12-961

To Be Argued By:
CHRISTOPHER M. MATTEI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-961

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UNITED STATES OF AMERICA,
Appellee,

-vs-

MICAL BETHEA, aka Kareem,
Defendant-Appellant.

———

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PETITION FOR PANEL REHEARING

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Preliminary Statement

The United States petitions for panel rehearing in *United States v. Bethea*, 735 F.3d 86 (2d Cir. 2013) (per curiam). In *Bethea*, this Court vacated the judgment of the district court and remanded for further proceedings, holding that the district court's denial of the defendant's request for a sentence reduction under 18 U.S.C. § 3582(c)(2) failed to comport with the procedural requirements of *Dillon v. United States*, 130 S.

Ct. 2683 (2010) and *United States v. Wilson*, 716 F.3d 50, 52 (2d Cir. 2013) (per curiam). The government does not challenge that portion of the Court's decision.

In Section II of the opinion, however, this Court observed that, on remand, the district court should apply the sentencing scheme of the Fair Sentencing Act of 2010 ("FSA"), which was not applied at the original sentencing because *Dorsey v. United States*, 132 S. Ct. 2321 (2012), had not yet been decided. In doing so, this Court, in effect, directed the district court to use a § 3582(c)(2) proceeding to correct an error that occurred at the original sentencing. This approach appears inconsistent with *Dillon* and *United States v. Mock*, 612 F.3d 233 (2d Cir. 2010 (per curiam). At a minimum, *Dillon* and *Mock* suggest that this complex question should be considered in a future case where, unlike here, the parties have briefed the issue for the Court. Accordingly, the government respectfully requests that this Court reconsider the language in Section II of its opinion that suggests that a district court may correct a sentencing error in a § 3582(c)(2) proceeding.

Statement of the Case

On June 29, 2010, the defendant pled guilty to one count of distribution of more than five grams of cocaine base, in violation of 21 U.S.C.

§ 841(a)(1) and (b)(1)(B). GA4.[1] On September 20, 2010, after the enactment of the FSA, but before the Supreme Court's decision in *Dorsey*, the district court sentenced the defendant principally to 80 months of imprisonment. GA5. The defendant did not appeal or collaterally attack his sentence.

On September 22, 2011, the defendant requested a sentence reduction under 18 U.S.C. § 3582(c)(2). GA6. On March 5, 2012, the district court entered an order denying the defendant's motion. GA6-7.

On appeal, the defendant argued that the district court erred in denying his motion because the 80-month term of imprisonment was substantively unreasonable and the district court failed to articulate a sufficient basis for refusing to reduce his sentence. The defendant did not argue that the district court's failure to apply the FSA's sentencing scheme at the original sentencing was an error that could or should have been corrected in the § 3582(c)(2) proceeding.

In vacating the judgment and remanding, this Court concluded that the district court had failed to articulate fully whether the defendant was eligible for § 3582(c)(2) relief and whether the § 3553(a) factors counseled in favor of a reduction. 735 F.3d at 87-88. Then, in Section II,

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[1] The Government Appendix filed with the government's brief in this appeal is cited as "GA__."

this Court announced that the district court's failure, pre-*Dorsey*, to apply the FSA's new mandatory minimum sentencing scheme should be corrected at the § 3582(c)(2) proceeding on remand. *Id.* at 88. In particular, the Court observed that because the quantity of crack cocaine at issue in the defendant's case subjected him to a 5-year mandatory minimum term under pre-FSA law, but required no mandatory minimum under the FSA, the district court was required to consider the defendant's new guidelines range—calculated without a mandatory minimum term—on remand. *Id.*

Argument

The government respectfully requests that this Court reconsider the language in Section II of its opinion which suggested that the district court could correct a sentencing error in a § 3582(c)(2) proceeding. This language is at odds with *Dillon* and its progeny and improperly expands the scope of § 3582(c)(2) proceedings. Further, this issue was neither briefed nor argued in this Court, and thus the government respectfully requests that this question be left open for definitive resolution, if necessary, in a future case.[2]

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[2] The government notes that this issue is unlikely to arise in any subsequent appeal in *this* case. Shortly after this Court issued a certified copy of its opinion to the district court, the district court entered a new order denying a sentence reduction under 18 U.S.C.

In Section II of *Bethea*, this Court noted that the district court's failure to explain its decision denying relief under § 3582(c)(2) was especially problematic because the district court had erroneously failed to apply the FSA's new mandatory minimum scheme when calculating the defendant's guidelines range at his original sentencing and in the § 3582(c)(2) proceeding. 735 F.3d at 88. In effect, then, the Court suggested that the court erred in a § 3582(c)(2) proceeding by failing to correct an error made in the original sentencing proceeding.

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§ 3582(c)(2). The court acknowledged that the defendant was eligible for a sentence reduction, but concluded, as a matter of discretion, that such a reduction was unwarranted in light of the need to protect the public. Accordingly, any appeal from that decision would not require consideration of whether the FSA error could be corrected in a § 3582(c)(2) proceeding.

The government notes that the defendant has filed—under the docket in this appeal—a motion to vacate the district court's latest order, claiming that the district court was without jurisdiction to enter that order until the mandate issued from this Court. Even if the validity of the district court's latest order were properly before this Court in this appeal, the government respectfully suggests that the defendant's current motion does not warrant any relief beyond a direction that the district court re-enter its order upon issuance of the formal mandate from this Court.

This language, however, appears inconsistent with *Dillon* and its progeny, all of which have held that § 3582(c)(2) proceeding is strictly limited and should not become a "plenary resentencing proceeding." *United States v. Johnson*, 732 F.3d 109, 116 (2d Cir. 2013).

Section 3582(c)(2) provides a procedural mechanism for a defendant to receive the benefit of an amendment to the Sentencing Guidelines that lowers his sentencing guidelines range. 18 U.S.C. § 3582(c)(2). As the Supreme Court has made clear, however, the fact that the district court may reduce a defendant's sentence to address a guideline amendment that subsequently reduces his guidelines range, does not mean that the district court may reconsider other parts of the defendant's sentence, even if there were errors committed at the original sentencing. In particular, the Supreme Court has held that a court considering a motion under § 3582(c)(2) to apply a retroactive guideline amendment may replace only the amended guideline in the sentencing calculus, and must leave all other determinations made at the original sentencing proceeding intact:

> Specifically, § 1B1.10(b)(1) requires the court to begin by determin[ing] the amended guideline range that would have been applicable to the defendant had the relevant amendment been in effect at the time of the initial sentencing. In making

> such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

Dillon, 130 S. Ct. at 2691.

After setting forth this central principle, the Supreme Court applied it to the facts of the case before it. There, the defendant argued that the district court erred in failing to correct two sentencing errors when it ruled on his motion under § 3582(c)(2). *Id.* at 2693-94. The Supreme Court rejected that argument, holding that "[b]ecause the aspects of his sentence that Dillon seeks to correct were not affected by the [amended guideline], they are outside the scope of the proceeding authorized by § 3582(c)(2), and the District Court properly declined to address them." *Id.* at 2694.

This Court has applied the same principle in its own cases interpreting § 3582(c)(2). In *United States v. Mock*, for example, the defendant argued that he was eligible for a sentence reduction because the district court had erroneously sentenced him as a career offender at his original sentencing. 612 F.3d 133, 135-36 (2d Cir. 2010) (per curiam). The Court rejected this argument, noting that in a § 3582(c)(2) proceeding, a defendant "may not seek to attribute error to

the original, otherwise-final sentence . . . ." *Id.* at 137. In other words, because § 3582(c)(2) does not authorize a plenary resentencing, "regardless of whether there is merit to the defendant's argument that the district court committed . . . error . . . at his original sentencing, neither the district court nor this Court is authorized to consider that contention in the context of a motion pursuant to 18 U.S.C. § 3582(c)(2)." *Id.* at 138. *See also Johnson*, 732 F.3d at 116 (holding that § 3582(c)(2) does not authorize a plenary resentencing proceeding); *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam) (holding that although *United States v. Booker*, 543 U.S. 220 (2005) affected the application of the guidelines, it was not a guidelines amendment cognizable in a § 3582(c)(2) proceeding).

Applying this principle—that a § 3582(c)(2) proceeding may not be used to correct errors made at the original sentencing—in this case would suggest that the district court should not correct its original error and apply the FSA in the § 3582(c)(2) proceeding here.[3] At the defendant's original sentencing, in September 2010, the

[3] The fact that a § 3582(c)(2) proceeding is not available to a defendant to correct the erroneous application of pre-FSA standards to his case does not leave the defendant without remedy. Such a defendant could challenge the district court's decision on appeal or through a petition for collateral relief under 28 U.S.C. § 2255.

district court applied the pre-FSA standards to sentence the defendant based on a 60-month mandatory minimum term as set forth in 21 U.S.C. § 841(b)(1)(B). After *Dorsey*, there is no doubt that this was procedural error, and that the court should have sentenced the defendant based on the FSA standards, which would have allowed the court to sentence the defendant with no mandatory minimum penalty. But under *Dillon* and *Mock*, the proceeding under § 3582(c)(2), was not the place to correct this error.

Indeed, on this issue, *Dillon* and *Mock* are directly on point. In both cases, the defendants argued that the district court should have corrected a sentencing error when it ruled on their respective motions under § 3582(c)(2), but in both cases, these arguments were rejected because, regardless of the merits of the defendants' arguments about the alleged errors at sentencing, the requested relief was beyond the scope of § 3582(c)(2). As applied here, *Dillon* and *Mock* would suggest that regardless of the merit of the defendant's argument that the district court committed procedural error at his sentencing (*i.e.*, erroneously applied pre-FSA standards to his case), that error is not cognizable "in the context of a motion" under § 3582(c)(2). *Mock*, 612 F.3d at 138; *see also Dillon*, 130 S. Ct. at 2694. Accordingly, this Court's language in Section II suggesting that the FSA error *was* cognizable in

a motion under § 3582(c)(2) appears inconsistent with *Dillon* and *Mock*.

At a minimum, *Dillon* and *Mock* suggest that the question purportedly resolved by this Court in Section II of its opinion—how to calculate the defendant's guidelines range in a § 3582(c)(2) proceeding when the district court erroneously applied pre-FSA standards at the original sentencing—is a complicated question. Given the complexity of this question, and the complete absence of briefing on this issue before this Court,[4] the government respectfully requests that the panel amend its opinion to leave this question open for resolution in a future case, after full adversarial briefing.

[4] Although the government was aware of this potential issue in this case, in the absence of any argument in the defendant's brief that the district court should have corrected the FSA error in the § 3582(c)(2) proceeding, the government did not address this question in its brief. *But see Bethea*, 735 F.3d at 88 (suggesting that this issue "eluded" the parties in this case).

Conclusion

For the foregoing reasons, the petition for rehearing should be granted.

Dated: December 16, 2013

Respectfully submitted,

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ADDENDUM

735 F.3d 86
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Mical BETHEA, aka Kareem, Defendant–Appellant.

Docket No. 12–961–CR. | Argued: Oct. 17, 2013. | Decided: Oct. 31, 2013.

Synopsis

Background: Prisoner filed motion for reduction of sentence for cocaine distribution, based on post-sentencing lowering of Sentencing Guidelines ranges for crack cocaine offenses. The United States District Court for the District of Connecticut, Bryant, J., denied the motion. Prisoner appealed.

[Holding:] The Court of Appeals held that district court failed to comply with two-step approach for ruling on sentence reduction motion.

Vacated and remanded.

Attorneys and Law Firms

***87** Michael L. Moscowitz, New Haven, CT, for Defendant–Appellant.

Christopher M. Mattei (Sandra S. Glover, on the brief) for Deirdre M. Daly, Acting United States Attorney for the District of Connecticut, for Appellee.

Before: WINTER, JACOBS and STRAUB, Circuit Judges.

Opinion

PER CURIAM:

This appeal from the denial of a motion for sentencing modification in the United States District Court for the District of Connecticut (Bryant, J.) presents an issue as to what procedure a district court should follow under 18 U.S.C. § 3582(c).

Bethea pled guilty in June 2010 to a single count of cocaine distribution. The Presentence Report ("PSR") calculated a guidelines range of 60–71 months. At sentencing, in September 2010, Judge Bryant extensively reviewed the sentencing factors and imposed an above-guidelines sentence of 80 months' imprisonment, citing Bethea's additional sales of firearms; his extensive criminal history and risk of recidivism; the need for general deterrence; and the danger Bethea posed to the public. Bethea did not appeal his sentence.

In September 2011, Bethea filed an 18 U.S.C. § 3582(c) motion for sentence modification based on retroactive amendments to the crack cocaine sentencing guidelines. An addendum to the PSR calculated a revised guidelines sentence of 60 months' imprisonment by reason of a five-year mandatory minimum in Bethea's case.

In March 2012, the court denied Bethea's motion and Bethea appealed.

I

[1] When presented with a motion to reduce a sentence pursuant to § 3582(c)(2), a district court must engage in a "two-step approach." *Dillon v. United States,* 560 U.S. 817, 130 S.Ct. 2683, 2691, 177 L.Ed.2d 271 (2010). At step one, the court "must consider whether the defendant is eligible for a reduction by calculating the Guidelines range that would have been applicable had the amended Guidelines been in place at the time the defendant originally was sentenced." *United States v. Wilson,* 716 F.3d 50, 52 (2d Cir.2013). "At step two ..., § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction ... is warranted in whole or in part under the particular circumstances of the case." *Dillon,* 130 S.Ct. at 2692.

[2] The district court disposed of Bethea's motion by stating:

> The court sentenced defendant to a non-guidelines sentence predicated on the agreement between the parties that the calculated guideline range was insufficient. ***88** Therefore, a further reduction within the applicable guidelines range would only exacerbate the insufficiency.

Dillon and *Wilson* require more. We remand for the district court to (1) specifically determine Bethea's eligibility for

a sentencing modification; and (2) consider whether any applicable § 3553(a) factors counsel in favor of a reduction.

II

The importance of the systematic approach required by *Dillon* and *Wilson* is underlined by a significant consideration that appears to have eluded both the government and Bethea's counsel: Bethea is not subject to a mandatory minimum sentence.

[3] The Supreme Court held in *Dorsey v. United States* that the "new, more lenient mandatory minimum provisions" "apply to offenders who committed a crack cocaine crime before August 3, 2010 but were not sentenced until after August 3." —— U.S. ——, 132 S.Ct. 2321, 2326, 183 L.Ed.2d 250 (2012). Bethea is just such an offender: his crack sales occurred in early 2009 and he was sentenced in September 2010. The amount of cocaine base attributed to Bethea, 15.79 grams, would have subjected Bethea to a mandatory minimum of five years prior to the Fair Sentencing Act, but subjects him to no mandatory minimum under the current regime. *See id.* at 2329 ("The Act increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5–year minimum....").

Dorsey was issued after the district court's order and after the Probation Office issued sentencing recommendations based on the assumption that a five-year mandatory minimum was applicable. Bethea's Guidelines sentencing range did not shift from a 60–71 month range to a fixed 60 months, as assumed by all involved; without the mandatory minimum, the range instead began below 60 months—at 57–71 months—and was considerably reduced to 37–46 months. On remand, the district court will have the opportunity to (and, indeed, must under *Wilson*) consider this development.

For the foregoing reasons, we vacate and remand.