet. App. 3a.

After the enactment of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5194, petitioner moved for a

reduction of sentence under Section 404 of that Act. See Pet. App. 3a. The district court granted the motion and reduced petitioner's term of imprisonment to 360 months. Id. at 4a. The court of appeals affirmed. Id. at 1a-10a.

1. Petitioner was a major drug distributor in Muskegon, Michigan. Presentence Investigation Report (PSR) ¶¶ 13-16. In 2005, investigators with the Drug Enforcement Administration connected petitioner to an interstate shipment of 3 kilograms of powder cocaine. PSR ¶ 12. Acting pursuant to a warrant, local police officers searched petitioner's residence and vehicles, where they found, among other things, several loaded firearms; approximately 1.5 kilograms of powder cocaine; and 276.2 grams of cocaine base. PSR ¶¶ 17-19. Multiple witnesses confirmed to law enforcement that petitioner sold crack and powder cocaine, including to other dealers. PSR ¶¶ 13-15.

In 2006, a grand jury in the Western District of Michigan returned a superseding indictment charging petitioner with conspiring to distribute and to possess with intent to distribute 500 grams or more of powder cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), (b)(1)(A)(iii), and (b)(1)(B)(ii) (2000) and 21 U.S.C. 846 (Count 1); possessing with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2000) (Count 2); possessing with intent to distribute 500 grams or more of powder cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(ii)

(2000) (Count 3); and possessing a firearm after a priory felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (Count 4). Pet. App. 2a. The government later filed an information pursuant to 21 U.S.C. 851, which stated that petitioner had multiple prior felony drug convictions that made him subject to mandatory life sentences on Counts 1 and 2. Pet. App. 2a-3a; see 21 U.S.C. 841(b)(1)(A) (2000) (specifying a mandatory life sentence for a defendant who violates Section 841(a) "after two or more prior convictions for a felony drug offense have become final").

Following a jury trial, petitioner was convicted on all counts. Pet. App. 2a. On Counts 1 and 2, the district court sentenced him to concurrent terms of life imprisonment. Id. at 3a; Judgment 2. On Count 3, the court sentenced him to a concurrent term of 360 months of imprisonment, to be followed by eight years of supervised release. Judgment 2-3. On Count 4, the court sentenced him to a concurrent term of 120 months of imprisonment, to be followed by two years of supervised release. Ibid. The court of appeals affirmed. 510 F.3d 641.

Petitioner later filed several unsuccessful collateral attacks on his conviction under Section 2255. Pet. App. 3a; see Gov't C.A. Br. 6-7. He also filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(2), which the district court denied. Pet. App. 3a.

2. In the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, Congress prospectively modified the penalties for certain drug offenses. In particular, Section 2(a) of the Fair Sentencing Act increased the threshold quantities of cocaine base necessary to trigger the statutory penalties set forth in 21 U.S.C. 841(b)(1)(A) from 50 grams to 280 grams, and in 21 U.S.C. 841(b)(1)(B) from 5 grams to 28 grams. 124 Stat. 2372. Those amendments did not apply retroactively to offenses for which a defendant had already been sentenced as of the enactment of the Fair Sentencing Act, on August 3, 2010. See Dorsey v. United States, 567 U.S. 260, 264 (2012).

In 2018, Congress enacted the First Step Act. Under Section 404 of that Act, a district court that "imposed a sentence for a covered offense may, on motion of the defendant, * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222. Section 404(a) defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 * * * that was committed before August 3, 2010." 132 Stat. 5222. And Section 404(c) provides, among other things, that the court may not reduce a sentence that was "previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing

Act," and that Section 404 "shall [not] be construed to require a court to reduce any sentence." 132 Stat. 5222.

3. On March 18, 2019, petitioner filed a pro se motion for a sentence reduction under Section 404 of the First Step Act. D. Ct. Doc. 99. The district court appointed counsel to represent him in connection with the motion, D. Ct. Doc. 100 (Mar. 27, 2019), and petitioner filed, through counsel, a memorandum of law in support of his motion, D. Ct. Doc. 101 (Apr. 17, 2019). In the memorandum, petitioner contended that Counts 1 and 2 were "covered offense[s]" within the meaning of Section 404 of the First Step Act because "[u]nder the Fair Sentencing Act [he] would have faced a sentence of a minimum of 10 years and a maximum of life on Counts 1 and 2, instead of mandatory life imprisonment." Id. at 3-4 & n.2 (citation omitted). He acknowledged that the Fair Sentencing Act "did not affect the penalty that could be imposed for [his] convictions on Counts 3 or 4," and he did not ask the court to reduce his sentences on those counts. Id. at 4. He did, however, ask for an "opportunity to be heard." Pet. App. 3a.

The government agreed that petitioner was eligible for a reduced sentence on Counts 1 and 2 and asked the district court to impose a sentence of 360 months, which corresponded to the bottom of the applicable Sentencing Guidelines range. Pet. App. 4a; see D. Ct. Doc. 102, at 8-9 (May 13, 2019). The government also argued that no hearing was required. D. Ct. Doc. 102, at 9-10.

The district court granted petitioner's motion without a hearing. Pet. App. 4a. The court reduced petitioner's concurrent sentences on Counts 1 and 2 from life imprisonment to 360 months, to be followed by eight years of supervised release. Id. at 4a, 11a. In a form order, the court explained that it had considered the sentencing factors set forth in 18 U.S.C. 3553(a) to the extent applicable and that the reduced sentence fell within the applicable Sentencing Guidelines range. Pet. App. 4a, 9a-10a.

4. The court of appeals affirmed. Pet. App. 1a-10a. Petitioner contended that the district court erred by not conducting a plenary resentencing on all counts and considering new arguments. Id. at 4a-5a. The court of appeals rejected that contention, adhering to circuit precedent recognizing that "the First Step Act's limited, discretionary authorization to impose a reduced sentence is inconsistent with a plenary resentencing." Id. at 6a (quoting United States v. Alexander, 951 F.3d 706, 708 (6th Cir. 2019)) (brackets omitted).

The court of appeals explained that, under 18 U.S.C. 3582(c)(1)(B), district courts generally may modify a previously imposed term of imprisonment only "to the extent * * * expressly permitted by statute." Pet. App. 5a (quoting 18 U.S.C. 3582(c)(1)(B)). And the court observed that the "language of" Section 404 -- "which authorizes 'a court that imposed a sentence for a covered offense' to 'impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect

at the time the covered offense was committed'" -- does not suggest a plenary resentencing. Id. at 6a (quoting First Step Act § 404(b), 132 Stat. 5222) (brackets omitted). The court also found support for a limited proceeding in "Federal Rule of Criminal Procedure 43, which provides that a defendant must be present at sentencing, but need not be present for proceedings 'involving the correction or reduction of sentence under . . . 18 U.S.C. § 3582(c).'" Ibid. (quoting Alexander, 951 F.3d at 708) (brackets omitted). The court explained that it had treated sentence reductions under Section 404 as "analogous to sentence modifications based on Sentencing Guideline reductions under [18 U.S.C.] § 3582(c)(2)," which authorizes "'only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.'" Ibid. (quoting Dillon v. United States, 560 U.S. 817, 826 (2010)). And the court stated that the Fourth, Seventh, and Eighth Circuits had likewise recognized that Section 404 does not authorize a plenary resentencing. See id. at 6a-7a (citing cases).

The court of appeals separately rejected petitioner's challenge to the district court's use of a form order to explain its sentencing decision. Pet. App. 7a-10a.

ARGUMENT

Petitioner contends (Pet. 5-12) that the district court erred in granting his Section 404 motion without conducting an in-person hearing. But as every court of appeals to address the issue has

held, a district court is not required to hold a hearing in connection with a Section 404 motion, and petitioner has not identified any circumstances warranting a hearing in this case. In addition, the question presented was not directly pressed or passed upon below. The petition for a writ of certiorari should be denied.

1. Petitioner contends (Pet. 11-12) that in resolving a Section 404 motion, a district court must conduct a hearing "where the defendant is present and can argue in favor of the reduced sentence he seeks," "at least when the defendant wants a hearing" and "was previously sentenced to life in prison." But petitioner fails to identify any legal basis for that purported requirement. He acknowledges (Pet. 11) that a hearing is not "constitutionally compelled." And Section 404 itself "does not mention, let alone mandate, a hearing." United States v. Williams, 943 F.3d 841, 843 (8th Cir. 2019). Instead, Section 404 provides only that the district court "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." First Step Act § 404(b), 132 Stat. 5222. The statutory "text imposes no further procedural hoops." United States v. Jackson, 945 F.3d 315, 321 (5th Cir. 2019), cert. denied, 140 S. Ct. 2699 (2020).

The Federal Rules of Criminal Procedure likewise do not require a hearing when a defendant invokes Section 404. Rule 43 requires that a defendant be present at "sentencing," Fed. R. Crim.

P. 43(a)(3), but "it excludes from that requirement proceedings that 'involve the * * * reduction of sentence under * * * 18 U.S.C. § 3582(c),'" Dillon v. United States, 560 U.S. 817, 828 (2010) (quoting Fed. R. Crim. P. 43(b)(4)) (brackets omitted). As the court of appeals explained (Pet. App. 5a-6a), Section 3582(c) generally forbids a district court from "modify[ing] a term of imprisonment once it has been imposed," subject to limited exceptions -- including when the modification is "expressly permitted by statute." 18 U.S.C. 3582(c) and (c)(1)(B). Section 404 of the First Step Act, which expressly permits such a modification for covered offenses, fits within Section 3582(c)'s framework as the type of statute that falls within that exception. Pet. App. 5a-6a; see United States v. Easter, No. 19-2587, 2020 WL 5525395, at *4 (3d Cir. Sept. 15, 2020); United States v. Brown, 974 F.3d 1137, 1143-1144 (10th Cir. 2020); United States v. Martin, 974 F.3d 124, 137 (2d Cir. 2020); United States v. Wirsing, 943 F.3d 175, 183 (4th Cir. 2019). Accordingly, when a defendant moves for a reduced term of imprisonment under Section 404, the proceedings "involve[] the * * * reduction of sentence under * * * 18 U.S.C. § 3582(c)," and the defendant's presence is not required. Fed. R. Crim. P. 43(b)(4).

Petitioner argues (Pet. 10) that a Section 404 reduction is more akin to an initial sentencing than a sentence-modification proceeding, in that a district court may be required to revisit the defendant's statutory penalties, recalculate the defendant's

Sentencing Guidelines range, and consider the sentencing factors set forth in 18 U.S.C. 3553(a). In Dillon v. United States, supra, however, this Court explained that Section 3582(c)(2) -- which permits a sentence reduction for a defendant "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. 3582(c)(2) -- "authorize[s] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding," because it permits district courts only to "'reduce'" sentences, and only for a "limited class of prisoners" under specified circumstances, Dillon, 560 U.S. at 825-826 (citation omitted). Similar logic applies to Section 404, which permits a district court only to impose a "reduced sentence"; only "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed"; and only for prisoners serving a sentence for a "covered offense" who are not excluded by Section 404(c). First Step Act § 404(b), 132 Stat. 5222 (emphasis added). And, as in Dillon, the district court may exercise discretion to reduce a sentence "only at the second step of [a] circumscribed inquiry," Dillon, 560 U.S. at 827, in which it first determines eligibility for a reduction and only then the extent (if any) of such a reduction, see First Step Act § 404(b) and (c), 132 Stat. 5222.

Although petitioner identifies (Pet. 6-8) some tension in the circuits regarding the precise degree to which a Section 404 sentence reduction is informed by legal developments since the

original sentencing, see United States v. Kelley, 962 F.3d 470, 475-476 (9th Cir. 2020), he identifies no circuit that treats Section 404 as the equivalent of an initial sentencing at which the defendant's presence is required. Instead, consistent with Dillon, every court of appeals to address the issue has held that a district court need not conduct a hearing in the defendant's presence before resolving a Section 404 motion. See Easter, 2020 WL 5525395, at *7 (describing this as "the clear consensus"); see also United States v. Mannie, 971 F.3d 1145, 1155-1157 (10th Cir. 2020); United States v. Denson, 963 F.3d 1080, 1086-1088 (11th Cir. 2020); United States v. Foreman, 958 F.3d 506, 510-512 (6th Cir. 2020); Jackson, 945 F.3d at 321; Williams, 943 F.3d at 843-844; cf. United States v. Hamilton, 790 Fed. Appx. 824, 826 (7th Cir. 2020).

Moreover, even assuming that a district court may choose to conduct a hearing in connection with a Section 404 motion, see Mannie, 971 F.3d at 1157, petitioner fails to explain why a hearing was necessary in this case. He has not contested the factual accuracy of any information before the district court or identified any evidence that he was unable to present. Instead, he claims (Pet. 11) that he "never got the chance to tell the district court what he thought was important when considering his motion to modify his sentence." But he had such an opportunity in pro se and counseled briefing before the district court. See p. 6, supra;

see, e.g., D. Ct. Doc. 99, at 6. His factbound assertion to the contrary does not warrant this Court's review.*

2. In any event, this case would be an unsuitable vehicle in which to address the question presented because petitioner did not squarely challenge the district court's decision to adjudicate his motion without first holding a hearing. Although petitioner requested a hearing in the district court, he did not argue there that a hearing was required. See Pet. App. 3a-4a. And although on appeal he requested that the court of appeals remand to afford him the opportunity to "appear and give his reasons for a time-served sentence," Pet. C.A. Br. 17, he again did not argue that the district court was required to hold a hearing, see Pet. App. 4a.

To the extent that petitioner might perceive the argument that he did press below -- that a plenary resentencing was required -- as one and the same as his current contention -- that he was entitled to a hearing -- the court of appeals did not share that perception. To the contrary, it effectively took as a given that

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* Petitioner suggests in passing (Pet. 12) that the district court should have "revisit[ed] the entire sentencing package." That underdeveloped suggestion is not directly encompassed within the question presented, and provides no sound basis for further review. Cf. Wood v. Allen, 558 U.S. 290, 304 (2010). Petitioner acknowledged in the district court that Section 404 "'did not affect the penalty that could be imposed for [his] convictions on Counts 3 [and] 4,'" and he "did not raise any specific arguments about why a below-Guideline range may be appropriate for any of these counts." Pet. App. 3a-4a (citation omitted).

petitioner had no right to a hearing and, like this Court in Dillon, relied on that as a basis for rejecting his claim of entitlement to a plenary resentencing. Pet. App. 6a; see Dillon, 560 U.S. at 827-828. Accordingly, neither the district court nor the court of appeals addressed the question presented. This Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and petitioner identifies no sound reason for this Court to address his current claim in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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