UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR-03-81-B-W
	)	
ROBERT H. SMITH	)	
	)	
Defendant.	)	

ORDER REGARDING EVIDENTIARY HEARING

Although the Defendant has no right to have or be present at an evidentiary hearing on a Rule 35(b) motion, in the circumstances of this case and in the exercise of its discretion, the Court will hold a hearing and will allow him, if he wishes, to be present.

I. STATEMENT OF FACTS

After pleading guilty on January 3, 2005 to possession of firearms by a felon, a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and to bank fraud, a violation of 18 U.S.C. § 1344, Robert H. Smith was sentenced on June 16, 2006 to 144 months incarceration. On May 29, 2007, the Government filed a Rule 35(b) motion for reduction of sentence. At a conference on October 2, 2007, counsel raised a question as to whether Mr. Smith has the legal right to be present at a Rule 35(b) hearing.

II. DISCUSSION

Under First Circuit law, a defendant does not have a right to an evidentiary hearing on a Rule 35 motion. *United States v. McAndrews*, 12 F.3d 273, 279-80 (1st Cir. 1993). To be entitled to an evidentiary hearing, a defendant must "at the very least, carry an entry-level burden by making a sufficient preliminary showing that material facts [are] in doubt or in dispute." *Id.* (internal quotation omitted). In *McAndrews*, the First Circuit wrote that "Rule 35(b) motions, as

a class, do not demand special swaddling" *id.* at 279, and the "party seeking an evidentiary hearing on a post-judgment motion must carry a formidable burden of persuasion." *Id.* at 280. Whether to hold a hearing is left to the trial court's discretion and is reviewed "under an abuse-of-discretion rubric." *Id.* at 279.

A defendant has neither the right to be present at the Rule 35(b) hearing nor the right to allocution. *United States v. Behrens*, 375 U.S. 162, 165 (1963) (noting that Rule 43 "provides that a defendant's presence is not required when his sentence is reduced under Rule 35."); *Fournier v. United States*, 485 F.2d 130, 131 (5th Cir. 1973); *United States v. Birnbaum*, 421 F.2d 993, 998 (2d Cir. 1970) (holding that a defendant's presence is not required for a Rule 35 reduction); *Jones v. United States*, 381 F.2d 351, 352 (5th Cir. 1967) (no right of allocution); *United States v. Woykovsky*, 297 F.2d 179, 182 (7th Cir. 1961); 3 Charles A.Wright et al., *Federal Practice & Procedure: Criminal 2d* § 586, at 405-6 (1982).

Here, the Court notes that the Government has agreed to recommend a specific reduction in his 144 month sentence and the Defendant, although certainly in agreement that his sentence should be reduced, seeks a much greater reduction. The Defendant has filed affidavits in support of his position and the Government has not objected to their admissibility. Nevertheless, rather than rule on the written submissions of the parties, the Court will schedule a Rule 35(b) hearing to receive argument of counsel and, if the parties desire, further evidence, including testimony. The Court will allow the Defendant to be present at the hearing, if he wishes to be present. The Court does so not because the Defendant has the right to a hearing or to be present, but because in its exercise of discretion, the Court concludes that, in the circumstances of this case, the Defendant should be allowed to be present at a hearing that may substantially affect the length of his incarceration. Of course, the Defendant may choose not to be present and if he does so and

counsel conclude that no further argument is necessary or beneficial, they may inform the Court and it will decide the Rule 35 motion based on the submitted documents.

III. CONCLUSION

The Court concludes that although the Defendant has no right to a Rule 35(b) hearing, he will, if he so wishes, be accorded a hearing and will be allowed to be present.[1]

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 5th day of October, 2007

Defendant

ROBERT H SMITH (1)
TERMINATED: 06/16/2006

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[1] At a conference of counsel on October 5, 2007, the Court explained its conclusion and defense counsel represented that in anticipation that a hearing might be available, she had consulted with her client and that Mr. Smith had agreed to waive any hearing. The parties are therefore standing on their written submissions. No hearing will be necessary.

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