APPENDIX C: District Court's Order dated December 12, 2024

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ABDIRAHMAN KHEYRE, Defendant.	Case No.: 22-cr-2313-RSH **ORDER DENYING DEFENDANT'S MOTION TO REDUCE SENTENCE**

Pending before the Court is Defendant's motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). ECF No. 68. As set forth below, Defendant's motion is denied.

I. BACKGROUND

On June 30, 2023, the Court sentenced Defendant based on Defendant's guilty plea to Counts Two and Four of the Indictment: Distribution of Fentanyl, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), and Possession with Intent to Distribute 5 Grams and More of Methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). ECF Nos. 1 (indictment), 42 (minute entry for sentencing hearing). As set forth in Defendant's plea agreement, as a result of using fentanyl supplied by Defendant, a young person overdosed and died. ECF No. 30 (plea agreement) at 4. The Parties agreed that the Sentencing

Guidelines for distribution of a controlled substance resulting in death or serios bodily injury should apply. *Id.*

At sentencing, the Court calculated Defendant's total offense level at 35, determined that Defendant had eight criminal history points for a criminal history category of IV, and concluded that Defendant's guidelines range was 235 to 293 months. *See* ECF No. 55 (transcript) at 40. Of Defendant's eight criminal history points, two were "status points"—points that were added to the total because he was subject to a criminal justice sentence at the time he committed the instant offense. *See* ECF No. 33 (Presentence Report) ¶ 35.

For the reasons stated at the hearing, including but not limited to Defendant's status as a combat veteran who suffered injuries in the course of his lengthy military service and later struggled with apparently related substance abuse problems, the Court sentenced Defendant to a custodial term of 180 months, followed by a five-year term of supervised release. ECF No. 42. The term of supervised release was subject to the mandatory and standard terms of supervision, as well as special terms that included drug or alcohol abuse treatment (special condition 1) and mental health treatment (special condition 2). *See* ECF No. 62 (judgment).

Defendant appealed, and the U.S. Court of Appeals for the Ninth Circuit remanded "for the limited purpose of permitting the district court to orally pronounce any standard conditions it wishes to impose after giving Kheyre an opportunity to object." ECF No. 67 (citing *United States v. Montoya*, 82 F.4th 640, 656 (9th Cir. 2023) (en banc)). The Court of Appeals also "vacate[d] special conditions 1 and 2 and remand[ed] for the district court to 'clarify the scope of authority delegated to the probation officer' if it elects to reimpose these conditions." *Id.* (citing *United States v. Nishida*, 53 F.4th 1144, 1155 (9th Cir. 2022)).

On September 13, 2024, after soliciting briefing from the Parties, the Court held a resentencing hearing, orally pronounced the standard conditions of supervised release and re-imposed special conditions 1 and 2 as modified. ECF Nos. 70 (minute entry for resentencing hearing), 71 (amended judgment).

In connection with Defendant's brief filed in advance of the resentencing hearing, Defendant argued that if the Court did not permit full reconsideration of his sentence at the hearing, the sentence should alternatively be reduced pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 821 to the U.S. Sentencing Guidelines, effective November 1, 2023 but given retroactive effect, which limited the criminal history impact of "status points." ECF No. 68 at 2-3 (Defendant's brief on resentencing). Applied to Defendant, he would have six (instead of eight) criminal history points, would be in a criminal history category III (instead of IV), and would have an advisory guidelines range of 210-262 months (instead of 235-293 months). Defendant acknowledged that under Ninth Circuit precedent, because the 180-month sentence actually imposed was below the low end of the recalculated guidelines (210 months), he would be ineligible for the requested relief:

> Kheyre accepts that *Dillon v. United States*, 560 U.S. 817, 826, 130 S. Ct. 2683, 2691 (2010), held that Congress gave the Sentencing Commission the authority to decide when and by how much a sentence would be reduced. And the Commission's instruction in Guideline Section 1B1.10 makes the floor for relief the bottom of the new guideline range prior to any Chapter V departures of Section 3553 variances. USSG §1B1.10, comment., n. 1(A) ("Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance).") Further, Kheyre accepts that the Ninth Circuit has embraced this reading of Dillon and Section 1B1.10. *See United States v. Hernandez-Martinez*, 933 F.3d 1126, 1132 (9th Cir. 2019).

ECF No. 68 at 9-10. Defendant argued, however, that recent U.S. Supreme Court decisions in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), "directly challenge[d] the premise in *Dillon* that allows the Sentencing Commission to set binding guidelines under § 3582(c)(2)." ECF No. 68 at 11.

The United States thereafter filed an opposition to Defendant's motion. ECF No. 72. Defendant filed a reply. ECF No. 73.

II. LEGAL STANDARD

The Supreme Court has stated that there is "no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments." *Dillon v. United States*, 560 U.S. 817, 828 (2010). Even so, the Court may reduce the term of imprisonment for 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). Courts engage in a "two-step inquiry" to determine whether the reduction is appropriate under 18 U.S.C § 3582(c)(2). *Dillon*, 560 U.S. at 826. "First, a district court 'must determine whether a prisoner is eligible for a sentence reduction under the Commission's policy statement in § 1B1.10.'" *United States v. Brito*, 868 F.3d 875,880 (9th Cir. 2017) (citing Dillon, 560 U.S. at 827). "Second, a district court must 'consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case.'" *Id.* The Ninth Circuit has "called these steps the 'eligibility prong' and the 'discretionary prong.'" *Id.* (quoting *United States v. Dunn*, 728 F.3d 1151, 1157 (9th Cir. 2013)).

To satisfy the eligibility prong, the Court must "determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced . . . and shall leave all other guideline application decisions unaffected." *Id.* (quoting U.S.S.G. § 1B1.10(b)(1)). "Section 1B1.10(b)(2)(A) limits the permissible reduction in sentence. It provides, in relevant part, that 'the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.'" *Id.* (quoting U.S.S.G. § 1B1.10(b)(2)(A)).

To satisfy the discretionary prong, the Court must "consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case." *Dillon*, 560 U.S. at 827. These factors "include, among other things: (1) the defendant's personal history and characteristics; (2) his sentence relative to the nature and seriousness of his offense; (3) the need for a sentence to provide just punishment, promote respect for the law, reflect the seriousness of the offense, deter crime, and protect the public; (4) the need for rehabilitative services; (5) the applicable sentence guidelines; and (6) the need to avoid unwarranted sentencing disparities among similarly situated defendants." *United States v. Wright*, 46 F.4th 938, 945 n.4 (9th Cir. 2022) (citing 18 U.S.C. § 3553(a)).

III. DISCUSSION

Defendant is correct that under the Supreme Court's decision in *Dillon* and applicable Ninth Circuit precedent, he is not eligible for relief because the sentence actually imposed (180 months) is less than the minimum of the applicable guidelines range as amended (210 months). *See United States v. Hernandez-Martinez*, 933 F.3d 1126, 1132 (9th Cir. 2019) ("*Dillon* … held that § 1B1.10 is binding in § 3582(c)(2) proceedings."). Defendant argues that "[a]fter *Loper Bright Enterprises* and *Jarkesy*, there is a fundamental question regarding the authority of the Sentence Commission to promulgate policy statements like U.S.S.G. § 1B1.10(b) that purport to limit a court's discretion under 18 U.S.C. § 3582(c)(2)." ECF No. 73 at 2-3.

This Court is bound by this Ninth Circuit precedent unless that precedent is "effectively overruled," which occurs when "the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority." *Miller v. Gammie*, 335 F.3d 889, 890, 893 (9th Cir. 2003) (en banc). "The clearly irreconcilable requirement is a high standard." *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1073 (9th Cir. 2018) (quotation omitted). "[I]t is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the

intervening higher authority to cast doubt on the prior circuit precedent." *Id.* (quotation omitted). Although Defendant raises questions, he has not argued that the precedent applicable here has been "effectively overruled," nor has he provided any authority from any jurisdiction so holding.

In the event the Court had discretion to consider Defendant's request for a sentencing reduction, the Court would deny that request. For the reasons stated on the record at the time of sentencing, giving consideration to the statutory factors, the 180-month sentence imposed is sufficient but not greater than necessary to comply with the statutory purposes of sentencing under 18 U.S.C. § 3553(a). Neither the change in the advisory guidelines nor any other factor that has been brought to the Court's attention would cause the Court to reduce the sentence previously imposed. Defendant has provided evidence of his participation in programming—including relating to substance abuse, general education, and vocational training—while in custody. *See* ECF No. 68 Ex. A. While participation in such programs is positive and constructive, and the Court hopes that such programs are and will be beneficial to Defendant, they do not alter the Court's assessment of the sentence to be imposed.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to reduce his sentence [ECF No. 68] is **DENIED**.

IT IS SO ORDERED.

Dated: December 12, 2024

Robert S Huie

Hon. Robert S. Huie
United States District Judge