IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

v. Case No. 4:92cr4013-WS/CAS-3

EMERSON DAVIS,

Defendant.
_____/

RESPONSE TO MOTION TO REDUCE SENTENCE

Defendant Emerson Davis has filed a motion for a reduction of a current sentence of 360 months of imprisonment. He apparently seeks relief under the First Step Act of 2018. This Court should deny the motion because the record conclusively establishes that the quantity of crack cocaine that Defendant is responsible for exceeds 280 grams.

BACKGROUND

In 1995, a federal grand jury charged Defendant with conspiring to distribute and to possess with intent to distribute cocaine, cocaine base, and marijuana, and several counts of money laundering. ECF 848. Except for one money laundering charge, a trial jury found him guilty. ECF 979.

The Presentence Investigation Report (PSR) calculated the base offense level for the conspiracy charge. At the time, the base offense level for offenses involving 1.5 kilograms or more of cocaine was 38. PSR ¶¶89–100. Combining a total offense level of 44 with criminal history category IV, the guideline range was life imprisonment. PSR ¶128. The statutory range for the conspiracy charge was a mandatory minimum 10 years to life under 21 U.S.C. §841(b)(1)(A)(iii), which, at the time, applied to offenses involving "50 grams or more of a mixture or substance [of cocaine] which contains cocaine base." See PSR ¶128.

The Court sentenced Defendant on August 8, 1996. ECF 1123. The Court found that the PSR was accurate and adopted its findings into the sentence. ECF 1123 at 18. The Court sentenced Defendant to life imprisonment on the conspiracy charge, and concurrent 240 month sentences on the other charges. ECF 1123 at 19.

In January 2008, Davis moved for a modification of his sentence based on Sentencing Guidelines Amendment 706, which retroactively reduced from 38 to 36 the base offense level scored by defendants whose conduct involved more than 1.5, but fewer than 4.5, kilograms of cocaine base. But it did not reduce the offense level for those responsible for more

than 4.5 kilograms. *Id.* This Court denied that motion and the Eleventh Circuit affirmed, explaining that "[b]y adopting the factual findings in the PSI that were deemed admitted by [Defendant] when he failed to object to them, the sentencing court found [Defendant] responsible for over eight kilograms of cocaine base." See *United States v. Davis*, 587 F.3d 1300, 1304 (11th Cir. 2009).

The Fair Sentencing Act of 2010, Pub. L. 111—220, 23 Stat. 2372, reduced the *statutory* penalties for crack cocaine offenses. Relevant here, Section 2 increased the quantity of crack cocaine necessary to trigger the 10 year-to-life penalty from 50 grams to 280 grams. That law's new mandatory minimum sentences were held not to apply to defendants who were sentenced before its effective date. See, *e.g.*, *United States v. Hippolyte*, 712 F.3d 535, 542 (11th Cir. 2013).

Sentencing Guidelines Amendment 750 retroactively raised the necessary weight for level 38 from 4.5 to 8.4 kilos. On October 4, 2013, the Court denied Defendant's motion for a sentence reduction under Amendment 750 because the PSR "indicated that [Defendant] was responsible for well over 8.4 kilograms of crack cocaine." ECF 2074 at 2.

On February 24, 2015, the Court granted Defendant's motion for a sentence reduction under Sentencing Guidelines Amendment 782, which, among other things, changed the base offense level to 36 for crack cocaine weights between 8.4 kilograms and 25.2 kilograms. ECF 2102. Defendant's new guideline range was 360 months to life. *Id.* at 3. Accordingly, the Court exercised its discretion under §3582(c) and reduced Defendant's sentence to 360 months of imprisonment. *Id.* at 5.

The First Step Act of 2018 became law on December 21, 2018. Section 404(b) provides that a court that imposed a sentence covered by sections 2 and 3 of the Fair Sentencing Act of 2010 "may on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if" those sections of the Fair Sentencing Act "were in effect at the time the covered offense was committed." Thus, a defendant sentenced prior to August 3, 2010, for a crack cocaine offense subject to 21 U.S.C. §841(b)(1)(A) or (B), may seek a reduction of his sentence under §404 of the First Step Act if §2 or §3 of the Fair Sentencing Act reduces the statutory penalties for that offense.

Defendant recently filed a motion for a sentence reduction. ECF 2235. Defendant appears to be seeking relief under the First Step Act's provision making the Fair Sentencing Act retroactive. *Id.* at 3.

ARGUMENT

This Court should deny Defendant's motion because the existing record establishes that the quantity of crack cocaine involved in the offense supports application of the same statutory penalties even after passage of the Fair Sentencing Act.

It may be argued that, at the original proceeding, the only determination that was made for purposes of applying §841(b)(1)(A)(iii) is that the crime involved 50 grams of cocaine base. That was particularly true in trials, where juries (after the 2000 decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)) were only asked to determine whether the quantity exceeded the threshold. That is, a defendant could argue that any different determination now by a judge of a higher quantity, justifying confirmation of the original penalties under the higher thresholds of the Fair Sentencing Act, would violate *Apprendi*, which barred increase of a statutory maximum sentence based on facts found by a judge alone, and *Alleyne v. United States*, 570 U.S. 99 (2013), stating the same prohibition

regarding imposition of an increased statutory mandatory minimum penalty.

The Government disagrees for two reasons. First, as a legal matter, the *Apprendi/Alleyne* doctrine should not apply in the present context. The original sentence was lawful at the time it was imposed, and the *Apprendi/Alleyne* doctrine does not apply retroactively to afford relief on collateral review. See *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285-86 (11th Cir. 2014).

Second, the First Step Act only directs the court to examine a sentence as if §§ 2 and 3 of the Fair Sentencing Act were in effect at the time, not to change the manner of determining quantity. And such a determination at this time—or rather, recognition of what was previously determined at sentencing—does not offend *Apprendi* or *Alleyne,* as it does it involve any *increase* in a sentence based on judge-found facts. To the contrary, the First Step Act only authorizes a court to "reduce" a sentence, and further makes clear, in §404(c), that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." See also *Dillon v. United States,* 560 U.S. 817 (2010) (holding that a court need not apply *Booker v. United States,* 543 U.S. 220 (2005),

which rendered the Guidelines advisory to remedy a violation of *Apprendi*, where the court is considering only whether to reduce a sentence based on a retroactive guideline amendment).

Accordingly, a court presented with a sentence reduction motion under the First Step Act should determine from the record the quantity involved in the offense, and if that quantity continues to support under the Fair Sentencing Act the same penalty provision applied at the original sentencing proceeding (that is, the crime involved more than 280 grams for a defendant sentenced under §841(b)(1)(A)) should deny relief.

Even if the Court disagrees that the *Apprendi/Alleyne* doctrine is inapplicable in this circumstance, the Court nevertheless should exercise the plenary discretion afforded by the First Step Act to deny relief where, as here, it is apparent given the known quantity involved in the offense that Defendant would have received the same sentence if the Fair Sentencing Act had been in effect at the time of the original sentencing, and the Government had presented its case subject to the Fair Sentencing Act requirements. Otherwise, defendants who receive a sentencing reduction under the First Step Act will receive a windfall not available to defend-

ants prosecuted after August 3, 2010, offending "the need to avoid unwarranted sentencing disparities among" similarly situated offenders under 18 U.S.C. §3553(a)(6), and the need for a sentence to "reflect the seriousness of the offenses," "promote respect for the law," and "provide just punishment for the offense" under §3553(a)(2)(A). *See Dorsey v. United States*, 567 U.S. 260, 276-79 (2012) (expressing the importance of consistency in sentencing similarly situated offenders when determining the retroactive application of a statutory amendment).

CONCLUSION

Accordingly, the Government respectfully requests that the Court deny Defendant Emerson Davis' motion to reduce his sentence.

Respectfully submitted on February 15, 2019,

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LOCAL RULE 7.1(F) CERTIFICATE

I certify that this memorandum contains 1487 words, per Microsoft Word's word count, which complies with the word limit requirements set forth in Local Rule 7.1(F).

/s/ Andrew J. Grogan
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CERTIFICATE OF SERVICE

I certify that this paper has been electronically filed on CM/ECF and served by U.S. Mail to the pro se defendant Emerson Davis, Reg. No. 00364-501, at his address of record, D. Ray James Correctional Institution, P.O. Box 2000, Folkston, Georgia 31537, on February 15, 2019.

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