

APPENDIX A

No. 17-40343

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**UNITED STATES OF AMERICA,
*Plaintiff-Appellee,***

v.

**MARVIN STEVE MARTINEZ-HERNANDEZ,
*Defendant-Appellant.***

**APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION, No. 5:15-cr-1534**

**UNITED STATES' OPPOSED MOTION
TO DISMISS MARTINEZ'S APPEAL,
AND, ALTERNATIVELY, OPPOSED MOTION FOR
THIRTY-DAY LEVEL 1 EXTENSION**

The United States moves to dismiss Marvin Steve Martinez-Hernandez's direct appeal as frivolous. If this motion is denied, the United States respectfully requests a Level 1 extension of thirty (30) days in which to file its appellee's brief.

Proceedings Below

On December 22, 2015, Marvin Steve Martinez-Hernandez (Martinez) was charged by indictment with illegal re-entry after deportation, in violation of 8 U.S.C. § 1326. (ROA.14).¹ On May 13, 2016, pursuant to his written consent, Martinez appeared with counsel before a magistrate judge for the admonishments required by Fed. R. Crim. P. 11 and the entry of a guilty plea to the one count indictment. (ROA.43). There was no plea agreement between the parties and no waiver of appellate or collateral review rights. (ROA.45, 139, 152) (PSR ¶¶ 3, 77). That same day, the magistrate judge reported these facts to the district court with the recommendation that Martinez's guilty plea be accepted. (ROA.45-47). On September 14, 2016, the Honorable United States District Judge Marina Garcia Marmolejo accepted the magistrate judge's report and recommendation and found Martinez guilty after neither party objected. (ROA.48).

The probation officer recommended a base offense level of 8,

¹ "ROA" refers to the record on appeal, which is cited in accordance with 5th Cir. R. 28.2.2. "PSR" refers to the presentence investigation report, with all addenda, and is cited by ROA page number and by paragraph number.

pursuant to U.S.S.G. § 2L1.2(a). (ROA.141) (PSR ¶ 18). On October 20, 2006, Martinez was convicted of the aggravated assault of a family member in Case No. 1080975, in the 180th District Court of Harris County, Houston, Texas. (ROA.141, 146-47) (PSR ¶¶ 20, 46). Martinez was sentenced to five years of deferred adjudication probation with a condition of the probation that he serve 90 days in custody. (ROA.141, 146-47) (PSR ¶¶ 20, 46). On February 4, 2009, Martinez's probation was revoked, he was adjudicated guilty, and he was sentenced to seven years of imprisonment. (ROA.141, 146-47) (PSR ¶¶ 20, 46). The probation officer recommended that this prior felony conviction constituted a "crime of violence" pursuant to U.S.S.G. § 2L1.2, cmt. n.1(B)(iii), and recommended a 16-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii). (ROA.141) (PSR ¶ 20). After a three-level reduction for acceptance of responsibility and timely notification of intent to plead guilty, pursuant to U.S.S.G. § 3E1.1(a) and (b), Martinez had a total offense level of 21. (ROA.142) (PSR ¶¶ 28-30, 32).

Martinez had 15 prior convictions, which netted him 14 criminal history points, or one more than necessary to place him in criminal history category VI. (ROA.143-48) (PSR ¶¶ 34-51). The statutory

maximum term of imprisonment was 20 years, pursuant to 8 U.S.C. § 1326(b)(2). (ROA.152) (PSR ¶ 74). Based on a total offense level of 21 and a criminal history category of VI, Martinez's advisory Guidelines range of imprisonment was 77 to 96 months. (ROA.152) (PSR ¶ 74).

On July 18, 2016, Martinez's defense counsel filed a statement that he had no objections or corrections to the material in the PSR. (ROA.174-75). The prosecutor had filed a similar statement on July 3, 2016. (ROA.135-36).

In a judgment announced on September 14, 2016, and entered on September 28, 2016, the district court sentenced Martinez to 77 months' imprisonment, to be followed by three years of supervised release. (ROA.50-55). Martinez did not appeal his sentence.

On January 20, 2017, Martinez filed a motion for reduction of sentence, pursuant to 18 U.S.C. § 3582(c)(2), in which he alleged that the enhancement for having been deported after a conviction for aggravated felony was reduced by the November 2016 amendments to the Guidelines. (ROA.59-81). The United States filed a response on February 3, 2017. (ROA.82-85).

On February 7, 2017, Martinez filed a motion to vacate, set aside,

or correct his conviction and sentence pursuant to 28 U.S.C. § 2255, in which he alleged that his trial counsel was ineffective for his failure to object to the sentencing enhancement due to Martinez's prior conviction for aggravated assault. (ROA.86-100).

On March 9, 2017, the district court denied Martinez's motion for reduction of sentence under 18 U.S.C. § 3582(c)(2) and his motion to vacate, set aside, or correct his conviction and sentence, under 28 U.S.C. § 2255. (ROA.101-06). The district court denied the habeas motion with prejudice, dismissed the attendant civil action, and denied Martinez a certificate of appealability (COA). (ROA.101-07).

On March 31, 2017, Martinez filed a notice of appeal in which he stated that he was appealing only the denial of his motion to reduce his sentence under 18 U.S.C. § 3582(c)(2). (ROA.108).

Jurisdiction

This Court's jurisdiction vests under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Record on Appeal

The appellant generally bears the burden of creating the record on appeal. *United States v. Coveney*, 995 F.2d 578, 587 (5th Cir. 1993); *see*

Fed. R. App. P. 10(b)(1)(A) (stating that the appellant must order “transcript of such parts of the proceedings not already on file as the appellant considers necessary”); *United States v. Hinojosa*, 958 F.2d 624, 632 (5th Cir. 1992) (“We are unable to consider [defendant’s sentencing challenge] because [he] has not provided this Court with a record of the sentencing hearing, and no justification is given for not doing so.”); *Brookins v. United States*, 397 F.2d 261, 261 (5th Cir. 1968) (“This appellate court ‘[C]an only take the record as it finds it, and cannot add thereto, or go behind, beyond, or outside it, and it will not prosecute an independent inquiry’ as to what happened in the lower court. . . .”) (quotation omitted); *United States v. Narvaez*, 38 F.3d 162, 167 (5th Cir. 1994) (“It is the appellant’s responsibility to order parts of the record which he contends contain error and his failure to do so prevents us from reviewing this assignment of error.”). Here, Martinez failed to order the transcripts, failed to designate the record on appeal, and failed to explain why he did not do so. One explanation might be the district court’s finding that Martinez “makes no substantial showing of a denial of a constitutional right, and further, that any appeal would not be taken in good faith.” (ROA.105). Accordingly, the district court denied

Martinez *in forma pauperis* (IFP) status, under 28 U.S.C. § 1915(a)(3). (ROA.106-07).

Argument

MARTINEZ WAS NOT SENTENCED UNDER A GUIDELINE THAT WAS LATER REDUCED BY THE SENTENCING COMMISSION AND HE IS ENTITLED TO NO RELIEF.

Martinez was not eligible for a reduction of his sentence under 18 U.S.C. § 3582(c)(2), because he was sentenced under U.S.S.G. § 2L1.2, which is applicable to unlawfully entering or remaining in the United States.

A. Standard of Review.

“In determining whether to reduce a sentence under § 3582(c)(2), the district court first decides whether the defendant is eligible for a sentence modification, and if so, must consider the applicable 18 U.S.C. § 3553(a) factors to decide whether a reduction is warranted in whole or in part under the particular circumstances of the case.” *United States v. Benton*, 546 F. App’x 365, 368 (5th Cir. 2013) (unpublished)² (citing

² Unpublished opinions issued on or after January 1, 1996, are not precedent, except under certain circumstances not present here. An unpublished opinion may, however, be persuasive. See 5th Cir. Loc. R. 47.5.4; see also *Ballard v. Burton*, 444

Dillon v. United States, 560 U.S. 817, 827 (2010)). A reduction must also be consistent with the Sentencing Commission's applicable policy statements. *Id.* (citing 18 U.S.C. § 3582(c)(2)).

The district court's decision on a motion for a sentence reduction under § 3582(c)(2) is reviewed for an abuse of discretion; its application of the advisory Guidelines is reviewed *de novo*. *United States v. Henderson*, 636 F.3d 713, 717 (5th Cir. 2011); *United States v. Doublin*, 572 F.3d 235, 237 (5th Cir. 2009). A district court abuses its discretion when its decision is based on an error of law. *United States v. Smith*, 417 F.3d 483, 486-87 (5th Cir. 2005).

Under § 3582(c)(2), a court may reduce a 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." *United States v. Dupre*, 565 F. App'x 307 (5th Cir. 2014) (unpublished) (citing 18 U.S.C. § 3582(c)(2)). Application notes to the Guidelines policy statement direct courts to consider the § 3553(a) factors, as well as public safety

F.3d 391, 401 n.7 (5th Cir. 2006).

consequences, and state: “The court may consider post-sentencing conduct . . . in determining . . . [w]hether a reduction in the defendant’s term of imprisonment is warranted.” *Id.* (citing U.S.S.G. § 1B1.10, cmt. n.1(B)(i)-(iii)). A § 3582(c) proceeding is not a full re-sentencing, and a new sentencing hearing is not required. *Dillon*, 560 U.S. at 826-31.

B. Martinez was sentenced as an illegal alien, under U.S.S.G. § 2L1.2.

Martinez received a base offense level of 8 pursuant to U.S.S.G. § 2L1.2(a); a 16-level “crime of violence” enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii) and cmt. n.1(B)(iii); and reductions pursuant to U.S.S.G. § 3E1.1(a) and (b). (ROA.141-42) (PSR ¶¶ 18, 28-30, 32). Martinez’s defense counsel and the prosecutor filed no objection to the PSR. (ROA.135-36, 174-75). The district court adopted the PSR without change. (ROA.178). The district court sentenced Martinez to the lowest end of a correctly calculated Guidelines range of imprisonment. (ROA.50-55).

The gist of Martinez’s argument in his motion for reduction of sentence was that the Guidelines were amended such that his offense no longer merits a prison sentence of the length he received. (ROA.59-81).

The Guidelines were revised effective November 1, 2016, but the revisions do not aid Martinez.

A district court may not modify a term of imprisonment once it has been imposed, except in limited circumstances. 18 U.S.C. § 3582(c). One of those exceptions is that a district court may modify a term of imprisonment once it has been imposed “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.” 18 U.S.C. § 3582(c)(2); *see Dublin*, 572 F.3d at 237. “[E]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered *only by an amendment listed in subsection (c) of U.S.S.G. § 1B1.10 that lowers the guideline range.*” *United States v. Drath*, 89 F.3d 216, 218 (5th Cir. 1996) (brackets omitted) (quoting U.S.S.G. § 1.B1.10 (cmt. n. 1.)). A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if--(A) none of the amendments listed in subsection (d) is applicable to the defendant; or (B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range. U.S.S.G. § 1B1.10 (2016).

As the district court correctly noted, Martinez refers to Amendment 798, which is not listed U.S.S.G. § 1B1.10(d) and thus does not apply retroactively for purposes of a § 3582(c)(2) motion. (ROA.101-06).

Indeed, the district court correctly noted that Martinez's reliance on § 3582(c)(2) and Amendment 798 was misplaced. (ROA.102). First, Martinez referred to amendments to U.S.S.G. § 4B1.2 in his motion for reduction of sentence. Those amendments are irrelevant, as Martinez's sentence was calculated under U.S.S.G. § 2L1.2. Martinez was not sentenced as a career offender. (ROA.101). Second, even if Martinez had been sentenced as career offender, the Sentencing Commission did not make the amendments to U.S.S.G. § 4B1.2 retroactive, as those amendments are not listed in the U.S.S.G. § 1B1.10. (ROA.101).

Martinez has presented no non-frivolous issue on appeal. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). The district court correctly denied Martinez permission to appeal IFP. (ROA.106-07). Martinez's appeal is frivolous, and it should be dismissed. 5th Cir. R. 42.2. Alternatively, the district court order denying Martinez relief under 18 U.S.C. § 3582(c)(2) should be affirmed.

Conclusion

The United States respectfully submits that this Court should dismiss Martinez's appeal as frivolous, or affirm the district court's order denying Martinez relief under 18 U.S.C. § 3582(c)(2). If the Court denies this motion, the United States respectfully requests a Level 1 Extension of thirty (30) days in which to file its appellee's brief.

Respectfully submitted,

ABE MARTINEZ
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CERTIFICATE OF CONFERENCE

Martinez is pro se in this matter and undersigned counsel cannot contact him to determine whether he opposes (1) the motion to dismiss his appeal or (2) the alternative motion for a thirty (30) day, Level 1, extension in which to file the Appellee's Brief. Undersigned counsel indulges the assumption that Martinez is **opposed** to both requests.

s/ John Richard Berry
John Richard Berry
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, Assistant United States Attorney John Richard Berry, certify that on August 14, 2017, a copy of this motion was served on appellant below, via certified United States mail, return receipt requested:

Mr. Marvin Steve Martinez-Hernandez
Reg. No. 60698-379
FCI Beaumont Medium
Federal Correctional Institution
P. O. Box 26040
Beaumont, Texas 77720

Defendant/Appellant pro se

s/ John Richard Berry
John Richard Berry
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains approximately 2,051 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Word 2016 in Century Schoolbook font, 14-point font for text and 12-point font for footnotes.

3. This motion complies with the privacy redaction requirement of 5th Cir. R. 25.2.13 because this motion has been redacted of any personal data identifiers.

4. This motion complies with the electronic submission of 5th Cir. R. 25.2.1, because this motion is an exact copy of the paper document.

5. This motion is free of viruses because this motion has been scanned for viruses with the most recent version of the McAfee Endpoint Security scanning program.

s/ John Richard Berry

John Richard Berry

Assistant United States Attorney

Date: August 14, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40343



UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARVIN STEVE MARTINEZ-HERNANDEZ,

Defendant - Appellant

A True Copy
Certified order issued Sep 11, 2017

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

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

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of September 11, 2017,
for want of prosecution. The appellant failed to timely pay the docketing fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Angelique B. Tardie

By: _____
Angelique B. Tardie, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

UNITED STATES OF AMERICA	§	
	§	
VS.	§	5:15-CR-1534
	§	
MARVIN STEVE MARTINEZ-HERNANDEZ	§	

**GOVERNMENT'S RESPONSE TO
MOTION TO REQUEST SENTENCE REDUCTION PURSUANT TO
18 U.S.C. § 3582(c)(2) AND THE AMENDMENT TO THE SENTENCING GUIDELINES**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW The United States of America (hereinafter "Government") and files this Response to Motion to Request Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) and the Amendment to the Sentencing Guidelines as follows:

1. On December 22, 2015, Defendant, Marvin Steve Martinez-Hernandez, was indicted on one count of illegal re-entry in violation of 8 U.S.C. § 1326. [Docket Entry 8]. He entered a plea of guilty to that charge on May 13, 2016 and, on September 14, 2016, was sentenced by this Court to 77 months to serve, a three-year term of supervised release, and a \$100 special assessment. The 77 months of incarceration was at the low end of the guideline range of 77 – 96 months. Defendant now has filed a motion seeking reduction of that sentence he received in the above-referenced matter.

2. It appears that the gist of Defendant's argument is that the Sentencing Guidelines were amended such that his offense no longer merits a prison sentence of the length he received. However, the Sentencing Guidelines were not retroactively amended in the manner suggested by Defendant. Rather, the Guidelines were revised effective November 1, 2016 to address issues

raised by *Johnson v. United States*, 135 S.Ct. 2551 (2015). Indeed, Defendant refers to *Johnson* in his motion and cites it for authority for his requested reduction of sentence. However, Defendant's reliance on *Johnson* is misplaced.

3. As set forth in the PSR and as approved by this Court, defendant's offense level was increased by twelve because his 2006 conviction for aggravated assault (for which he was sentenced to seven years custody following revocation of his probation) was a crime of violence as defined in U.S.S.G. § 2L1.2, Commentary Application Note 1(B)(iii). [PSR paragraph 20]. Aggravated assault was one of the enumerated offenses set out in that application note. *Johnson* held unconstitutional the 18 U.S.C. § 924(e)(2)(B)(ii) "residual clause." The "residual clause" is the portion that reads, "or otherwise involves conduct that presents a serious potential risk of physical injury to another. Defendant's sentence was not based on a conviction described by the residual clause, and it is therefore untouched by the reasoning of *Johnson*.

4. On January 8, 2016, the United States Sentencing Commission promulgated amendments to §4B.1 and 4B.2 to address *Johnson* issues. However, those amendments are irrelevant to Defendant's case because he was not sentenced under the residual clause. The enhancement to his base level was occasioned by his aggravated assault conviction.

5. As noted above, defendant was sentenced on September 14, 2016. While defendant would have scored differently under the current guidelines, "[a] sentencing court must apply the version of the sentencing guidelines effective at the time of sentencing unless application of that version would violate the Ex Post Factor Clause of the Constitution." *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999). See also *United States v. Gaither*, 434 Fed. Appx. 393, 394 (5th Cir. 2011). The Ex Post Facto Clause prohibits "imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred." *Kimler* at 893, citing *Weaver*

~~v. *Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 67 L.Ed. 17 (1981).~~ In this case, Defendant can fairly be said to have been on notice of the sentencing enhancement occasioned by U.S.S.G. § 2L1.2, Commentary Application Note 1(B)(iii). That enhancement was in effect at the time Defendant committed his offense and at the time of his sentencing. There are no ex post facto issues.

6. Defendant has not provided this Court with legal authority supporting his request that his sentence be reduced. He was fairly sentenced under the guidelines in effect at the time of his sentencing. *Johnson* is inapplicable to Defendant's sentencing and he has not otherwise demonstrated that he should be availed of any advantages of new sentencing guidelines that have no retroactive effect.

WHEREFORE, PREMISES CONSIDERED, the Government respectfully requests that Defendant's Motion to Request Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) and the Amendment to the Sentencing Guidelines be in all things denied.

Respectfully submitted,

KENNETH MAGIDSON
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF TEXAS

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2017, a true and correct copy of the Government's Response to Defendant's Motion to Request Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) and the Amendment to the Sentencing Guidelines was electronically filed with the Clerk of the Court using the CM/ECF System. Further, a copy of this document was forwarded to the pro se defendant by certified mail, return receipt requested.

Marvin Steve Martinez-Hernandez
FCI Beaumont Medium
P.O. Box 26040
Beaumont, Texas 77720

**CERTIFIED MAIL,
RETURN RECEIPT REQUESTED**

Michael Bukiewicz
MICHAEL BUKIEWICZ
Assistant United States Attorney