No. _____

IN THE
Supreme Court of the United States

NOLAN EDWARDS,
***Petitioner*,**

v.

UNITED STATES OF AMERICA,
***Respondent*.**

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether § 404 of the First Step Act allows a district court to impose a term of supervised release not previously imposed, as it was not a component of the original sentence

II. Whether the Due Process Clause requires a defendant's presence at any such resentencing where a new sentence component, including a term of supervised release not previously imposed, is added to a sentence, thereby putting him on notice of the conditions that could subject him to further terms to incarceration in the event of violation.

LIST OF PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

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

- *United States v. Edwards*, No. 8:96-cr-332-JDW-MAP, 2019 WL 3858171 (M.D. Fla. Aug. 16, 2019)

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

- *United States v. Edwards*, 997 F.3d 1115 (11th Cir. 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nolan Edwards respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion, 997 F.3d 1115 (11th Cir. 2021), is provided in the petition appendix (Pet. App.) at 1a.

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. The Eleventh Circuit issued its decision affirming the district court's partial grant of Mr. Edwards' motion for relief under § 404 of the First Step Act. Mr. Edwards has timely filed this petition pursuant to this Court's Order Regarding Filing Deadlines (Mar. 19, 2020) (extending deadlines due to COVID-19) and Rule 29.2.

RELEVANT CONSTITUTIONAL/STATUTORY PROVISIONS

A. The Due Process Clause

The Due Process Clause provides that "[No person shall be] be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.

B. The First Step Act of 2018

Entitled "Application of the Fair Sentencing Act," Section 404 of the First Step Act of 2018 provides in full:

> (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 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.
>
> (b) DEFENDANTS 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.
>
> (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.

Pub L. No. 115-391, 132 Stat. 5194, § 404.

C. The Fair Sentencing Act of 2010

Entitled "Cocaine Sentencing Disparity Reduction," Section 2 of the Fair Sentencing Act of 2010 provides, in relevant part:

> (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
>
> > (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and
> >
> > (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

Pub. L. No. 111-220, 124 Stat. 2372, § 2(a).

D. 21 U.S.C. § 841

As amended by the Fair Sentencing Act of 2010, 21 U.S.C. § 841 provides, in pertinent part:

> **(a) Unlawful acts** Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;
>
> * * *

(b) Penalties Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 280 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years . . . . Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. . . .

* * *

(B) In the case of a violation of subsection (a) of this section involving—

* * *

> **(iii)** 28 grams or more of a mixture or substance described in clause (ii) [i.e., cocaine] which contains cocaine base;
>
> * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment . . . .

(C) In the case of a controlled substance in schedule I or II . . . , except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life . . . . If any person commits such a violation

> after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . . Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. . . .

21 U.S.C. §§ 841(a)(1), (b)(1)(A)–(C).

STATEMENT OF THE CASE

In 1997, a jury found Petitioner Nolan Edwards guilty of one count of conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. § 846, and one count of possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). Based on his prior convictions, the government filed an information pursuant to 21 U.S.C. § 851, subjecting Mr. Edwards to a mandatory Life sentence. He was subsequently sentenced to concurrent Life sentences as to both counts. However, in imposing the Life sentence, the sentencing court did not order any term of supervised release.

On August 12, 2019, Mr. Edwards filed a motion to reduce his sentence pursuant to the First Step Act, maintaining that he was eligible for relief as he was convicted of "covered offenses" as defined in § 404 of the First Step Act.[1] Doc. 235. Mr. Edwards requested that his sentence be reduced to 262 months, or time served, whichever is

[1] Signed into law on December 21, 2018, § 404(b) of the First Step Act makes retroactive the Fair Sentencing Act of 2010's reduction in the disparity between crack and powder cocaine sentences to defendants whose offense occurred before the Act's passage. First Step Act of 2018, Pub. L. No. 115-391 (S. 756), 132 Stat. 5194 (enacted Dec. 21, 2018). Mr. Edwards is one such defendant who has borne the consequence of the disparate drug sentencing policy that Congress sought to correct by enacting the legislation.

greater. *Id.* The government agreed to the reduction in the term of imprisonment, but the parties disputed whether the district court could belatedly impose a term of supervised release that was not originally imposed when Mr. Edwards was sentenced to Life imprisonment in 1997.

The district court granted in part Mr. Edwards' motion, reducing Mr. Edwards' prison sentence and imposing "concurrent 8 year terms of supervised release, subject to the standard conditions of supervised release adopted in this district. The mandatory drug testing requirements of the Violent Crime Control Act are imposed." *United States v. Edwards*, No. 8:96-cr-332-JDW-MAP, 2019 WL 3858171, at *3 (M.D. Fla. Aug. 16, 2019). The district court denied Mr. Edwards' request for a hearing with his presence, stating "Rule 43(b), Fed. R. Crim. P. expressly provides that a defendant 'need not be present' when his sentence is reduced under 18 U.S.C. § 3582(c)." *Id.* Mr. Edwards timely appealed the district court's order. Doc. 242.

On appeal, Mr. Edwards maintained that the district court erred in determining that it possessed the authority under § 404 of the First Step Act to impose terms of supervised release not previously imposed,

as supervision is a component of the original sentence. Alternatively, if the district court did have such authority, Mr. Edwards maintained that due process required his presence at any such plenary resentencing where a component of a sentence—here, supervised release—not previously imposed was added to put him on notice of the conditions of supervision that could subject him to further terms of incarceration in the event those conditions were violated.

The government maintained that the district court was required to impose the term of supervised release. It further maintained that this proceeding was under 18 U.S.C. § 3582(c), and Rule 43(b) states that a defendant "need not be present" when a court reduces a sentence under that provision.

The court of appeals affirmed the district court's decision. The Eleventh Circuit held that "[§ 404 of] the First Step Act is a self-contained, self-executing, independent grant of authority empowering district courts to modify criminal sentences in the circumstances to which the Act applies." *United States v. Edwards*, 997 F.3d 1115, 1118 (11th Cir. 2021). The panel held that authority of district courts is,

therefore, not necessarily cabined by 18 U.S.C. § 3582(c).[2] *Id.* at 1119 ("§ 404(b)'s broad authorization to reduce 'sentence[s]' is, to put the matter plainly, too big to fit into § 3582(c)(1)(B)'s narrower authorization regarding modifications of 'term[s] of imprisonment.'"). The appeals court then rejected Mr. Edwards argument that the district court exceeded its statutory authority when it included a new term of supervised release in his reduced sentence, stating that "[s]o long as a defendant's overall 'sentence' is 'reduced,' therefore, it seems to us that the authority that § 404(b) confers is broad enough to empower a court to impose a new term of supervised release, it being one aspect of the 'sentence.'" *Id.* at 1121.

Relegated to two footnotes, the appeals court also cursorily rejected Mr. Edwards' due-process contention that a hearing with his presence was required when the new term of supervision was imposed. "Because we aren't faced with a scenario in which the district court imposed any non-standard conditions of supervised release, we have no

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[2] The Eleventh Circuit recognized that this holding diverged somewhat from the reasoning of other circuits. *See Edwards*, 997 F.3d at 1119–20 nn.2, 3 (distinguishing holding from the reasoning in *United States v. Sutton*, 962 F.3d 979, 981 (7th Cir. 2020); *United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019), as amended (Nov. 21, 2019); *United States v. Holloway*, 956 F.3d 660, 666 (2d Cir. 2020)).

occasion to determine what process or hearing, if any, would be due in that circumstance." *Id.* at 1120 n.4. "As already noted, though, since Edwards filed his briefs in this case, we held in [*United States v. Denson*, 963 F.3d 1080, 1082 (11th Cir. 2020)] that 'the First Step Act does not require district courts to hold a hearing with the defendant present before ruling on a defendant's motion for a reduced sentence under the Act.'" *Id.* at 1121 n.6.

REASONS FOR GRANTING THE WRIT

I. The district court was without authority under § 404 of the First Step Act to impose a term of supervised release that was not a component of the original sentence.

The plain language of the First Step Act states that a district court may "impose a *reduced* sentence as if sections 2 and 3 of the [2010 FSA,] were in effect at the time the covered offense was committed." § 404(b) (emphasis added); *see also Randall v. Loftsgaarden*, 478 U.S. 647, 656 (1986) ("[T]the starting point in construing a statute is the language of the statute itself."). Therefore, § 404 grants a district court the authority only to reduce a previously imposed sentence, including a term of supervision. In this context, a district court may not add any penalty, or an additional component of a sentence—including a term of

supervised release—that it had not previously imposed; to do so would exceed the district court's authority to *reduce* a previously imposed sentence. Accordingly, as supervised release was not imposed as part of Mr. Edwards' original sentence, the district court lacked the authority to now impose such a penalty component as new eight-year terms of supervised release.

Any term of supervised release is considered part of the original sentence. *See* 18 U.S.C. § 3583(a) ("The court, in *imposing* a sentence to a term of imprisonment for a felony or a misdemeanor, may include *as a part of that sentence* a requirement that the defendant be placed on a term of supervised release after imprisonment . . . ." (emphasis added)); *see also United States v. Haymond*, 139 S. Ct. 2369, 2379–80 (2019) (citing *Johnson v. United States*, 529 U.S. 694, 700 (2000)) ("Today, we merely acknowledge that an accused's final sentence includes any supervised release sentence he may receive.").

Furthermore, a defendant's presence is required at sentencing. Fed. R. Crim. P. 43(a)(3). When imposing any sentence, including a term of supervised release, a district court must also orally pronounce both its overall imposition and its conditions. *See* 18 U.S.C. § 3553(c)

("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence . . . .").

The district court did not impose terms of supervised release at Mr. Edwards' August 28, 1997 sentencing. "It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal . . . or in habeas corpus proceedings." *Bozza v. United States*, 330 U.S. 160, 166 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 168, 169 (1878); *Murphy v. Commonwealth of Massachusetts*, 177 U.S. 155, 157 (1900); and *In re Bonner*, 151 U.S. 242 (1894)). However, these matters were not before the district courts under either of these avenues. Mr. Edwards appealed his sentence, which was affirmed. *United States v. Edwards*, 167 F.3d 539 (11th Cir. 1998) (table). Mr. Edwards moved to vacate his convictions and sentences under 28 U.S.C. § 2255, which the district court also denied. Doc. 176. Neither the government nor the district court raised the issue of imposing a term of supervised release at those times.

Accordingly, the district court's errors at the original sentencing—failure to impose a term of supervision where it concluded that Mr.

Edwards' Life sentence precluded imposition of a term of supervised release—and the government's failure to object, cannot be remedied over two decades later by now imposing terms of supervised release in this First Step Act proceeding. To do so would overlook § 404's plain language, which allows the district courts the authority only 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."

Rule 32.1(c) addresses the procedural requirements for *modifying* conditions of supervised release. "Before modifying the conditions of . . . supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation." Fed. R. Crim. P. 32.1(c)(1). However, a "hearing is not required if . . . the relief sought is favorable to the person and *does not extend the term* . . . of supervised release; and . . . an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so." Fed. R. Crim. P. 32.1(c)(2) (emphasis added). Because Rule 32.1 contemplates modification of conditions previously imposed, it is inapplicable here.

It is too late for the district courts to correct errors related to the failure to impose a term of supervised release. *See* Fed. R. Crim. P. 35(a) ("Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.").[3] Nor is this a clerical error that the district may could correct at any time. *See* Fed. R. Crim. P. 36.

Accordingly, where there is no legal mechanism to now impose a new component of a sentence not previously imposed, the district court exceeded the authority afforded it under § 404 by imposing eight-year terms of supervised release to Mr. Edwards' sentence that was not previously imposed. The case should be remanded for imposition of a reduced sentence with no term of supervised release imposed.

[3] Rule 35 was amended in 1987, before Mr. Edwards was charged, convicted, and sentenced.

II. In the event the district court had the authority to impose a term of supervised release not previously imposed, due process requires a defendant's presence at any such resentencing. This is necessary to put the defendant on notice of the conditions that could subject him to further terms of incarceration in the event the conditions were violated.

It has long been recognized that supervised release is a restriction on a supervisee's liberty. *See United States v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997) ("[H]e was still subject to the restrictions on liberty that accompany a term of supervised release. Supervised release carries with it the possibility of revocation and additional jail time."). Due process necessitates that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This principle applies to supervised release conditions: there is "a separate due process right to conditions of supervised release that are sufficiently clear to inform [a supervisee] of what conduct will result in his being returned to prison." *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir. 2002). Therefore, the Due Process Clause requires that "[c]onditions of supervised release . . . 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so

that he may act accordingly.'" *United States v. Balon,* 384 F.3d 38, 43 (2d Cir. 2004) (quoting *United States v. Simmons,* 343 F.3d 72, 81 (2d Cir. 2003)).

The Due Process Clause guarantees a defendant's "right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987); *see also United States v. Tidwell*, 178 F. 3d 946, 950–951 (7th Cir. 1999) (Ripple, J., dissenting) ("For the first time, the court was required to give thoughtful assessment to the length of time Mr. Tidwell would spend in prison. Mr. Tidwell therefore had a right to be present at the rehearing and to address the court pursuant to Rule 32."). If the "district court exercises its discretion so significantly that the [sentence] modification is a critical stage where the defendant's presence could make a difference," a hearing requiring the defendant's presence is necessary. *United States v. Thomason*, 940 F.3d 1166, 1171, 1173 (11th Cir. 2019)

Federal Rule of Criminal Procedure 43(a)(3) requires the defendant's physical presence when a sentence is imposed, and the sentencing court must orally pronounce its sentence. *See* 18 U.S.C.

§ 3553(c); *United States v. Sanford,* 806 F.3d 954, 960 (7th Cir. 2015) ("only punishments stated orally, in open court, at sentencing are valid"); *see also United States v. Bates*, 213 F.3d 1336, 1340 (11th Cir. 2000) ("When a sentence pronounced orally and unambiguously conflicts with the written order of judgment, the oral pronouncement governs.").

Disturbing the district court's prior determination to not impose terms of supervised release, to which the government did not object, requires a plenary resentencing of Mr. Edwards. Several lower courts have held that plenary resentencings are not authorized under § 404 of the First Step Act.[4] But those holdings are of limited applicability here. In the event a previously imposed term of imprisonment or supervised release is merely reduced, a hearing may not be necessary. However, as here, if the sentencing court imposes a term of supervised release or other additional component of a sentence to which the defendant was not previously sentenced, the Due Process Clause requires that court to

[4] *See United States v. Denson*, 963 F.3d 1080, 1086–87 (11th Cir. 2020); *United States v. Williams*, 943 F.3d 841, 843–44 (8th Cir. 2019); *United States v. Jackson*, 945 F.3d 315, 321 (5th Cir. 2019); *United States v. Smith*, 982 F.3d 106, 112 (2d Cir. 2020).

have a hearing, with the defendant present. Thus the defendant is put on notice of the conditions to which he is subject, violation of which could result in his return to custody.

Mr. Edwards argued these due process issues below. In its response in the district court, the government did not address the due process arguments raised. Instead, the government contended that Rules 43 and 32.1(c) were not applicable when the relief sought is under 18 U.S.C. § 3582(c). Neither did the district court address the due process arguments.

On appeal, the circuit court gave short shrift to this contention, relying on prior precedent that a defendant was not entitled to a hearing in a § 404 proceeding. *Edwards*, 997 F.3d at 1121 n.6 ("[S]ince Edwards filed his briefs in this case, we held in *Denson* that 'the First Step Act does not require district courts to hold a hearing with the defendant present before ruling on a defendant's motion for a reduced sentence under the Act.'" However, the *Denson* case cited for this reasoning is undermined by the reasoning of the *Edwards*' court that 18 U.S.C. § 3582(c)(1)(B) did not control. The *Denson* court reasoned that Fed. R. Crim. P. 43 expressly provides that neither hearing nor

presence is required when a court modifies or corrects his sentence pursuant to a 18 U.S.C. § 3582(c) proceeding. 963 F.3d at 1087. If § 404 is a self-executing statute, then Rule 43's limitation on a hearing in a § 3582(c) proceeding has no application in a § 404 proceeding.

In any event, Mr. Edwards was not present when the concurrent terms of supervised release were imposed upon him, nor was he informed by the district court what those terms might be and the potential penalties he might face were those conditions to be violated. Summarily imposing conditions of supervised release in a written order, without a hearing, raises concerns of the notice afforded to Mr. Edwards. Due process requires more.

If the district court's authority includes imposition of new terms of supervised release as to Mr. Edwards, this would require a plenary resentencing. A plenary resentencing hearing requires Mr. Edwards' presence at a hearing at which any term of supervised release be orally imposed pursuant to the Due Process Clause. Accordingly, at a minimum, this case should be remanded with instructions that the district court hold a hearing, with Mr. Edwards present, at which the district court must orally impose the new sentence components of terms

of supervised release, putting Mr. Edwards on notice of the conditions to which he is subject and the penalties he might face upon their violation.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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