

APPENDIX

701 Fed.Appx. 722

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. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

James Earl MERIDYTH, Defendant-Appellant.

No. 16-2037

Filed July 11, 2017

Synopsis

Background: Following convictions for drug trafficking, the United States District Court for the District of New Mexico, No. 2:00-CR-00557-LH-1, C. Leroy Hansen, Senior District Judge, 2016 WL 8794508, partially granted defendant's motion to reduce sentence. Defendant appealed.

[Holding:] The Court of Appeals, Timothy M. Tymkovich, Chief Judge, held that district court did not abuse its discretion by reducing sentence from 300 months' imprisonment to 250 months' imprisonment.

Affirmed.

West Headnotes (1)

[1] Sentencing and Punishment

↔ Reduction of sentence

District court did not abuse its discretion by reducing sentence for drug trafficking offenses from 300 months' imprisonment to 250 months' imprisonment, although defendant had improved his prison conduct and purportedly taken steps toward rehabilitation; no legal authority required court to assign

certain weight to defendant's conduct in prison, defendant's criminal history and characteristics remained unchanged, need to promote respect for law, provide adequate deterrence, and to protect public remained unchanged, and defendant's record of prison infractions remained basically unchanged, except that some additional time had passed since his last infraction. 18 U.S.C.A. § 3582(c) (2).

Cases that cite this headnote

(D.C. No. 2:00-CR-00557-LH-1) (D. New Mexico)

Attorneys and Law Firms

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Before TYMKOVICH, Chief Judge, and HARTZ, Circuit Judges. *

* Per the court's June 13, 2017 Order, The Honorable Bobby R. Baldock, who attended the April 27, 2017 oral arguments for this case, determined it was necessary to recuse, and he does not participate in this order and judgment.

Opinion

ORDER AND JUDGMENT **

** This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Timothy M. Tymkovich, Chief Judge

James Meridyth, a convicted drug trafficker, has twice moved to reduce his prison sentence based on retroactive

amendments to his Sentencing Guideline range. *723 The district court partially granted both of Meridyth's motions. The first time, the district court reduced his sentence by one-sixth. The district court cited Meridyth's extensive criminal history and disciplinary infractions in prison as reasons for not reducing his sentence further. Meridyth appealed and we affirmed the sentence-reduction order.

After a second request for a sentence reduction, the district court again reduced Meridyth's sentence by one-sixth, citing the explanation it provided the first time. Meridyth contests the explanation the district court supplied, arguing he has avoided prison disciplinary infractions since his first sentence reduction. In his view, that means he should not have received the same proportional reduction he did the first time, when that reduction expressly accounted for his infractions. He thus argues, in effect, that the district court was legally required to credit his improved conduct in prison by granting him a proportionally more generous reduction than the first reduction.

We disagree, and **AFFIRM** the district court's sentence-reduction order. Nothing indicates the district court abused its discretion when it reduced Meridyth's sentence by one-sixth. No legal authority requires the district court to grant a proportionally more generous reduction when a prisoner's disciplinary record improves. Moreover, the district court adequately explained the basis for its sentence.

I. Background

A jury convicted Meridyth of three counts of violating federal drug trafficking laws. The district court imposed a 360-month prison sentence, the Sentencing Guidelines minimum. We subsequently affirmed his conviction. See *United States v. Meridyth*, 364 F.3d 1181 (10th Cir. 2004).

In 2014, after the Sentencing Commission amended the Guidelines to reduce the relevant offense levels, Meridyth sought a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). Although the amendments lowered Meridyth's guidelines range to 235–293 months, the district court ultimately reduced Meridyth's sentence from 360 months to 300 months—a one-sixth reduction. The court explained its decision in a detailed memorandum

opinion, citing Meridyth's extensive criminal history and disciplinary infractions in prison since commencing his imprisonment in 2003.

Meridyth then appealed the sentence-reduction order, arguing the district court abused its discretion by sentencing him above his amended guidelines range. We disagreed, finding no abuse of discretion in the court's reasoning or the sentence imposed. *United States v. Meridyth*, 573 Fed.Appx. 791 (10th Cir. 2014) (unpublished).

After his first appeal, the Sentencing Commission amended the Guidelines to further reduce the relevant offense levels. The new amendments lowered the guidelines range to 188–235 months. And Meridyth sought another sentence reduction. The district court granted his motion, but only reduced Meridyth's sentence from 300 months to 250 months—the same one-sixth reduction the court had previously granted.

Once again, the court wrote a memorandum opinion explaining its decision. The court re-examined the history outlined above, and then concluded:

While recognizing that the Bureau of Prisoners has not reported any further misconduct by Defendant [in the preceding four years], the [c]ourt again finds that a full reduction in Defendant's sentence is not appropriate. For the reasons stated fully in its Memorandum Opinion of December 10, 2013, the [c]ourt finds *724 that a partial reduction of Defendant's sentence is appropriate and by a contemporaneously entered Order, his sentence will be reduced to 250 months imprisonment.

R., Vol. 1 at 193. And once again, Meridyth appealed to this court.

II. Analysis

Meridyth contends a one-sixth sentence reduction cannot be an appropriate response to both of his sentence-reduction motions, because his circumstances changed

between the two. At the time of his first sentence reduction, argues Meridyth, he had engaged in recent misconduct in prison, and the government opposed any reduction at all. But at the time of his second motion, there was no recent misconduct, and the government did not oppose his motion. Moreover, Meridyth submitted a letter to the district court accompanying his second motion, in which he wrote that he had matured in prison, overcome his struggles with mental-health issues, and was earnestly attempting to rehabilitate himself (for example, by pursuing his GED).

A district court may reduce a sentence “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2). The statute leaves the decision to reduce a sentence in the discretion of the district court: “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.” *Id.* (emphasis added). The relevant policy statement also provides that “the court *may* reduce the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2)” if a reduction is consistent with the policy statement. USSG § 1B1.10(a)(1) (emphasis added). The accompanying application notes provide that the court “shall consider” the factors in § 3553 as well as the nature and seriousness of any threat to public safety. *Id.* § 1B1.10, cmt. n. 1(B). In addition, the court “*may* consider” the defendant’s post-sentencing conduct. *Id.* (emphasis added).

We review a district court’s decision to grant or deny a § 3582(c)(2) motion for an abuse of discretion. *United States v. Chavez-Meza*, 854 F.3d 655, 657 (10th Cir. 2017). “We ‘do not disturb decisions entrusted by statute or other rule of law to the discretion of a district court unless we have a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.’” *Chavez-Meza*, 854 F.3d at 659 (quoting *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1201 (10th Cir. 2007)).

The sole issue before us is whether the district court abused its discretion by granting a one-sixth reduction in response to Meridyth’s second § 3582(c)(2) motion, even though Meridyth had improved his prison conduct and

purportedly taken steps toward rehabilitation.¹ [Aplt. Br. at 2.]

1 We grant Meridyth’s April 21, 2017 sealed motion to supplement the record on appeal only to the extent it involves materials that were presented to the district court. “Federal Rule of Appellate Procedure 10(e) authorizes the modification of the record only to the extent it is necessary to ‘truly disclose[] what occurred in the district court.’ This court will not consider material outside the record before the district court.” *United States v. Kennedy*, 225 F.3d 1187, 1191 (10th Cir. 2000) (citation omitted) (quoting Fed. R. App. P. 10(e)). Although in rare circumstances “we have an inherent equitable power to supplement the record on appeal,” *id.* at 1192, we decline to exercise that power here.

*725 We see nothing in the district court’s approach that amounts to a “clear error of judgment” or that “exceeded the bounds of permissible choice.” No legal authority *requires* the court to assign a certain weight to a defendant’s conduct in prison. Indeed, the Sentencing Guidelines expressly do *not* require district courts to consider post-sentencing conduct. See USSG § 1B1.10, cmt. n. 1(B)(iii) (“The court *may* consider post-sentencing conduct of the defendant....” (emphasis added)); *but cf.*, e.g., *id.* cmt. n. 1(B)(i) (“[T]he court *shall* consider the factors set forth in 18 U.S.C. 3553(a)....” (emphasis added)).

Apart from cases discussing this court’s jurisdiction and the appropriate standard of review, Meridyth’s briefs only cite two cases.

First, Meridyth cites *Pepper v. United States*, 562 U.S. 476, 481, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011). But *Pepper* is not on point. *Pepper* held that “when a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant’s postsentencing rehabilitation and that such evidence may ... support a downward variance” from the guidelines range. *Id.* at 481, 131 S.Ct. 1229. As a threshold matter, as a case about resentencing, *Pepper* has no bearing on § 3582(c)(2) sentence-reduction motions.² But even if it were on point, it would not get Meridyth very far: no one debates the proposition that a district court *may* consider the defendant’s post-sentencing conduct in sentence-reduction proceedings. See USSG § 1B1.10, cmt. n. 1(B)(iii) (“The court may consider post-sentencing

conduct of the defendant...."). And that is the proposition for which *Pepper* stands.

- 2 As the Supreme Court explains in *Dillon v. United States*, 560 U.S. 817, 825, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010), § 3582(c)(2) proceedings are different from the "resentencing" proceedings discussed in *Pepper*. See *id.* at 825, 130 S.Ct. 2683 ("The language of § 3582(c)(2) belies Dillon's characterization of proceedings under that section. By its terms, § 3582(c)(2) does not authorize a sentencing or resentencing proceeding."), 826 ("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."); 827 ("Because reference to § 3553(a) is appropriate only at the second step of this circumscribed inquiry, it cannot serve to transform the proceedings under § 3582(c)(2) into plenary resentencing proceedings."); 831 ("As noted, § 3582(c)(2) does not authorize a resentencing. Instead, it permits a sentence reduction within the narrow bounds established by the Commission."); see also *Pepper*, 562 U.S. at 490, 131 S.Ct. 1229 (directing readers to the portion of *Dillon* that distinguishes § 3582(c)(2) proceedings from plenary resentencing proceedings). Compare Aplt. Br. at 14 (citing *Pepper* as if it were a case about sentence reduction); Aplee. Br. at 12 (referring to sentence-reduction proceedings as "resentencing[s]"); Reply Br. at 3 (same).

Second, Meridyth cites a Seventh Circuit case, *United States v. Miller*, 832 F.3d 703 (7th Cir. 2016). Although *Miller* is a sentence-reduction case, it is no more helpful here, because the facts are easily distinguishable. *Miller* involved an attorney who completely failed to submit evidence of the defendant's positive achievements in prison to the district court. *Id.* at 704. The Seventh Circuit objected to the district court's characterization of three-year-old disciplinary infractions as ones that had "occurred relatively recently" and were "serious." *Id.* And the Seventh Circuit noted that the district court had failed to discuss whether the defendant would be "likely to remain a significant danger to the community when he is released." *Id.* In light of these three shortcomings, the Seventh Circuit remanded. *Id.* at 805.

Here, by contrast, Meridyth does not allege that the district court did not have all the relevant evidence in front of him. *726 Nor did the district court mischaracterize the chronology of the disciplinary infractions; as we explain below, the district court was aware of Meridyth's

improved behavior. See R., Vol. 1 at 193 ("[R]ecognizing that the Bureau of Prisons has not reported any further misconduct by Defendant since March 2012 ..."); see also R., Vol. 1 at 137 (noting the dates of each disciplinary infraction and noting that Meridyth "has been discipline free since March 1, 2012"). And the district court extensively considered whether Meridyth would be a significant danger to the community when he is released. See R., Vol. 1 at 135–36 (explaining that Meridyth "basically engaged in a pattern of criminal conduct for his entire adult life" and rejecting Meridyth's assertion that "this past conduct is less relevant because of its age").

In any event, the record makes clear that the district court was aware that Meridyth had stayed out of trouble in prison since his first sentence reduction. Far from failing to consider Meridyth's recent prison record, the district court expressly acknowledged it. See R., Vol. 1 at 193 ("[R]ecognizing that the Bureau of Prisons has not reported any further misconduct by Defendant [in the preceding four years]...."). And although Meridyth contends that the district court "did not know of [Meridyth's improvement in his mental health issues and his educational efforts] when it last acted," the record reveals Meridyth presented similar arguments in his first sentence-reduction proceedings. See R., Vol. 1, at 10–12 (arguing that "Meridyth has made concerted efforts to better himself during his period of incarceration," including earning several certificates, and emphasizing his "recent and on-going self-improvement efforts"). Meridyth moreover concedes that only three of the fifteen programs and classes in which he participated occurred after the first sentence reduction. See Aplt. Br. at 10.

The district court's first sentence reduction opinion goes into considerable detail regarding its decision. It discusses the underlying offense. R., Vol. 1 at 130–31. It lists the factors a court may consider—including post-sentencing conduct—as well as the § 3553(a) factors the court is required to consider. R., Vol. 1 at 132–36. Recounting Meridyth's extensive criminal history, the court describes him as a danger to the community. R., Vol. 1 at 135–36; see USSG § 1B1.10, cmt. n. 1(B) (providing that the court "shall consider" the nature and seriousness of any threat to public safety.). After listing Meridyth's prison disciplinary infractions, the court notes that "Meridyth's pre- and post-sentencing behavior ... is of major concern to the [c]ourt and heavily influences its determination of any reduction in his sentence." R., Vol. 1 at 137.

In context, it is evident that the post-sentencing infractions were not the most important factor in the court's first sentence-reduction decision. The court noted that the Bureau of Prisons described Meridyth's behavior as "relatively decent," that he had been incident-free for a year and a half, and that he had "good rapport with staff and inmates." *Id.* The court also noted that Meridyth was "working closely with psychology services regarding his medication and self-improvement programming," and that he had gained more than five years of work experience. *Id.*

The one-sixth reduction, explained the court, reflected several considerations: (1) the defendant's "criminal history and characteristics," (2) "his behavior in prison," (3) "the need ... to promote respect for the law," (4) the need to "provide adequate deterrence," and (5) the need to "protect the public from further crimes of the [d]efendant." *R.*, Vol. 1 at 139.

*727 In sum, the district court did not abuse its discretion by referring back to its original explanation. The defendant's criminal history and characteristics remained unchanged. The need to promote respect for the law, provide adequate deterrence, and to protect the public remained unchanged. Meridyth's record of prison

infractions remained basically unchanged, except that some additional time had passed since his last infraction. But the same incidents were on his record as before; and just as before, his recent record reflected an effort at rehabilitation. Given that the circumstances were largely the same as before, we cannot say the district court should have had to discard its thorough explanation from just a couple years prior only to recapitulate it.

And it is worth emphasizing in closing that Meridyth benefited considerably from the district court's decision. Sentence reduction is an "act of lenity." *Dillon*, 560 U.S. at 828, 130 S.Ct. 2683. More than four years were taken off his sentence. The district court has not penalized Meridyth—Meridyth simply wishes the act of lenity had gone further.

III. Conclusion

The decision of the district court is therefore AFFIRMED.

All Citations

701 Fed.Appx. 722

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

CRIMINAL No. 00-0557 LH

JAMES EARL MERIDYTH,

Defendant.

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant's letter (ECF No. 548), filed December 5, 2014, which the Court has construed as a pro se Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2). Counsel for Defendant was appointed on September 10, 2015. Having considered Defendant's Motion, the parties' Stipulated Agreement in Petition for Reduced Sentence Under 18 U.S.C. § 3582(c)(2) Regarding Drug Quantity Table (ECF No. 563), filed December 21, 2015, the record in this case, and the relevant law, and otherwise being fully advised, the Court finds that Defendant's Motion is well taken in part and it will be granted in part.

On January 25, 2001, a jury found Defendant guilty of conspiracy to possess with intent to distribute more than 50 grams of cocaine base (Count I), possession with intent to distribute more than 50 grams of cocaine base (Count V), and possession with intent to distribute less than 500 grams of a mixture containing cocaine (Count VI). At the sentencing hearing on March 13, 2003, the Court found that Defendant's total offense level was 38 and his criminal history category V,

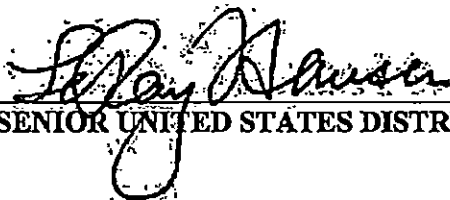
resulting in a guideline imprisonment range of 360 months to life for the cocaine base convictions in Counts I and V. Given the statutory maximum sentence of 20 years for Count VI, the guideline imprisonment range for the cocaine charge was 240 months. The Court sentenced Defendant to 360 months for each of the crack cocaine convictions and 240 months for the cocaine conviction, with the sentences to be served concurrently.

On December 10, 2013, the Court granted in part Defendant's Motion to Reduce Sentence (ECF No 478), deemed filed on July 28, 2011. Applying the retroactive amendments to the crack cocaine sentencing guidelines, Defendant's total offense level became 34, resulting in a guideline imprisonment range of 235 to 293 months for Counts I and V and a range of 235 to 240 months for Count VI. After thorough consideration of the record, including Defendant's criminal history and characteristics and his behavior in prison, along with the need for any sentence to promote respect for the law, provide adequate deterrence, and protect the public from further crimes of the Defendant, the Court found that a full reduction in Defendant's sentence was not appropriate and reduced his sentence to 300 months. *See* Memorandum Opinion (ECF No. 534) and Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) (ECF No. 533), both filed December 10, 2013; *aff'd United States v. Meridith*, 573 F. App'x 791 (10th Cir. 2014).

Defendant now moves for a reduction in his sentence pursuant to Amendment 782 to the Sentencing Guidelines. The parties agree, and the Court concurs, that he is eligible for a sentence reduction under this retroactive guideline amendment to U.S.S.G. § 2D.1.1. Applying Amendment 782, Defendant's total offense level is reduced to 32, resulting in a guideline imprisonment range of 188 to 235 months. Defendant asks that the Court impose an amended sentence of 188 months.

Stipulated Agreement at 3. The government takes the position that it will not oppose any sentence within the Court's discretion. *Id.*

While recognizing that the Bureau of Prisons has not reported any further misconduct by Defendant since March 2012, the Court again finds that a full reduction in Defendant's sentence is not appropriate. For the reasons stated fully in its Memorandum Opinion of December 10, 2013, the Court finds that a partial reduction of Defendant's sentence is appropriate and by a contemporaneously entered Order, his sentence will be reduced to 250 months imprisonment.


SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

CRIMINAL No. 00-557 LH

JAMES EARL MERIDYTH,

Defendant.

MEMORANDUM OPINION

THIS MATTER comes before the Court on Defendant's *pro se* Motion to Reduce Sentence, deemed filed on July 28, 2011. *See* Order (ECF No. 478), filed Dec. 2, 2011. Having considered the Motion, the memoranda submitted by counsel for the government and for Mr. Meridyth and by the United States Probation Department, the record in this case, and the relevant law, and otherwise being fully advised, the Court finds that the Motion is well taken in part and it will be granted in part by a contemporaneously entered Order.

On January 25, 2001, a jury found Defendant James Earl Meridyth guilty of conspiracy to possess with intent to distribute more than 50 grams of cocaine base ("crack cocaine") (Count I of the Superseding Indictment (ECF No. 107), filed Sept. 21, 2000), possession with intent to distribute more than 50 grams of cocaine base (Count V), and possession with intent to distribute less than 500 grams of a mixture containing cocaine (Count VI). Verdict (ECF No. 214), filed Jan. 25, 2001. At

the sentencing hearing on March 13, 2003, the Court found that Defendant's total offense level was thirty-eight and his criminal history category V, resulting in a guideline imprisonment range of 360 months to life for the cocaine base convictions in Counts I and V. Given the statutory maximum sentence of 20 years for Count VI, the guideline imprisonment range for the cocaine charge was 240 months. The Court sentenced Defendant to 360 months for each of the crack cocaine convictions and 240 months for the cocaine conviction, with the sentences to be served concurrently.

Defendant did not request resentencing under the initial retroactive amendments to the crack cocaine sentencing guidelines. He does so now, however, pursuant to the more recent amendment. Applying both amendments to the cocaine base guidelines, Defendant's total offense level now is 34, which combined with a criminal history category of V results in a guideline imprisonment range of 235 to 293 months for Counts I and V and a range of 235 to 240 months imprisonment for Count VI.

As a general matter, federal courts do not have authority to "modify a term of imprisonment once it has been imposed." *Freeman v. United States*, ___ U.S. ___, 131 S. Ct. 2685, 2690 (2011) (plurality opinion) (quoting 18 U.S.C. § 3582(c)). Section 3582 further provides, however, that a court may modify a term of imprisonment "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). In 2007, the United States Sentencing Commission amended the guidelines to reduce the offense level for possession of cocaine base by two levels and directed that the amendment be applied retroactively. *See, e.g., United States v. Lucero*, 713 F.3d 1024, 1025 (10th Cir. 2013). The Commission again lowered the guidelines

provisions pertaining to crack cocaine on November 1, 2011, retroactively implementing the Fair Sentencing Act. *See, e.g., United States v. Wilkerson*, 485 F.App'x 318, 320 (10th Cir. 2012).

The court “may reduce a defendant’s sentence if, after considering the applicable factors in 18 U.S.C. § 3553(a), ‘such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.’” *United States v. Price*, 486 F. App'x. 727, 731 (10th Cir. 2012) (quoting 18 U.S.C. § 3582(c)(2)). The statutory factors to be considered include “the nature and circumstances of the offense and the history and characteristics of the defendant,” and the need for the sentence “to reflect the seriousness of the offense, to promote respect for the law, . . . to afford adequate deterrence,” and “to protect the public from further crimes of the defendant.” 18 U.S.C. § 3553(a). Additionally, “the relevant Sentencing Commission policy statement instructs the court to consider ‘the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment.’” *United States v. Lindsey*, 527 F. App'x 700, 703 (10th Cir. 2013) (quoting U.S.S.G. § 1B1.10, cmt. n.1(B)(ii)). The court also “‘may consider’ the defendant’s post-sentencing conduct.” *United States v. Osborn*, 679 F.3d 1193, 1195 (10th Cir. 2012) (quoting U.S.S.G. § 1B1.1.0, cmt. n.1(B)).

While agreeing that the amended guidelines apply to Defendant, making him eligible for a sentence reduction, the United States maintains that the Court should decline to reduce his sentence. It first argues that Mr. Meridyth’s extensive criminal history, which includes criminal convictions for the three serious drug trafficking crimes at issue here and prior convictions for burglary, assault, and fleeing a police officer, shows that he is a danger to the community. The government additionally cites Defendant’s history of contacts with law enforcement that did not result in

convictions, including arrests for assault, stabbing, felon in possession of a firearm, a drive-by shooting involving an Uzi-type machine gun, and allegations he was involved in a scheme trading federal food coupons for cash, cocaine, and firearms.

The United States additionally contends that reducing Defendant's sentence would result in unwarranted sentencing disparities with two of his codefendants, Daryl Wayne Wilkerson and Edward James Oliver, both of whom it describes as having worked as runners for Mr. Meridyth and, arguably, were far less culpable than he.¹ Finally, the government cites to a number of cases in which courts denied defendants reductions in their sentences for reasons including the nature of their original criminal conduct, previous criminal conduct, and post-sentencing behavior while incarcerated.

In his response, Mr. Meridyth first maintains that his sentence should be reduced to redress the unfair disparity between crack cocaine and powder cocaine sentences, which now has been corrected by Congress and the Sentencing Commission. He also contrasts his efforts toward self-improvement during his incarceration² to the behavior of the "violent and dangerous prisoners" in the cases cited by the government. Defendant further claims that his offense conduct was non-violent, again in contrast to the "very violent offense conduct" involved in the cases relied upon by

1 Mr. Wilkerson was sentenced as a career offender to 360 months imprisonment and is ineligible for any reduction under the amended crack guidelines. See *Wilkerson*, 485 F. App'x 318. Mr. Oliver was sentenced to 228 months imprisonment, pursuant to a FED. R. CRIM. P. 11(c)(1)(C) plea agreement, and also is ineligible for any sentence reduction. See Mem. Op. and Order (ECF No. 519), filed Feb. 27, 2013; Order (ECF No. 530-1), filed Aug. 29, 2013 (dismissing appeal, per voluntary withdrawal by defendant).

2 In 2008, Mr. Meridyth earned certificates for completion of a welding qualification test, outstanding performance as a football coach, and completion of a stress management program and in 2010 he completed a course to obtain a commercial driver's license. Defendant subsequently supplemented the record regarding his post-sentencing efforts toward self-improvement with copies of certificates earned in 2013 for completion of Basic Business Math, Networking for Success, and Political Science; participation in yoga class, and completion of Anger Management, Coping with Anger Management, and Thinking for Good: Changing Antisocial and Criminal Thinking workbooks. Letter (ECF 531), filed Aug. 29, 2013. The October 28, 2013, Second Updated Memorandum provided by the United States Probation Department indicates that Defendant also completed the following programs and classes: Land Management Tech

the government.³ He challenges the government's contention that he is a danger to the community, saying it is based on faulty information; specifically, he asserts that he was not arrested for assault, stabbing, a drive-by shooting, and trading food stamps. He contends that "decades-old" matters should not warrant a significantly longer sentence than that currently called for under the guideline amendments and that they do not outweigh his recent and on-going self-improvement efforts and his current conduct in prison.⁴ Finally, he maintains that a reduction in his sentence, as provided by the amended guidelines, would not create any unwarranted sentencing disparity between him and his codefendants, both of whom are career offenders.⁵

The Court agrees that Defendant is eligible for a sentencing reduction under the amendments to the crack sentencing guidelines. It does not agree, however, that he should receive a full reduction in sentence as he proposes or no reduction as advocated by the United States.

As an initial matter, the Court does not credit Defendant's argument that his sentence must be reduced to ameliorate the unwarranted and unjust disparity between powder and crack cocaine sentences. While it is true that both the Sentencing Guideline Commission and Congress have

Explore in July 2004 and Positive Voices, May 30, 2013, through October 24, 2013.

3 Defendant argues that his case is not comparable those cited by the United States, in that he did not engage in sexual misconduct in prison and has not incited prison riots or presented a serious hazard to prison security. He also distinguishes the facts of his case in that his offense conduct was non-violent and his criminal history points were not "near-record," and he was sentenced to concurrent, not consecutive, sentences at the low end of his guideline range, not the high end.

4 Defendant insists that his conduct in prison contains "a small number of minor infractions . . . clustered in time near his arrival . . . in 2003." He also points to the "relatively positive review" of his conduct by prison officials, apparently referring to his caseworker's description of his conduct in prison as "relatively decent," Probation Mem., Oct. 26, 2011, at 5.

5 As noted *supra* note 1, Mr. Oliver was sentenced pursuant to a Fed. R. Crim. P. 11(c)(1)(C) agreement. Although the parties and the Court originally believed he was a career offender, during proceedings on his Motion for Modification or Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c)(2) (Guideline Amendment No. 750) it was determined that he in fact was not and never had been a career offender. While his two prior felony convictions for simple possession of narcotics did not qualify for purposes of establishing career offender status, they were, however, predicate offenses for

addressed this disparity subsequent to Mr. Meridyth's original sentencing, it is beyond debate that the Court must follow the statutory and guideline requirements applicable to any retroactive resentencing.

The Court also questions Defendant's assertion that the government's position that he is a danger to the community is based on faulty information. Specifically, he argues he was not "arrested" for assault, stabbing, a drive-by shooting, and trading food stamps. As detailed in the Presentence Report, Mr. Meridyth's criminal history includes prior convictions for 1) Minor in Possession of Alcohol While Operating a Motor Vehicle and Possession of Marijuana (arrested March 15, 1985); 2) Noises Expressly Prohibited (arrested August 20, 1988); 3) Burglary with Habitual Offender Enhancement (arrested February 16, 1988); 4) Possession of Marijuana (arrested July 13, 1989); 5) Assault (arrested April 28, 1992); 6) three separate counts of Theft, two of which were combined (arrested September 4 and October 10, 1992); 7) Resisting, Evading, or Obstructing a Police Officer (arrested September 19, 1992); 8) four counts of Unlawful Dealing in Food Coupons for cash, Possession of Drug Paraphernalia and Attempted Felon in Possession of a Firearm (arrested October 17, 1994); and 9) Fleeing Police Officer (arrested April 1, 1999). Defendant's conviction for Noises Expressly Prohibited also included the charge of Battery Upon a Peace Officer, as he struggled during the arrest and bit the officer in the arm. His Burglary with Habitual Offender arrest and conviction also included charges of Commercial Burglary, Concealing Self on Private Property, and Contributing to the Delinquency of a Minor. Finally, during his arrest for the Resisting, Evading, or Obstructing a Police Officer conviction, Defendant was combative and stuck officers.

sentencing enhancements under 21 U.S.C. § 841(b)(1)(A), thereby exposing Mr. Oliver to the possibility of a mandatory life sentence. *See* Mem. Op. and Order (ECF No. 519).

The Court further notes the Defendant's criminal history included in the Presentence Report that did not result in convictions: 1) a 1989 incident in which Defendant and two other men repeatedly struck a man over the head and shoulders with chains; 2) a 1991 stabbing by the Defendant of an individual in the abdomen and the shoulder; 3) Defendant's arrest in July 1992 for Seat Belts and Felon in Possession of a Firearm, a Titan .25 caliber pistol, charges to which the District Attorney entered a Nolle Prosequi due to Defendant's Motion to Suppress Evidence; 4) a report by an individual to a police officer in September 1992 that Defendant fired several rounds from an Uzi-type machine gun at him, officers subsequently located five spent rounds and holes in the night club building, but the victim indicated he did not want to prosecute due to possible retaliation by Defendant; and 5) in December 1993, Defendant was indicted on six counts of Unlawful Dealing in Federal Food Coupons, two counts of Conspiracy to Commit Unlawful Dealing in Federal Food Coupons, Trafficking in a Controlled Substance (cocaine), and Felon in Possession of a Firearm; the Indictment was quashed for not having been delivered in adequate time; police reports indicate that Defendant traded Federal Food Coupons for cash, cocaine, and guns.

While Defendant discounts the import of his criminal past, asserting that conduct more than two decades old does not outweigh his recent and on-going self-improvement efforts and his current conduct in prison, the Court is not convinced that this past conduct is less relevant because of its age.

The criminal drug conspiracy for which Defendant now is imprisoned began on June 1, 1996. It is clear that Defendant basically engaged in a pattern of criminal conduct for his entire adult life - up until his arrest in this case in April 2000. Additionally, while his current convictions arguably may not constitute crimes of violence, Defendant's criminal history includes more than a few violent acts.

Defendant also has committed a number disciplinary infractions since his incarceration with the Bureau of Prisons ("BOP") in mid-2003, several of them involving violence: 1) Refusing to Obey an Order in November and December 2003, 2) Assault without Serious Injury in January 2004, 3) Being in an Unauthorized Area in September 2004, and 4) two instances of Fighting with Another Person in June 2011 and March 2012. While his BOP Case Manager in 2011 described Defendant's behavior as "relatively decent," his current Case Manager reports that he has been discipline free since March 1, 2012, and has "good rapport with staff and inmates." Additionally, the Case Manager reports that Defendant is working closely with psychology services regarding his medication and self-improvement programming. He also has more than five years of work experience in the UNICOR Factory and has begun formulating his release plan. Clearly, while Mr. Meridyth's pre- and post-sentencing behavior may not rise to the level of criminal conduct and violence exhibited by many of the defendants in the cases cited by the government, it is of major concern to the Court and heavily influences its determination of any reduction in his sentence.

Finally, the Court is not convinced by either parties' argument regarding possible sentencing disparities between Mr. Meridyth and Codefendants Wilkerson and Oliver. While it is true that neither of his codefendants qualifies for resentencing, as Wilkerson was a career offender and Oliver was sentenced pursuant to a Rule 11(c)(1)(C) agreement, Mr. Meridyth's attempts to distinguish his behavior from theirs in this case is questionable. Defendant notes that Oliver was described as "heavily" involved in cocaine distribution and that Wilkerson boasted that he could supply any amount of crack cocaine and was described as "a major player in the organization." What Mr. Meridyth fails to acknowledge, however, is that he was found to be a leader or organizer of the criminal activity, which involved a conspiracy of more than five persons. Sentencing Tr. 67:12-16

(ECF NO. 425-4), filed *ex parte* Aug. 6, 2008 (Sealed United States' Correction/Supplement to United States Resp. to Def.'s Mot. to Vacate, Set Aside or Correct Sentence, Ex. 5). The Court is similarly unconvinced, however, by the government's description of Wilkerson and Oliver as merely runners in the criminal organization.

Regardless, "disparity among codefendants is not a consideration required by § 3553(a)." *United States v. Rojas*, 531 F.3d 1203, 1210 (10th Cir.2008) (citing *United States v. Verdin-Garcia*, 516 F.3d 884, 899 (10th Cir.2008)). Rather, "§ 3553(a)(6) requires a judge to take into account only disparities *nationwide* among defendants with similar records and Guideline calculations." *Verdin-Garcia*, 516 F.3d at 899 (citing *United States v. Davis*, 437 F.3d 989, 997 (10th Cir.2006); *United States v. Gallegos*, 129 F.3d 1140, 1143 (10th Cir.1997)). Thus, "[a]lthough it is not improper to consider co-defendant disparity, neither is it mandated." *Rojas*, 531 F.3d at 1210 (citing *United States v. Smart*, 518 F.3d 800, 804 (10th Cir.2008)). Furthermore, "disparate sentences are allowed where the disparity is explicable by the facts on the record," *United States v. Zapata*, 546 F.3d 1179, 1194 (10th Cir. 2008) (quoting *Davis*, 437 F.3d at 997), such as "when sentences are dissimilar because of a plea bargain," *id.* (quoting *Gallegos*, 129 F.3d at 1144)).

Here, any disparity in sentences among the codefendants is explained by the record. While Wilkerson was convicted by a jury of aiding and abetting the possession with intent to distribute five grams or more of a substance containing cocaine base, his prior felony convictions for cocaine trafficking and voluntary manslaughter qualified him as a career offender. *Wilkerson*, 484 F. App'x at 320, 323. Although his original base offense level was 30 and the criminal history category V, application of the career offender guidelines resulted in an offense level of 37 and criminal history category VI, with a sentencing guideline range of 360 months to life. *Id.* at 320. The sentencing

transcript reveals the Court's "concern that Wilkerson had killed his wife and trafficked in drugs in the past," but it sentenced him at the low end of the guideline range to 360 months imprisonment, with no departure or variance. *Id.* at 323.

Codefendant Oliver, on the other hand, while erroneously believed to have been a career offender, but also facing the possibility of a statutorily mandated life sentence, pleaded guilty to a two-count Second Superseding Indictment charging conspiracy to possess with intent to distribute more than 50 grams of cocaine base and possession with intent to distribute more than 50 grams of cocaine base. The Court sentenced him to 228 months imprisonment on each count, to run concurrently, as provided by the Rule 11(c)(1)(C) agreement.

Having considered the record in this matter, including Defendant's criminal history and characteristics and his behavior in prison, along with the need for any sentence to promote respect for the law, provide adequate deterrence, and protect the public from further crimes of the Defendant, the Court finds that a full reduction in Mr. Meridyth's sentence would be inappropriate. On the other hand, the Court also finds that the circumstances of Defendant's case do not rise to the level of those relied upon by the government, such that no reduction in sentence should be granted. Accordingly, the Court finds that a partial sentence reduction of Defendant's sentence is appropriate and Defendant's sentence will be reduced to 300 months imprisonment by a contemporaneously entered Order.


SENIOR UNITED STATES DISTRICT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 19, 2018

Mr. Howard A. Pincus
Fed Pub. Def. for Dist. CO & WY
633 17th Street
Suite 1000
Denver, CO 80202

RECEIVED

JAN 26 2018

Federal Public Defender

Re: James Meridith
v. United States
Application No. 17A763

Dear Mr. Pincus:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on January 19, 2018, extended the time to and including March 29, 2018.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by



Redmond K. Barnes
Case Analyst

TO: Howard Pincus
Attorney

IN THE SUPREME COURT OF
THE UNITED STATES

FROM: JAMES EARL MERIDYTH
Defendant - Appellant.

JAMES EARL MERIDYTH
Defendant - Appellant

RE: Case NO. 2:00-CA-00557-
-LH-1 NO. 16-2037
10th CCA NO. 16-2037

V.

UNITED STATES OF AMERICA,
Plaintiff - Appellee.

MEMORANDUM PRO SE AMENDMENT OF LAW
And ISSUES OF UNDERSTANDING

TO THE HONORABLE SUPREME COURT JUSTICES OF THE UNITED STATES:

The ISSUES I would like to present to the Court ARE AS
Followed:

(1) The Abuse of discretion by the district Judge
who failed to Consider All the Factors that are in Place For the
(3553)(a) And did not even Consider None of the Movants Medical
Condition in the 3553(a)(2)(b) Factors..

(2) THE Attorneys at Movants district Court Stages Failed
him by not Objecting to the Misleading information in his Presentencing
Report (PSR) that have prejudice errors of the Miscalculation of the
Movants Criminal history points by Six (6) points, And the Misleading
information of "Alleged acts" that never lead to any Arrests, Violates
Movant "Due process Clause right. The Supreme Court has held that
a defendant is entitled to a Competent Attorney in all Court proceedings..

(3) THE Appeals Court, Abused its discretion by denying
Movants PRO SE Motion For ^{Re} Hearing OR A Full ReHearing EN BANC,
And Also Sealed BOP Records of Movants Mental Conditions While

being in prison, that need to be Reviewed..

COMES NOW, JAMES EARL MERIDYTH, Movant, by and through the help of others, hereby File this PRO SE Amendment with points of law in Support of the Supreme Court Rules 10 - Rule 16 For The Supreme Court to Review..

Issue (1) The district Court abused it discretion by denying Movant a full Sentencing Reduction (OR) Atleast a Reduction within his New guideline Range of 188-235. The Court used the Same Recommendation from the Movants First Reduction which he received a 60-Months Reduction, But the Second one is 50-Months, And it is 10-Months Lesser. The Movant asserts that Court did not Consider the facts of Movants Progress Report Prepared by the BOP Staff that Clearly Show the Medical Condition, And the tremendous Programming that Movant Completed Since his First Sentencing Reduction. Should also be noted, there are incidents in Movant Presentence Report that Ms. Thayenda White prepared for the Court and government the Movant was Found not Responsible for his action on a numerous Occasion, And the Appeals Court Sealed this evidence which Clearly Violates Movant due Process.. These Record are in the BOP Sentry Files And also the Psychology department, And the Court Could of Considered this information in the (3553)(a)(2)(D) Factors. IN "United States v. Miller" (No. 15-3584) (7th Cir. Aug. 10, 2016) This Case Speaks of disciplinary infraction, that had "occurred relatively recently" (which WAS untrue; the most recent one had occurred three years earlier, But in Movant Case he was found not Responsible for some of his disciplinary infraction due to the wrong Medications, And Mental health Problem And the Movant have not had any Incident Report OR "INFRACTIONS" Since December 2011.. The district Court lable Movant a danger to the Community. The Movant asserts

(2)

A21

To: Mr. Howard,

By doing so the Court violated his due process Clause Rights, by impermissibly considering among other things, Arrests that did not result in conviction, And also using misleading information of "Alleged Criminal acts" that the Movant were never Arrested nor ever question in regards to these prejudice Allegations. These Same "Alleged acts" that the Court considered caused the denial of a full Sentence Reduction. The Court erroneously considered movant to be a violent Offender, And this error violates his due process.. See United States v. Mateo-Molina (No. 15-2862) (3rd Cir. Jan. 9, 2017) Should also be noted: IN the Movant Factual and procedural back ground in his Presentencing Report, Show, one Correction that Probation Officer And the Court Corrected. It Show how they had my Criminal history points at (14) And my Base Offense level was (6) VI Six..

The Movant asserts that if the Court know that, they should also this, The Movant Received (6) Six ~~Extra~~ Extra Criminal history points For (3) three Misdemeanor offenses. See, Presentencing Report Page Number # 22 Paragraphs 64, 65, 67. These three (3) Cases are the Result of one Criminal act, and disposition (OR) Consolidated into one Charge.. Therefore, Movant ask this Honorable Court for Review ~~and~~ grant him Relief in this matter.. See the United States Supreme Court opinion in Molina-Martinez v. United States..

Issue (2) Movant asserts that his Attorneys at the district Court Stages allowed him to be prejudiced by the errors, And misleading information that caused him to be considered as a **Violent** Offender by the Court, And also for not bring to the Courts attention that the Movant was given the wrong medication that Almost killed him And now **have diabetes**. That medication was (Seroguel (OR) Quetiapine) that caused Movant to develop "Diabetes"..

The Movant asserts if Attorneys would^{of} used these Medical Records that was available in the BOP, And also Movant Mail Copies to them to be Attachments on his first And Second 3582 (C)(2) Motion there is a probability the out would of been different.. Clearly Movants due Process was Violated..

Wherefore,
Issue (3) The Movant asserts that the Appeal Court Should have Reviewed his ENBANC Motion for Plain ERROR OR had a hearing Concerning these issues, that Movant Attached all the Cases that the Probation office used to give him the Six (6) Criminal history points, And the Incident Reports that he was held not Responsible for his action. From the BOP Sentry file.. See, Movant PROse ENBANC For ~~A~~hearing OR a full Rehearing..

Concluding, Movant prays that this Honorable Supreme Court grant this Motion..

Respectfully Submitted

March 28, 2018

s. James Earl Merideth
JAMES EARL MERIDETH
Reg. NO. #19078-051

(4)