

No. 09-6338

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IN THE SUPREME COURT OF THE UNITED STATES

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PERCY DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the holding of United States v. Booker, 543 U.S. 220 (2005), which remedied the constitutional defect in the Sentencing Guidelines by rendering them advisory, applies in a sentence modification proceeding under 18 U.S.C. 3582(c).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 572 F.3d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 5, 2009. The petition for a writ of certiorari was filed on September 1, 2009. 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 Pennsylvania, petitioner was convicted of conspiracy to distribute and possess with the intent to distribute

more than 500 grams of cocaine and more than 50 grams of cocaine base (i.e., crack), in violation of 21 U.S.C. 846; use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 262 months of imprisonment on the narcotics counts and 60 months, to run consecutively, on the firearms count. The court of appeals affirmed. See United States v. Dillon, 100 F.3d 949 (3d Cir. 1996) (unpub.). Petitioner filed a series of postconviction attacks on his sentence, all of which were denied. See United States v. Dillon, 229 Fed. Appx 196, 196 (3d Cir. 2007).

On December 3, 2007, petitioner filed a motion for a sentencing modification under 18 U.S.C. 3582(c). Petitioner's motion was based on a recent, retroactively applicable amendment to the federal Sentencing Guidelines, which effectively lowered the base offense level for offenses involving crack cocaine and reduced the Guidelines range on petitioner's narcotics convictions to 210 to 267 months of imprisonment. The district court granted petitioner's motion insofar as it sought a reduction of his term of imprisonment pursuant to 18 U.S.C. 3582(c)(2) and resentenced him to 210 months of imprisonment on the narcotics convictions, but the court rejected petitioner's request for a sentence below the new Guidelines range. The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner was convicted after a jury trial of two

narcotics counts involving crack cocaine and one firearms count. Pet. App. 2a. He was sentenced to 262 months of imprisonment on the narcotics counts, the bottom of the Guidelines range, to be followed by a mandatory 60-month consecutive sentence on the firearms count, for a total sentence of 322 months of imprisonment. Ibid. At the time of sentencing, the district court stated that he “personally [didn’t] believe that you should be serving 322 months, but I feel I am bound by th[e] Guidelines.” Id. at 1a. In its written statement of reasons, the court wrote that, while it was bound by the guidelines range, it believed that range was “unfair to the defendant.” Ibid. The court of appeals affirmed petitioner’s conviction and sentence. United States v. Dillon, 100 F.3d 949 (3d Cir. 1996).

2. In United States v. Booker, 543 U.S. 220 (2005), this Court held that, because of the mandatory nature of the federal Sentencing Guidelines, the imposition of a sentence above the otherwise-applicable statutory maximum based on facts found by the judge at sentencing violates the defendant’s Sixth Amendment right to trial by jury. Id. at 238-244. To remedy that constitutional defect, the Court Booker invalidated the provisions of the Sentencing Reform Act of 1984 that made the Guidelines mandatory, 18 U.S.C. 3553(b) and 3742(e), thereby “mak[ing] the Guidelines effectively advisory,” Booker, 543 U.S. at 245.

3. a. On November 1, 2007, the United States Sentencing

Commission promulgated Amendment 706, which amended the Drug Quantity Table found in Section 2D1.1(c) of the Guidelines. See U.S.S.G. App. C, Amend. 706 (2007). Amendment 706 provided for a two-level reduction in the base offense levels for most offenses involving crack cocaine. Ibid. On December 11, 2007, the Sentencing Commission promulgated two additional amendments concerning Amendment 706, which, taken together, revised Section 1B1.10 to include Amendment 706 among the list of retroactively applicable amendments, effective as of March 3, 2008. See U.S.S.G. App. C, Amends. 712, 713. As so revised, Section 1B1.10 provides that,

[i]n a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

U.S.S.G. 1B1.10(a)(1).<sup>1</sup> The provision also states that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." U.S.S.G. 1B1.10(a)(3).

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<sup>1</sup> Section 1B1.10 is based on 18 U.S.C. 3582(c)(2), and it also implements 28 U.S.C. 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

b. In December 2007, following a series of unsuccessful postconviction challenges, petitioner filed a pro se motion pursuant to 18 U.S.C. 3582(c)(2) seeking a sentencing modification by virtue of those amendments, which lowered his Guidelines range on the narcotics counts to 210 to 267 months of imprisonment. Pet. App. A3. The district court granted petitioner's motion and resentenced him to 270 months of imprisonment -- 210 months on the narcotics counts, and 60 consecutive months on the firearms charge. The district court denied petitioner's motion, however, to the extent it argued that Booker applied and permitted the court to impose a lesser sentence. Ibid.

4. The court of appeals affirmed. Pet. App. 1a-4a. Following the position adopted by the "overwhelming majority" of other courts of appeals, Id. at 3a, the court concluded that "Booker applies to full sentencing hearings -- whether in an initial sentencing or in a resentencing where the original sentence is vacated for error, but not to sentence modification proceedings under Section 3582(c)(2)." Id. at 4a.

#### ARGUMENT

Petitioner contends (Pet. 15-22) that this Court should grant certiorari to resolve the circuit conflict on the question whether Booker's remedial holding extends to a sentence modification proceeding conducted under Section 3582(c)(2). For the reasons set forth in the government's brief in opposition in United States v.

Rhodes, No. 08-8318, a copy of which has been served on counsel for petitioner, the decision below is correct and further review is unwarranted at this time. This Court has recently denied a number of petitions for certiorari raising this conflict. See United States v. Fanfan, 2009 WL 1421273 (Oct. 5, 2009) (No. 08-10503); United States v. Cunningham, 129 S. Ct. 2826 (2009) (No. 08-1149); United States v. Melvin, 129 S. Ct. 2382 (2009) (No. 08-8664); United States v. Starks, 129 S. Ct. 2746 (2009)(No. 08-9839); United States v. Dunphy, 129 S. Ct. 2401 (2009) (No. 08-1185); Rhodes, supra, 129 S. Ct. 2052 (2009) (No 08-8318). There is no reason for a different result here.

As the government noted in Rhodes, all of the courts of appeals that have considered the issue, with the exception of the Ninth Circuit in United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007), have concluded that Booker does not apply in Section 3582(c) sentence modification proceedings. See U.S. Br. at 15-16, Rhodes, supra (No. 08-8318); see also United States v. Washington, 2009 WL 3425689, at \*4 (6th Cir. Oct. 27, 2009) (joining majority view and collecting cases). The Ninth Circuit recently granted the government's petition for an initial hearing en banc in United States v. Fox, No. 08-30445 (9th Cir.), in which the government is urging the Ninth Circuit to overrule Hicks. If the Ninth Circuit overrules Hicks, the current circuit conflict will disappear. And if the court of appeals adheres to Hicks, the government would

retain the option of seeking this Court's review at that time. The pendency of the proceedings in Fox therefore renders this Court's review of this issue premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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