

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MACI DENON DAVIS and

JOE L. FRANKLIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

INDEX TO APPENDIX

<i>United States v. Davis</i> , 834 F. App'x 296 (8th Cir. 2021)	1a
District Court Memorandum Opinion and Order	3a
District Court Opinion and Order on Motion for Reconsideration	9a

834 Fed.Appx. 296 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1, generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 8th Cir. Rule 32.1A. United States Court of Appeals, Eighth Circuit.

UNITED STATES of America Plaintiff - Appellee

v.

Maci Denon DAVIS Defendant - Appellant
United States of America Plaintiff - Appellee

v.

Joe L. Franklin Defendant - Appellant

No. 19-3050, No. 19-3082

|

Submitted: December 18, 2020

|

Filed: January 27, 2021

Appeals from United States District Court for the Western District of Arkansas - Fayetteville

Attorneys and Law Firms

Amanda Meredith Donat, Lloyd Vance Stone, Assistant United States Attorney, Candace L. Taylor, Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Arkansas, Fort Smith, AR, for Plaintiff-Appellee

Maci Denon Davis, Pro Se

[Bruce Eddy](#), Federal Public Defender, Anna Marie Williams, Assistant Federal Public Defender, Federal Public Defender's Office, Fayetteville, AR, for Defendant-Appellant

Before [SMITH](#), Chief Judge, [WOLLMAN](#) and [LOKEN](#), Circuit Judges.

[Unpublished]

PER CURIAM.

Maci Davis and Joe Franklin appeal judgments from the district court¹ reducing their sentences pursuant to Section 404 of the First Step Act of 2018. [Pub. L. No. 115-391](#), §

[404](#), [132 Stat. 5194](#), 5222 (2018). In light of our prior recent decisions resolving First Step Act issues, we affirm.

In 2007 and 2008, respectively, Davis and Franklin pleaded guilty to possession with the intent to distribute at least 50 grams of cocaine base (crack cocaine) in violation of [21 U.S.C. § 841\(a\)\(1\)](#), [\(b\)\(1\)\(A\)\(iii\)](#). As career offenders under the U.S. Sentencing Guidelines (U.S.S.G. or Guidelines), both Davis and Franklin had advisory Guidelines sentencing ranges of 262 to 327 months' imprisonment and were each sentenced to 262 months' imprisonment. [United States v. Davis](#), 317 F. App'x 572 (8th Cir. 2009) (unpublished per curiam) (affirming Davis's initial sentence); [United States v. Franklin](#), 362 F. App'x 571 (8th Cir. 2010) (unpublished per curiam) (affirming Franklin's initial sentence).

After Davis and Franklin filed motions for relief under the First Step Act, the district court reduced their respective sentences to 188 months' imprisonment, the bottom of their recalculated sentencing ranges. Davis and Franklin moved for reconsideration, seeking to supplement the record with information about their postconviction conduct. The district court denied the motions in September 2019 and [*297](#) opted instead to "tether itself to the recalculated guidelines not out of a belief that the First Step Act requires such a practice, but rather out of a belief that this is the most practicable way to effectuate the policies undergirding the First Step Act in a fair and consistent manner." D. Ct. Order of Sept. 5, 2019 at 4.

Section 404 of the First Step Act provides that a district judge "may ... impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed." 132 Stat. at 5222. If the district court determines that a defendant is eligible for relief when considering a motion for a reduced sentence under Section 404, it must then decide whether to grant a reduction.

[United States v. McDonald](#), 944 F.3d 769, 772 (8th Cir. 2019). The district court properly determined that Davis and Franklin were eligible for sentence reductions under the First Step Act. We review the district court's decision to grant or deny an authorized sentence reduction under Section 404 for abuse of discretion. [Id.](#) at 771.

Davis and Franklin first argue that the district court misunderstood its discretion under Section 404. Because it believed that conducting the resentencing "proceedings in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress,

had authorized the sort of retroactive sentencing relief contemplated by Section 404” would help “avoid arbitrary and unwarranted sentencing disparities, see [18 U.S.C. § 3553\(a\)\(6\)](#),” the district court looked to [U.S.S.G. § 1B1.10\(b\)](#) for guidance. D. Ct. Order of Aug. 15, 2019 at 11–12 (citing [U.S.S.G. § 1B1.10\(b\)\(1\)](#), which sets forth the manner in which a sentence reduction is determined following an amendment to the Guidelines and [U.S.S.G. § 1B1.10\(b\)\(2\)\(A\)](#), which limits the district court's authority pursuant to [18 U.S.C. § 3583\(c\)\(2\)](#) to reduce a sentence below the bottom of the recalculated Guidelines range). The district court, however, expressly recognized that, unlike sentence reductions under [18 U.S.C. § 3582\(c\)\(2\)](#), Section 404 did not require it to follow the Guidelines when imposing a reduced sentence pursuant to the First Step Act. D. Ct. Order of Aug. 15, 2019 at 13. *Contra* [United States v. Johnson](#), 821 F. App'x 670, 671–72 (8th Cir. 2020) (unpublished per curiam) (remanding when the district court's opinion was unclear whether the district court viewed a prior case as mandating the result rather than as mere guidance in exercising its discretion). It is not abuse of discretion for the district court to consider one of the [§ 3553\(a\)](#) sentencing factors when deciding whether to reduce a sentence pursuant to Section 404. [United States v. Moore](#), 963 F.3d 725, 727 (8th Cir. 2020). Nor is it abuse of discretion for the district court to find guidance in the Sentencing Commission's policy statements when, as here, the court recognizes that Section 404 of the First Step Act does not require it to do so.

Davis and Franklin next contend that the district court failed to conduct a complete review of the motions on the merits as contemplated by Section 404(c) of the First Step Act. To conduct a “complete review” under Section 404, a district court must consider the arguments presented in the defendant's motion and have a reasoned basis for its decision.

[Id.](#) at 728. Our review consists of determining whether the record shows that the district court “has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” [United States v. Booker](#), 974 F.3d 869, 871 (8th Cir. 2020) (quoting [Rita v. United States](#), 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007)). The record clearly establishes that the district court did so here. See *298 [United States v. Williams](#), 943 F.3d 841, 844 (8th Cir. 2019) (“The district court need not respond to every argument made by defendant.” (internal citation and quotation marks omitted)); [United States v. Hoskins](#), 973 F.3d 918, 921 (8th Cir. 2020) (record showed a complete review even though the district court did not give rehabilitation and good disciplinary record as much consideration as defendant would prefer).

The judgments of the district court are affirmed.

All Citations

834 Fed.Appx. 296 (Mem)

Footnotes

- 1 The Honorable Timothy L. Brooks, United States District Judge for the Western District of Arkansas.

2019 WL 3848946

Only the Westlaw citation is currently available.

United States District Court, W.D.
Arkansas, Fayetteville Division.

UNITED STATES of America, Plaintiff

v.

Joe L. FRANKLIN, Defendant
and

United States of America, Plaintiff

v.

Maci Denon Davis and Ronald
Antonio Moorehead, Defendants

CASE NO. 5:08-CR-50060, CASE NO. 5:07-
CR-50037-001, CASE NO. 5:07-CR-50037-002

|

Signed 08/15/2019

Attorneys and Law Firms

Brandon T. Carter, United States Attorneys Office, Fort
Smith, AR, M.C. Quinn, U.S. Attorney's Office, Texarkana,
AR, for Plaintiff.

MEMORANDUM OPINION AND ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT
JUDGE

*1 Currently before the Court in the case of *United States v. Franklin*, 5:08-cr-50060, are:

- Defendant Joe L. Franklin's Motion to Reduce Sentence (Doc. 85) and the Government's Response (Doc. 90).

Also before the Court in the case of *United States v. Davis & Moorehead*, Case No. 5:07-cr-50037, are:

- Defendant Maci Denon Davis's Motion to Reduce Sentence (Doc. 123) and the Government's Response (Doc. 126); and

- Defendant Ronald Antonio Moorehead's Motion to Reduce Sentence (Doc. 114) and the Government's Response (Doc. 119).

This Memorandum Opinion and Order addresses and rules upon issues that are common to all three of these Motions. Other matters that are unique to each Motion will be ruled upon in separate Orders—each of which will be filed on the docket for the case in which its movant is a party—in accordance with this Memorandum Opinion and Order.

I. BACKGROUND

In 2010, the Fair Sentencing Act was passed by Congress and signed by the President. Sections 2 and 3 of the Fair Sentencing Act effectively reduced certain statutory penalties for crack-cocaine offenses, thus lowering the federal sentencing disparity between crack-and powder-cocaine crimes. *See* Fair Sentencing Act of 2010, [Pub. L. No. 111-220](#), §§ 2-3, 124 Stat. 2372, 2372 (2010). Eight years later, the First Step Act of 2018 was passed and signed, enacting a wide range of various criminal-justice reforms. Among those many reforms was a provision designed to make Sections 2 and 3 of the Fair Sentencing Act retroactively applicable to defendants who had been sentenced before the Fair Sentencing Act became law. That provision is located in Section 404 of the First Step Act, which reads as follows:

- (a) DEFINITION OF COVERED OFFENSE.—In this section, the term “covered offense” means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 ([Public Law 111-220](#); 124 Stat. 2372), that was committed before August 3, 2010.
- (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prison, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 ([Public Law 111-220](#); 124 Stat. 2372) were in effect at the time the covered offense was committed.
- (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2

and 3 of the Fair Sentencing Act of 2010 ([Public Law 111-220](#); 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

First Step Act of 2018, [Pub. L. No. 115-391, § 404, 132 Stat. 5194](#), 5222 (2018).

*2 Defendants Franklin, Davis, and Moorehead were all sentenced in this Court for crack offenses before the Fair Sentencing Act was enacted. Now they are asking this Court to reduce their sentences under Section 404 of the First Step Act. The Government does not deny that these Defendants are eligible for sentencing relief, and it does not oppose an award of *some* of the relief they are requesting. But it disagrees with these Defendants on the amounts by which their sentences should be reduced, and on what type of proceedings this Court should follow when awarding them relief.

All three of these Defendants, when originally sentenced, were found by this Court to have criminal histories that made them “career offenders” as the United States Sentencing Guidelines then defined that term; accordingly they all received enhancements under [U.S.S.G. § 4B1.1\(b\)](#) which yielded more severe advisory sentencing ranges than would have applied absent their career-offender designations. This is significant because all three Defendants contend that subsequent developments in Supreme Court and Eighth Circuit caselaw imply that they would not qualify as career offenders if that analysis were performed anew today. Thus, all three Defendants want the opportunity to challenge their career-offender designations. Specifically, each of these Defendants is seeking a complete resentencing, at a hearing where the Defendant would be physically present. At those resentencing hearings, each Defendant wants this Court to perform a complete recalculation of his advisory sentencing range under the most recent version of the Sentencing Guidelines, in accordance with the current state of caselaw, and to consider anew all of the relevant sentencing factors under [18 U.S.C. § 3553\(a\)](#).

The Government, on the other hand, does not believe that the relevant statutes authorize a complete resentencing or the opportunity for these Defendants to challenge their career-offender designations. The Government agrees that this Court should recalculate each Defendant's advisory sentencing

range under the United States Sentencing Guidelines, but contends that when doing so this Court should alter only those variables which depend on the statutory penalties that were amended by the Fair Sentencing Act and made retroactive by the First Step Act. This approach would be a straightforward and mechanical process, because the only such variable in these cases is the *size* of the career-offender enhancement—not whether the career-offender enhancement applies in the first place. Essentially, when a defendant is designated a career offender under the Sentencing Guidelines, the severity of his career-offender enhancement depends on the severity of the maximum statutory penalty authorized for his offense of conviction: the higher the statutory maximum, the larger the career-offender enhancement. See [U.S.S.G. § 4B1.1\(b\)](#). There is no dispute between the Government and any of these Defendants as to what the new advisory sentencing ranges would be under this limited process; and if this limited process were employed, then the Government would not oppose each Defendant's sentence being reduced to the bottom of his newly-calculated advisory sentencing range.

In other words, in each of these cases the only dispute between the Defendant and the Government is whether applicable law authorizes a complete in-person resentencing that includes an opportunity for the Defendant to challenge his career-offender status, or whether the Defendant may only receive a purely mechanical reduction in his sentence which leaves his career-offender status in place but which reduces the impact that his career-offender status has on his advisory Guidelines range. This Court believes the latter position is the better reading of the relevant rules and statutes, in light of their underlying policies and purposes. The following Section explains why.

II. DISCUSSION

*3 Whether a defendant's presence is required at a sentencing proceeding depends upon the scope of the proceeding in question. Ordinarily, the Federal Rules of Criminal Procedure require that “the defendant must be present at ... sentencing.” [Fed. R. Crim. P. 43\(a\)\(3\)](#). However, “[a] defendant need not be present” when “[t]he proceeding involves the correction or reduction of sentence under Rule 35 or [18 U.S.C. § 3582\(c\)](#).” *See* [Fed. R. Crim. P. 43\(b\)\(4\)](#). Rule 35 does not apply here, as it is concerned only with correcting sentences “that resulted from arithmetical, technical, or other clear error,” *see* [Fed. R. Crim. P. 35\(a\)](#), or with reducing sentences for defendants who “provided

substantial assistance in investigating or prosecuting another person,” *see*  Fed. R. Crim. P. 35(b)(1).

 18 U.S.C. § 3582(c) states:

The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court ... may *reduce* the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in  section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, ... and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a *reduction* is consistent with *applicable policy statements issued by the Sentencing Commission*; and

(B) the court may *modify* an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by  Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing

Commission pursuant to  28 U.S.C. 994(o), ... the court may *reduce* the term of imprisonment, after considering the factors set forth in  section 3553(a) to the extent that they are applicable, if such a *reduction* is consistent with *applicable policy statements issued by the Sentencing Commission*.

(emphasis added). In other words, this statute provides that there are only four circumstances under which a court may

modify a term of imprisonment after it has been imposed: (1) if warranted by extraordinary and compelling reasons, *see id.* at § 3582(c)(1)(A)(i); (2) if a defendant is not dangerous, is at least 70 years old, and has served at least 30 years in prison, *see id.* at § 3582(c)(1)(A)(ii); (3) if the Guidelines range on which a defendant's sentence was based has subsequently been lowered by the Sentencing Commission, *see id.* at § 3582(c)(2); or (4) “to the extent otherwise expressly permitted by statute or by  Rule 35,” *see id.* at § 3582(c)(1)(B).

None of these Defendants is contending that there are “extraordinary and compelling reasons” present here that would warrant a reduction in his sentence. None of these Defendants is at least 70 years old. None of these Defendants was sentenced based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to  28 U.S.C. § 994(o).¹ And as previously mentioned,  Rule 35 does not apply here. So in the instant matter the only applicable exception to  18 U.S.C. § 3582(c)'s general rule against modifying terms of imprisonment is that found in  § 3582(c)(1)(B), authorizing such modifications “to the extent otherwise expressly permitted by statute.” And indeed, these Defendants are moving under an expressly permitted statutory basis: Section 404 of the First Step Act.

*4 One might hastily assume, then, that under Rule 43 a defendant's presence is not required for modification of his sentence under the First Step Act. After all, as previously noted, “[a] defendant need not be present” when “[t]he proceeding involves the correction or reduction of sentence under ...  18 U.S.C. § 3582(c).” *See Fed. R. Crim. P. 43(b)(4).*  18 U.S.C. § 3582(c)(1)(B) permits subsequent modification of a prison term when “expressly permitted by statute.” And Section 404 of the First Step Act is a statute that expressly permits subsequent modification of a prison term.

However, this Court believes the situation actually is not quite so simple. To see why, it is helpful to look at how Rule 43 and  18 U.S.C. § 3582(c) work in the context of two other situations where sentence modifications are “otherwise expressly permitted by statute”: following successful direct appeals from a sentence under  18 U.S.C. § 3742(f),  (g), or following successful collateral attacks on a sentence under  28 U.S.C. § 2255.² The former statute provides that if,

on appeal from a criminal sentence, “the court of appeals determines that ... the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.”  18 U.S.C. § 3742(f). As for the latter statute, it provides that if, on motion by a federal prisoner who is challenging the legality of his sentence,

the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

 28 U.S.C. § 2255.

Both of these statutes apparently contemplate a wide variety of potential remedies—including the possibility of a complete resentencing, but also including a variety of other lesser potential remedies, as deemed appropriate by the relevant court. When courts are asked to determine whether a defendant or prisoner must be present for a sentence modification under either of these statutes, the answer—or at least the outcome—seems to be driven by two considerations. One is whether the modification of the sentence might result in a more onerous sentence than was originally imposed. The other is whether the resentencing court will be required to exercise a significant amount of discretion while considering some matter that was not considered at the original sentencing proceeding. If either of these circumstances exists, then the defendant's presence is required at his resentencing; but if neither of these circumstances exists, then modification of the defendant's sentence may be done in his absence. See, e.g.,  *United States v. Brown*, 879 F.3d 1231, 1239–40 (11th Cir. 2018); cf. *United States v. Arrous*, 220 F.3d 355, 361–62 (2d. Cir. 2003) (holding that the defendant should have been present for his resentencing following remand from a

successful appeal, but that his exclusion from the proceeding was harmless error because his new sentence was less onerous than his previous one, and his presence would not have affected the outcome of his resentencing).

*5 The first consideration—whether the modified sentence might be more onerous than the original—fits well with Rule 43's language that “[a] defendant need not be present” for “reduction of sentence under ...  18 U.S.C. § 3582(c).” Fed. R. Crim. P. 43(b)(4) (emphasis added). And it is a very simple matter to observe that in the instant cases, these Defendants cannot receive more onerous sentences than their original ones. Section 404(b) of the First Step Act, by its own terms, only authorizes courts to “impose a reduced sentence.”

However, the second consideration—whether the resentencing court will be required to exercise a significant amount of discretion while considering some matter that was not considered at the original sentencing proceeding—is not so straightforward here. It seems less grounded in the language of Rule 43 than in the constitutional right that this Rule seeks to protect: the guarantee, in the Fifth Amendment's Due Process Clause, of a defendant's “right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” See  *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987);³ see also  *United States v. Jackson*, 923 F.2d 1494, 1496 (11th Cir. 1991) (describing Rule 43(a) as “constitutionally based”).

For guidance in how this second consideration applies to the First Step Act, it is useful to look at the United States Supreme Court's decision in  *Dillon v. United States*, 560 U.S. 817 (2010). Of course that case was not concerned with the First Step Act, which did not yet exist. But the majority opinion in *Dillon* did make some very salient observations about  18 U.S.C. § 3582(c)(2)—the previously-mentioned statute authorizing reduction of an imprisonment term if the Guidelines range on which a defendant's sentence was based has subsequently been lowered by the Sentencing Commission. With respect to *that* statute, the Supreme Court reasoned:

By its terms,  § 3582(c)(2) does not authorize a sentencing or resentencing proceeding. Instead, it provides for the “modif[ication of] a term of imprisonment” by giving courts the power to “reduce” an otherwise final

sentence in circumstances specified by the Commission.

Compare  28 U.S.C. § 994(a)(2)(C) (referring to  § 3582(c)(2) as a “sentence modification provisio[n]”) with  18 U.S.C. § 3742(f) (authorizing courts of appeals to remand “for further sentencing” upon a finding of error) and  § 3742(g) (establishing the terms of “sentencing upon remand” and describing the proceeding as a “resentenc[ing]” (capitalization omitted)). It is also notable that the provision applies only to a limited class of prisoners—namely, those whose sentence was based on a sentencing range subsequently lowered by the Commission.  Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.

 560 U.S. at 825-26 (alterations in original).

This passage from *Dillon* is instructive because there are strong textual and functional similarities between  18 U.S.C. § 3582(c)(2) and Section 404 of the First Step Act. As already noted, like  § 3582(c)(2), Section 404 only authorizes *reduction* of an otherwise final sentence. And similarly to  § 3582(c)(2), Section 404 applies only to a limited class of prisoners—namely, those who were sentenced for federal crimes with statutory penalties that were subsequently modified by section 2 or 3 of the Fair Sentencing Act. This policy decision of Congress to provide an avenue for retroactive sentencing relief to a particular class of prisoners is quite different from the purpose embodied by  18 U.S.C. § 3742(f),  (g), and  28 U.S.C. § 2255, which is to remedy situations where an individual defendant's sentence may have been based upon, or the result of, some legal, jurisdictional, or constitutional error or defect. For these reasons, then, this Court concludes that Section 404 of the First Step Act does not contemplate a plenary resentencing at which a defendant's presence is required.

*6 Nonetheless, it is clear that Section 404 vests quite a bit of discretion in the judge, including with respect to whether even to award any relief at all. As subsection (c) states: “Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.” Given this broad grant of discretion, the question arises how it should be exercised. This Court believes that the need to

avoid arbitrary and unwarranted sentencing disparities, *see*

 18 U.S.C. § 3553(a)(6), counsels in favor of conducting these proceedings in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress, had authorized the sort of retroactive sentencing relief contemplated by Section 404 of the First Step Act. That is to say, first this Court will recalculate each Defendant's advisory sentencing range under the United States Sentencing Guidelines, but only altering those variables which depend on the statutory penalties that were amended by the Fair Sentencing Act and made retroactive by the First Step Act.

See  U.S.S.G. § 1B1.10(b)(1). Then, the Court will decide whether to award each Defendant a reduction from his previously-imposed term of imprisonment, but in no event will the Court reduce a Defendant's term to an amount that is less than the minimum of the recalculated sentencing range.

See  *id.* at § 1B1.10(b)(2)(A).

The Court is adopting this process in order to avoid at least two potential arbitrary sentencing disparities. One such disparity would be between career offenders who were sentenced for crack offenses, and all other career offenders. Under the Sentencing Guidelines, it makes no difference to one's career-offender status whether his instant offense of conviction is related to crack cocaine as opposed to any other drug. It strikes this Court as unlikely that Congress intended for Section 404 of the First Step Act to provide certain career offenders with underlying crack-cocaine convictions a unique opportunity for collaterally attacking their career-offender designations while leaving career offenders with underlying convictions for other drugs out in the cold.

Another such disparity would be *within* the set of career offenders who were sentenced for crack offenses—between those who were sentenced for offenses committed before August 3, 2010, and those who were sentenced for offenses committed after that date. Doubtless there are individuals in the latter group who would like the opportunity to challenge their career-offender designations with the benefit of subsequent developments in caselaw. However, Section 404(c) instructs that “[n]o court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed ... in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010....” It is difficult to see why Congress would have imposed this limitation if it had intended for Section 404 of the First Step Act to be a mechanism by which crack-cocaine

offenders could retroactively challenge their career-offender status.

This Court is not going so far as to say it believes Section 404 *requires* it to conform these proceedings to the process described in  U.S.S.G. § 1B1.10(b). After all, Section 404 of the First Step Act says nothing about the United States Sentencing Guidelines. And  18 U.S.C. § 3582(c)(1)(B)—which authorizes modification of previously-imposed terms of imprisonment “to the extent otherwise expressly permitted by statute”—is the only subsection of  § 3582(c) that does *not* contain any requirement that the modification be “consistent with applicable policy statements issued by the Sentencing Commission.” Perhaps there are other ways of conducting these proceedings that might also effectively avoid the types of sentencing disparities that this Court is seeking to avoid. But the procedure that the Court has outlined here is reasonably calculated to accomplish these ends, and is one that this Court believes it has the discretion to implement. *See* First Step Act of 2018, § 404(b) (“A court ... may ... impose a reduced sentence....” (emphasis added));

id. at § 404(c) (“Nothing in this section shall be construed to *require* a court to reduce *any* sentence pursuant to this section.” (emphasis added)).

III. CONCLUSION

IT IS THEREFORE ORDERED that each Defendant's Motion to Reduce Sentence is **DENIED** to the extent that it is requesting a plenary resentencing at which the Defendant would be present. But the Court will **DEFER RULING** on these Motions to the extent that they are merely requesting sentence reductions, until such time as the Court has independently recalculated the advisory sentencing ranges for these Defendants under the United States Sentencing Guidelines.

***7 IT IS SO ORDERED** on this 15th day of August, 2019.

All Citations

Slip Copy, 2019 WL 3848946

Footnotes

- 1 The Sentencing Commission has promulgated some amendments to the Guidelines that retroactively reduced base offense levels for drug-trafficking offenses. *See* Amendments 782, 788. However, these Defendants' career-offender statuses prevented those retroactive amendments from having any effect on their ultimate Guidelines sentencing ranges. *See, e.g., United States v. Franklin*, Case No. 5:08-cr-50060, Doc. 69 (denying Mr. Franklin's motion for reduction of sentence because he “is a career offender,” making the issue “moot” because “[a]fter application of the reduction, the offense level is the same as the range the defendant was previously subject to”).
- 2 Prior to enactment of the First Step Act, a variety of Circuits held, or at least implied, that these two instances—appellate remand or collateral attack—were the *only* instances where subsequent modification of a sentence was “otherwise expressly permitted by statute” within the meaning of  18 U.S.C. § 3582(c)(1)(B). *See, e.g., United States v. Triestman*, 178 F.3d 624, 629 (2d. Cir. 1999);  *United States v. Goines*, 357 F.3d 469, 476 (4th Cir. 2004);  *United States v. Garcia-Quintanilla*, 574 F.3d 295, 303 (5th Cir. 2009);  *United States v. Ross*, 245 F.3d 577, 586 (6th Cir. 2001);  *United States v. Penson*, 526 F.3d 331, 335 (6th Cir. 2008);  *United States v. Bailey*, 777 F.3d 904, 906-07 (7th Cir. 2015).
- 3 Technically, *Kentucky v. Stincer* is concerned with the Due Process Clause of the Fourteenth Amendment. *See*  482 U.S. at 745. But that clause simply extends the same guarantee with respect to states as the Fifth Amendment's Due Process Clause already provides against the federal government. *Compare id. with, e.g., United States v. Gagnon*, 470 U.S. 522, 526–27 (1985).

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

V.

CASE NO. 5:08-CR-50060

JOE L. FRANKLIN

DEFENDANT

and

UNITED STATES OF AMERICA

PLAINTIFF

V.

CASE NO. 5:07-CR-50037-001

CASE NO. 5:07-CR-50037-002

**MACI DENON DAVIS and
RONALD ANTONIO MOOREHEAD**

DEFENDANTS

OPINION AND ORDER

Currently before the Court in the cases of *United States v. Franklin* and *United States v. Davis & Moorehead* are identical Motions for Reconsideration filed by Mr. Franklin (Case No 5:08-cr-50060, Doc. 92), Mr. Davis (Case No. 5:07-cr-50037, Doc. 129), and Mr. Moorehead (Case No. 5:07-cr-50037, Doc. 130). All three Motions are **DENIED.**

All three of these Defendants previously filed Motions to Reduce Sentence under Section 404 of the First Step Act of 2018. That statute authorizes federal courts to impose reduced sentences on defendants who were sentenced for criminal offenses under statutory penalties that were subsequently modified by Sections 2 or 3 of the Fair Sentencing Act of 2010. In those Motions to Reduce Sentence, each Defendant sought

a plenary in-person resentencing at which he could challenge his career-offender designation under the United States Sentencing Guidelines. The Court denied those Motions in part, in an omnibus order filed on August 15, 2019. See *United States v. Franklin*, 2019 WL 3848946 (Aug. 15, 2019). Specifically, the Court concluded “that Section 404 of the First Step Act does not contemplate a plenary resentencing at which a defendant’s presence is required.” *Id.* at *5. Instead the Court opted, in its discretion, to “conduct[] these proceedings in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress, had authorized” this sentencing relief, so as to avoid certain “potential arbitrary sentencing disparities.” See *id.* at *6.

The particular process the Court adopted involved two steps:

[F]irst, this Court will recalculate each Defendant’s advisory sentencing range under the United States Sentencing Guidelines, but only altering those variables which depend on the statutory penalties that were amended by the Fair Sentencing Act and made retroactive by the First Step Act. Then, the Court will decide whether to award each Defendant a reduction from his previously-imposed term of imprisonment, but in no event will the Court reduce a Defendant’s term to an amount that is less than the minimum of the recalculated sentencing range.

Id. (internal citations omitted). Later, the Court entered separate orders imposing reduced sentences on Messrs. Franklin, Davis, and Moorehead pursuant to this process. Each Defendant’s term of imprisonment was reduced from 262 months to 188 months. See Case No 5:08-cr-50060, Doc. 93; Case No. 5:07-cr-50037, Docs. 128, 131. All of these reduced sentences were at the bottom of their respective recalculated guideline ranges.

The Defendants’ Motions for Reconsideration are not seeking to reargue whether they are entitled to plenary in-person sentencing hearings or whether they may challenge their career-offender statuses. Instead they seek permission to supplement the record with, *inter alia*, information about their conduct while at the Bureau of Prisons, and to

argue on that basis for downward variances from their recalculated guideline ranges under 18 U.S.C. § 3553(a). The Court agrees that this information is relevant to determining the extent to which these Defendants' sentences should be reduced. See, e.g., *id.* at § 3553(a)(1), (a)(2)(B), (a)(2)(D) (instructing sentencing courts to consider "the history and characteristics of the defendant," and "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct" and "to provide the defendant with needed educational or vocational training"). But since the Court has already sentenced each of these Defendants at the bottom of their recalculated guidelines ranges, consideration of this additional information cannot benefit them any further unless the Court is willing to consider granting them a variance below those recalculated ranges.

The Defendants have cited a variety of cases from other districts around the country in support of their request. This Court has read all of those cases, and recognizes that many of them take approaches that differ in various ways from the one this Court has taken. For example, one of those cases appears to conclude that Section 404 of the First Step Act authorizes a plenary, in-person resentencing hearing. See *United States v. Payton*, 2019 WL 2775530, at *5 (E.D. Mich. July 2, 2019). Several of the cases cited by the Defendants resulted in awards of downward variances from recalculated guideline ranges. Some downward variances were awarded where the recalculated guideline range was unchanged from the original. See, e.g., *United States v. Norman*, 2019 WL 3296830 (W.D. Mich. July 23, 2019); *United States v. VanBuren*, 2019 WL 3082725 (W.D. Va. July 15, 2019); *United States v. Hughes*, W.D. Va., Abingdon Division, Case No. 1:08CR00024-035, Doc. 3698. Others were awarded even though the recalculated guideline range was lower than the original. See, e.g., *United States v. Logan*, 2019 WL

3391618 (D. Md. July 26, 2019);¹ *United States v. Berry*, 2019 WL 2521296 (W.D. Mich. June 19, 2019).

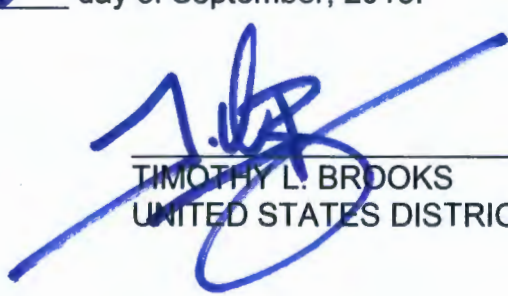
To be clear, this Court agrees that Section 404 of the First Step Act does not prohibit judges from varying all the way down to the statutory minimum when imposing a reduced sentence. *Cf. United States v. Valentine*, 2019 WL 2754489, at *5 (W.D. Mich. July 2, 2019) (“The only limits found in the First Step Act are the statutory minimums of the Fair Sentencing Act’s new thresholds.”). This Court has opted to tether itself to the recalculated sentencing guidelines not out of a belief that the First Step Act requires such a practice, but rather out of a belief that this is the most practicable way to effectuate the policies undergirding the First Step Act in a fair and consistent manner. *See Franklin*, 2019 WL 3848946, at *6 (Aug. 15, 2019) (“This Court is not going so far as to say it believes Section 404 *requires* it to conform these proceedings to the process described in U.S.S.G. § 1B1.10(b). . . . But the procedure that the Court has outlined here is reasonably calculated to accomplish these ends [of avoiding arbitrary sentencing disparities], and is one this Court believes it has the discretion to implement.”). Most of the cases cited by the Defendants do not acknowledge the arbitrary disparities that this Court is seeking to avoid. The few that do acknowledge them do not seem to be as troubled by them as this Court is, or at least do not seem to think that the potential for

¹ In *Logan*, the defendant’s original sentence had also been a downward variance, and the reduced sentence was calculated to produce a downward variance proportional to the original one. *See* 2019 WL 3391618 (D. Md. July 26, 2019). In the instant cases, Messrs. Franklin, Davis, and Moorehead all originally received within-guidelines sentences, so this Court did not have occasion to consider whether it would be proper to award a proportional downward variance upon resentencing. But this Court is willing to do so in cases where the original sentence was a downward variance, because that would not introduce the sort of disparities that this Court sought to avoid in its August 15 Order.

such disparities informs any consideration of congressional intent with respect to the First Step Act. *See, e.g., VanBuren*, 2019 WL 3082725, at *5 (W.D. Va. July 15, 2019) (“The Government similarly argues that a variance below the amended Guidelines range (of life) should not be granted in order to ensure parity with defendants who were sentenced after the Fair Sentencing Act and were not eligible for consideration of sentences below the Guidelines range[.] . . . The Court declines to follow the Government’s suggestion”); *cf. United States v. Vanzant*, 2019 WL 3468207, at *3 n.6 (S.D. Ala. July 31, 2019) (“Additionally, some sentencing disparities are inevitable when Congress enacts legislation designed to reduce sentences for a specific class of offenders.” (internal quotation marks omitted)). This Court is not persuaded by these cases to reconsider its prior ruling that it would not vary downward from the instant Defendants’ recalculated guideline ranges.

IT IS THEREFORE ORDERED that the Motions for Reconsideration filed by Mr. Franklin (Case No 5:08-cr-50060, Doc. 92), Mr. Davis (Case No. 5:07-cr-50037, Doc. 129), and Mr. Moorehead (Case No. 5:07-cr-50037, Doc. 130) are all **DENIED**.

IT IS SO ORDERED on this 5th day of September, 2019.



TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE