APPENDIX "A"

OPINION OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIR.
2018 U.S. APP. LEXIS 3547 U.S. V. MILLER. DISMISSAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40797
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
February 15, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ARTIS RYAN MILLER,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 5:08-CR-347-2

Before SMITH, WIENER, and HAYNES, Circuit Judges.

PER CURIAM:*

Artis Ryan Miller, federal prisoner # 37382-177, was convicted by a jury of conspiring to possess with intent to distribute in excess of 1,000 kilograms of marijuana and possession with intent to distribute in excess of 100 kilograms of marijuana. He moves for leave to proceed in forma pauperis (IFP) in his appeal of the district court's denial of his 18 U.S.C. § 3582(c)(2) motion, in which he sought a sentence reduction under Amendment 782 to the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Sentencing Guidelines. Miller argues that the district court erred by failing to correctly determine drug quantity at his original sentencing and should not have relied upon that erroneous determination to deny his § 3582(c)(2) motion. He also argues that the district court erred by denying relief based upon the determination that he obstructed justice, which was erroneous when made at his original sentencing.

By moving for leave to proceed IFP, Miller challenges the district court's certification that his appeal was not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). This court's inquiry into a litigant's good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

Miller's challenge to issues that were resolved at his original sentencing hearing lacks merit, as issues that relate to original sentencing determinations may not be relitigated in a § 3582(c)(2) proceeding. *United States v. Evans*, 587 F.3d 667, 674 (5th Cir. 2009). As the district court's decision reflects consideration of Miller's motion and the 18 U.S.C. § 3553(a) factors, the denial of the motion was not an abuse of discretion. *See United States v. Whitebird*, 55 F.3d 1007, 1010 (5th Cir. 1995).

This appeal does not present a nonfrivolous issue. *See Howard*, 707 F.2d at 220. Miller's IFP motion is DENIED, and the appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 & n.24; 5TH CIR. R. 42.2.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

5/9/18

No. 17-40797

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ARTIS RYAN MILLER,

Defendant - Appellant

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

Before SMITH, WIENER, and HAYNES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for panel rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 5:08-CR-347-2
	§	
ARTIS RYAN MILLER	§	

ORDER DENYING SENTENCE REDUCTION

This Court is tasked with determining whether it should re-sentence the above-named Defendant ("Defendant") in light of the retroactive application of the 2014 amendments to the United States Sentencing Guidelines ("Guidelines"). Amendment 782 changes the Drug Quantity Table, thus lowering the base offense level for most drug trafficking offenses. In this case, Defendant has moved for re-sentencing[1] in accordance with the now reduced Guidelines. Having determined that Defendant is eligible for sentence reduction, the Court first reviews the legal standards applicable to sentencing in the federal system during the Court's tenure.

This Court first began sentencing in January 2005. *United States v. Booker*, 543 S. Ct. 220 (2005) was decided that same month, just days before this Court conducted its first sentencing hearing. Thus, throughout the twelve years that this Court has been conducting sentencings, it has done so only under the advisory Guidelines. Though advisory, a judge is nonetheless required "to take account of the Guidelines together with other sentencing goals . . . to consider the [] 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. And . . . judges [are still required] to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." *Booker*, 543 U.S. at 259 (internal citations omitted).

One year and a half after *Booker*, the Supreme Court decided *Rita v. United States*, 551 U.S. 338 (2007), confirming that "the sentencing courts, applying the Guidelines in individual cases, may depart (either pursuant to the Guidelines or, since *Booker*, by imposing a non-Guidelines sentence)." *Id.* at 350. Late in 2007, in *Gall v. United States*, 552 U.S. 38, 47 (2007), the Supreme Court once again explained a district court's discretion.

> As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. [] As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to

[1] Dkt. No. 279 & 281.

> argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.[] In so doing, he may not presume that the Guidelines range is reasonable. [] He must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

Id. at 49-50.

Thus, since it began sentencing, but certainly since late 2007, this Court has understood that it must make an individualized assessment as to each defendant and then determine whether a within or outside Guideline sentence is warranted. The change in the Drug Quantity Table has not changed the Court's discretion, nor has it changed the need for the Court to follow the process set out above.

Having reviewed the legal consideration, the Court turns now to consideration of this case. In making this determination, this Court has seriously considered all relevant statutory factors and has evaluated whether a reduced sentence would be "sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2) . These factors, noted above, include the need for the sentence imposed:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide a just punishment for the offense; (B) to afford adequate deterrence to criminal conduct;(C) to protect the public from future crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

Considering all relevant information including the record in this case and Defendant's Presentence Investigation Report, the Court determines that a reduction of Defendant's sentence is not warranted. In particular, the Court notes Defendant's involvement in multiple loads of marijuana, his actions in absconding from law enforcement, and his false testimony at trial. Therefore, a reduction of Defendant's sentence would not meet these statutory goals. A further reduction would not provide a just punishment for Defendant. And more importantly, it would not provide specific deterrence to Defendant or general deterrence to others inclined to commit a similar offense.

Finally, the Court notes that the United States Sentencing Guidelines are not binding now, nor were they binding at the time of the initial sentence. The Court then considered all of the § 3553(a) factors to determine whether they supported the sentence requested by a party. In so doing, the Court did not presume that the Guidelines range was reasonable. Rather, the Court made an individualized determination as to the sentence to impose. The Guidelines being only

the starting point and one of several considerations, the changes to those guidelines do not now warrant a change in the sentence originally imposed.

Accordingly, it is ORDERED that Defendant's motion for a reduction of his sentence is DENIED.

IT IS SO ORDERED.

DONE at McAllen, Texas, this 13th day of July, 2017.

Micaela Alvarez
United States District Judge