

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEC 17 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 19-10041

Plaintiff-Appellee,

D.C. No. 2:11-cr-00119-WBS-5

v.

DANNY PEREDA, AKA T-Mighty,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted December 11, 2019**

Before: WALLACE, CANBY, and TASHIMA, Circuit Judges.

Danny Pereda appeals pro se from the district court's order denying his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Pereda argues that he is entitled to a sentence reduction under Amendment 782. We review de novo whether a district court has authority to modify a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

sentence under section 3582(c)(2). *See United States v. Wesson*, 583 F.3d 728, 730 (9th Cir. 2009). As the district court concluded, Pereda was sentenced as a career offender under U.S.S.G. § 4B1.1. Contrary to Pereda’s assertion, the fact that the parties stipulated to, and the district court accepted, a sentence below the career-offender guideline range does not make him eligible for a reduction. For purposes of a sentence reduction motion, the “applicable” guideline range is the pre-variance range. *See U.S.S.G. § 1B1.10 cmt. n.1(A); United States v. Pleasant*, 704 F.3d 808, 811-12 (9th Cir. 2013), *overruled on other grounds by United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc). Because the pre-variance range here was the career-offender range, which was not lowered by Amendment 782, Pereda is ineligible for a sentence reduction. *See Pleasant*, 704 F.3d at 812; *Wesson*, 583 F.3d at 731.

Pereda’s remaining claims are outside the scope of this section 3582(c)(2) proceeding. *See Dillon v. United States*, 560 U.S. 817, 831 (2010).

AFFIRMED.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 DANNY PEREDA,
16 Defendant.

No. 2:11-cr-119 WBS

ORDER RE: MOTION TO REDUCE
SENTENCE PURSUANT TO 18 U.S.C.
§ 3582(c)(2)

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20 Before the court is defendant Danny Pereda's Motion for
21 Modification of Sentence Pursuant to 18 U.S.C. § 3582(c)(2) and
22 Amendment 782. (Docket No. 299.)

23 On April 23, 2012, defendant pled guilty pursuant to a
24 plea agreement to one count of conspiracy to distribute and
25 possess with intent to distribute at least 500 grams of
26 methamphetamine, at least five kilograms of cocaine, and
27 marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1).
28 (Docket Nos. 90, 94.) In the plea agreement, the parties agreed

1 to a 240-month sentence. The parties also agreed to the Factual
2 Basis attached to the plea agreement, which stated, among other
3 things, that defendant agreed with others to distribute more than
4 ten pounds of methamphetamine and ten kilograms of cocaine.

5 (Plea Agreement Ex. A.)

6 Based on a presentence report prepared by the United
7 States Probation Office, which the court adopted in full, the
8 court found defendant to be a career offender on account of his
9 prior convictions, with a total offense level of 34 and criminal
10 history category of VI, and a corresponding Guidelines range of
11 262 to 327 months. (See Judgment (Docket No. 163); Statement of
12 Reasons; Presentence Report ¶¶ 21, 46-47.) The court sentenced
13 defendant to 240 months in prison and 60 months of supervised
14 release. (Judgment at 2-3.)

15 The government argues, and the court agrees, that
16 defendant's request for a sentence reduction must be denied
17 because his sentence was determined based on his status as a
18 career offender under U.S.S.G. § 4B1.1, which Amendment 782 does
19 not affect. See United States v. Charles, 749 F.3d 767, 770 (9th
20 Cir. 2014) ("[R]etroactive amendments regarding sentences under
21 the drug guidelines do not affect individuals who were sentenced
22 as career offenders"); United States v. Romero, 675 F.
23 App'x 777 (9th Cir. 2017) (denying motion to reduce sentence
24 pursuant to section 3582(c)(2) and Amendment 782 because
25 defendant was sentenced as a career offender under U.S.S.G. §
26 4B1.1).

27 Defendant recognizes that the probation officer found
28 that he was a career offender under § 4B1.1 but contends that the

1 parties agreed that the career offender provision did not apply
2 and the enhancement was "abandoned." (See Reply at 2-8 (Docket
3 No. 304).) However, defendant did not object to the PSR's
4 finding that he was a career offender under the Guidelines. (See
5 Def.'s Sentencing Mem. (Docket No. 161).) Moreover, there is no
6 indication in the record that the parties agreed the career
7 offender provision did not apply, and the court accepted the PSR
8 in full, including the PSR's finding that defendant was a career
9 offender. Based on this status as a career offender, defendant
10 is ineligible for a sentence reduction under Amendment 782, and
11 the court will deny the motion.

12 IT IS THEREFORE ORDERED that defendant's motion to
13 reduce his sentence pursuant to 18 U.S.C. § 3582(c) (2) (Docket
14 No. 299), be, and the same hereby is, DENIED.

15 Dated: January 28, 2019


16 WILLIAM B. SHUBB
17 UNITED STATES DISTRICT JUDGE

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8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

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11 UNITED STATES OF AMERICA, Plaintiff,
12 v.
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14 DANNY PEREDA, Defendant.
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CASE NO. 2:11-cr-0119 WBS

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S MOTION FOR REDUCTION OF
SENTENCE PURSUANT TO 18 U.S.C. § 3582

17 The United States, by and through Assistant United States Attorney Jason Hitt, respectfully
18 submits this brief in opposition to the motion for a reduction of sentence filed by Danny Pereda
19 ("defendant") pursuant to 18 U.S.C. § 3582. Docket No. 299.
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1 A. District Court Proceedings

2 On April 23, 2012, the defendant entered a guilty plea to Count One of the Indictment. PSR
3 ¶ 1. Count One charged the defendant with conspiracy to distribute and possess with intent to distribute
4 at least 500 grams of methamphetamine and at least 5 kilograms of cocaine in violation of 21 U.S.C.
5 §§ 846, 841(a). PSR ¶ 1. Prior to sentencing, a Presentence Investigation Report (“PSR”) was prepared.
6 In the Guidelines scoring section, the PSR described the offense conduct and offender characteristics,
7 including defendant’s extensive criminal history. PSR ¶¶ 2–11 (offense conduct), ¶¶ 25–42 (criminal
8 history). The probation officer found that the defendant qualified as a career offender under U.S.S.G.
9 § 4B1.1(b). PSR ¶¶ 21. As such, his base offense level was set at 37 and his criminal history category
10 was VI pursuant to U.S.S.G. § 4B1.1(b). PSR ¶¶ 21, 47. After a three-level reduction for acceptance of
11 responsibility, the resulting Guidelines range was calculated as follows: 34, VI = 262–327 months in
12 prison. PSR ¶ 75. The parties entered into a plea agreement pursuant to Rule 11(c)(1)(C) for a below-
13 Guidelines sentence of 240 months in prison. Docket No. 94.

14 On August 19, 2013, this Court held a sentencing hearing. Docket No. 162. Consistent with the
15 PSR and without defense objection,¹ the Court found that the defendant was a career offender, and as
16 such, he was subject to an offense level 34 (after a three-level reduction for acceptance of
17 responsibility), criminal history category VI, and a resulting a Guidelines range of 262–327 months in
18 prison. Docket No. 163, Judgment and Commitment Order, Statement of Reasons, at page 1.
19 Consistent with the parties’ plea agreement, the Court imposed a sentence of 240 months in prison, a
20 below-Guidelines sentence. Docket No. 163, Judgment and Commitment Order, at page 2, Statement of
21 Reasons at page 2.

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27 ¹ See Defendant’s Sentencing Memorandum, Docket No. 161, at 1 (“Defendant has no
28 objections to the calculation of the advisory sentencing guidelines or the factual information contained
in the Pre-Sentence Report (PSR) except to update the information contained on the face page of the
PSR under “Date of Arrest”.”).

II. ANALYSIS

A. Two-Step Analysis for Sentence Reduction under 18 U.S.C. § 3582 and *Dillon*

The defendant's motion seeks a reduction in his sentence based upon the Sentencing Commission's passage of Amendment 782, which became effective November 1, 2014. That Amendment generally revised the Drug Quantity Table in U.S.S.G. § 2D1.1 downward by two levels. The Sentencing Commission further provided that Amendment 782 would apply retroactively to previously-sentenced defendants. See U.S.S.G. §§ 1B1.10(d), (e)(1).

8 Defendant's motion under 18 U.S.C. § 3582(c)(2) triggers a two-step analysis to determine
9 whether to grant a sentence reduction. *Dillon v. United States*, 560 U.S. 817, 826 (2010). "A court must
10 first determine that a reduction is consistent with § 1B1.10 before it may consider whether the
11 authorized reduction is warranted, either in whole or in part, according to the factors set forth in
12 § 3553(a)." *Id.* The second step requires that "the court shall consider the factors set forth in 18 U.S.C.
13 § 3553(a) in determining . . . whether a reduction in the defendant's term of imprisonment is warranted."
14 U.S.S.G. § 1B1.10 app. note 1(B)(i); *see also* U.S.S.G. § 1B1.10 background ("The authorization of
15 such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed
16 sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a
17 defendant to a reduced term of imprisonment as a matter of right.").

B. Application of First Step of the *Dillon* Analysis

19 Applying the first step identified in *Dillon*, defendant does not qualify for a sentence reduction
20 because he scored as a career offender and Amendment 782 did not change his career offender status.
21 To be eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2), defendant must show that his
22 sentence was “based on a sentencing range that has subsequently been lowered by the Sentencing
23 Commission” and (2) “such a reduction is consistent with applicable policy statements issued by the
24 Sentencing Commission.” *United States v. Wesson*, 583 F.3d 728, 730 (9th Cir. 2009) (quoting 18
25 U.S.C. § 3582(c)(2)). Where application of the pertinent amendment does not result in a different
26 sentencing range, no reduction of sentence may occur. *United States v. Waters*, 648 F.3d 1114, 1117
27 (9th Cir. 2011) (finding defendant ineligible for sentence reduction because his career offender guideline
28 was not altered by reduction in drug offense guideline).

1 Defendant's career offender designation was not altered by Amendment 782 because it did not
2 address the career offender guideline. Indeed, Amendment 782 only adjusted U.S.S.G. § 2D1.1, it did
3 not change § 4B1.1. *United States v. Charles*, 749 F.3d 767, 770 (9th Cir. 2014) ("[R]etroactive
4 amendments regarding sentences under the drug guidelines do not affect individuals who were
5 sentenced as career offenders.") (internal citations and quotation marks omitted); *Wesson*, 583 F.3d at
6 731 (determining that career offender sentenced under guideline range calculated pursuant to § 4B1.1 is
7 not eligible for sentence reduction based on an amendment revising § 2D1.1); *Zeich v. United States*,
8 2014 WL 6774878, at *2 (E.D. Cal. Nov. 10, 2014) (holding that career offender sentenced pursuant to
9 § 4B1.1 is ineligible for sentence reduction based on Amendment 782). As a result, defendant's
10 Guidelines range remains 262–327 months in prison, the same as it was at the time of his original
11 sentencing. Docket No. 163, Judgment and Commitment Order, Statement of Reasons, at page 1.
12 Accordingly, defendant's motion for a sentence reduction must be denied. *Waters*, 648 F.3d at 1117.
13 Because a sentence reduction is not authorized for this defendant, this Court should not reach
14 consideration of the § 3553(a) factors. *See Dillon*, 560 U.S. at 826-27.

15 Defendant's reliance on *Hughes v. United States*, 138 S. Ct. 1765 (2018), and related authorities
16 interpreting the effect of Rule 11(c)(1)(C)-type agreements on sentence-reduction eligibility under
17 Amendment 782 is misplaced. This is because the defendant's ineligibility turns not on the nature of his
18 plea agreement; rather, his ineligibility results from his undisputed career offender status. *Hughes* does
19 not address the ineligibility of career offenders seeking sentence reductions under Amendment 782. The
20 Ninth Circuit's decision in *Charles* controls the outcome of defendant's motion.

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III. CONCLUSION

For the reasons set forth in this memorandum of points and authorities, the United States respectfully requests that the Court deny the defendant's motion for sentence reduction.

McGREGOR W. SCOTT
United States Attorney

Dated: November 13, 2018

/s/ Jason Hitt
JASON HITT
Assistant United States Attorney