09-0312-cr

To Be Argued By:
PETER S. JONGBLOED

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-0312-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

ALONZO T. GREGORY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The defendant pleaded guilty to a crack cocaine offense on December 3, 1996, and judgment was entered on November 14, 1997. Joint Appendix ("JA") 43; Government Appendix ("GA") 6. On July 10, 2008, the defendant filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). JA 1; GA 15. On December 23, 2008, the district court issued a ruling denying the motion, which was entered on the docket sheet on December 24, 2008. JA 43-44; GA 15. On December 30, 2008, the defendant filed a motion for extension of time to file a notice of appeal, which the district court granted *nunc pro tunc* on July 6, 2009. GA 15, 16. On January 21, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(A)(i) (permitting defendant to file notice of appeal within 10 days of entry of order) and Fed. R. App. P. 4(b)(4) (authorizing district court, "before or after the time has expired," to extend time for filing notice of appeal by up to 30 days for good cause). JA 45; GA 16.

Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over an appeal of a final order denying a § 3582(c)(2) motion. *See United States v. McGee*, 553 F.3d 226 (2d Cir. 2009) (per curiam).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court abused its discretion in denying the defendant's § 3582(c)(2) sentence reduction motion without a hearing where the court concluded that his criminal record and post-sentencing conduct in prison indicated the need to protect the public from further crimes, and where the defendant was on notice that these issues were before the court yet he did not submit any written materials in rebuttal.

United States Court of Appeals

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-vs-

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Preliminary Statement

This appeal arises out of a motion filed by the defendant, Alonzo Gregory, to reduce his sentence, pursuant to 18 U.S.C. § 3582(c)(2), based on the amendments to the Sentencing Guidelines reducing the applicable base offense levels for cocaine base ("crack") offenses. The district court denied the defendant's motion, finding that his violent criminal record and post-conviction conduct while in prison indicated the need to protect the public from future crimes. In light of this conclusion, the

district court did not address the defendant's further contention that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), authorizes a sentencing court to re-examine its entire sentence, unbounded by the limitations the Guidelines place on the extent of a sentence reduction under § 3582(c)(2).[1]

The defendant now claims on appeal that the district court erred in denying his § 3582(c)(2) motion without conducting a hearing. The relevant Guidelines policy statement, Federal Rule of Criminal Procedure, and case law show that the district court did not abuse its discretion in denying the motion. Therefore, the court's decision should be affirmed.

Statement of the Case

On June 11, 1996, a federal grand jury sitting in New Haven, Connecticut, returned a single-count indictment charging the defendant with possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). GA 4. The case was assigned to the Honorable Ellen Bree Burns, Senior United States District Judge for the United States District Court, District of Connecticut.

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[1] The defendant is not advancing this claim on appeal, which would now be foreclosed by this Court's decision in *United States v. Savoy*, 567 F.3d 71, 73-74 (2d Cir. 2009) (per curiam).

On December 3, 1996, at the start of jury selection, the defendant pleaded guilty to the single count in the indictment. JA 17; GA 6. On November 14, 1997, the defendant was sentenced principally to 262 months of incarceration. JA 21; GA 10. The defendant thereafter filed a notice of appeal, and this Court eventually affirmed the judgment. JA 22; GA 11, 13. The defendant later filed a motion attacking his conviction under 28 U.S.C. § 2255, GA 13, which was denied, GA 14, and both the district court and this Court subsequently denied the motion for a certificate of appealability as well. JA 22; GA 14, 15.

On July 10, 2008, the defendant filed a motion for a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2), based on the recent amendments to the drug quantity tables in the Sentencing Guidelines as applied to crack offenses. JA 1; GA 15. The district court denied the motion on December 23, 2008, and the ruling was entered on the docket on December 24, 2008. JA 43-44; GA 15. The defendant filed a motion for an extension of time to file his notice of appeal on December 30, 2008, GA 15, which was later granted, GA 16. He filed a notice of appeal on January 21, 2009. JA 45; GA 16.

The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

Prior to his incarceration, the defendant was a professional heroin and crack cocaine dealer in Hartford, Connecticut. JA 20. In 1996, he pleaded guilty to possession with intent to distribute and distribution of five or more grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). As a result, he faced a mandatory minimum term of imprisonment of five years, with a maximum of 40 years. 21 U.S.C. § 841(b)(1)(B). In the plea agreement, the defendant acknowledged that the DEA laboratory had calculated the cocaine base in his possession to weigh 11.3 grams. JA 17.

The presentence investigation report ("PSR") prepared at the time of sentencing noted the defendant's prior membership in a street gang, and his 13 prior criminal convictions, including convictions for larceny 2nd (four times, including two where the defendant used a firearm); burglary 3rd; larceny 3rd; weapon in a motor vehicle in 1989 (a loaded .38 Special with four bullets) and 1990 (fully loaded .32 caliber revolver); assault 3rd (defendant punched a woman); robbery 1st (defendant placed a handgun at victim's head demanding money); forgery 2nd; larceny 6th; and breach of peace (for beating and threatening his girlfriend). JA 18. Also the PSR noted pending state charges, including a March 31, 1996, arrest for possession of narcotics, possession of narcotics with intent to sell, operation of a drug factory, criminal use of a firearm, and possession of narcotics withing 1500 feet of a school; a November 14, 1996, arrest for violating state

probation based on the March 31, 1996, conduct; an April 1, 1995, arrest for possession of a controlled substance with intent to sell; an April 9, 1995, arrest for criminal possession of marijuana 5th degree and facilitated aggravated unlicensed operation of vehicle 3rd degree; and an outstanding warrant for failing to pay a fine in Manhattan Criminal Court following his guilty plea to operating a motor vehicle while impaired by drugs. JA 18-19. The Probation Office calculated the defendant's criminal history category to be VI. JA 19. Other arrests, including gambling, possession of a controlled substance, and assault were not factored into this criminal history. JA 19. At sentencing, the defendant's girlfriend testified that the defendant was a full-time narcotics dealer, and that he had brutally beaten her to deter her from testifying, including one instance of holding a gun to her head. JA 21.

At the defendant's sentencing hearing, the Government presented evidence of "relevant conduct" that impacted the court's sentencing calculation. The court found that the defendant possessed in excess of 100 grams of crack cocaine and three firearms at his residence in Hartford. JA 21. It also denied a downward adjustment for acceptance of responsibility, based on the defendant's efforts to withdraw his plea. JA 18, 21. The base offense level was, as a result, 34, with an accompanying sentence range of 262-327 months. JA 21-22. The defendant was sentenced to 262 months, which was the bottom of that range. JA 16.

On July 8, 2008, the defendant filed a motion for reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). JA 1. The motion sought a two-level reduction in the Guideline range based on the amendments to the Sentencing Guidelines reducing the offense level in the drug quantity tables for crack offenses. At the reduced offense level of 32, the applicable Guideline range for this defendant would be 210-262 months. He sought a reduction to, at a minimum, 210 months. JA 14. On July 25, 2008, the Government filed a response that noted the defendant was eligible for the two-level reduction and that it was deferring to the district court's discretion on whether to reduce his sentence under § 3582(c)(2). JA 16, 29, 41. That memorandum noted that the defendant's prior conduct included his possession of loaded .380 caliber pistols and a 9 mm pistol in connection with the crack cocaine offense, his involvement as an overseer in the 20-Love street gang, and his several prior convictions involving firearms and violence. JA 18-20, 29. The memorandum further noted that the district court could consider the defendant's post-sentencing conduct in its decision, and noted that the U.S. Probation Office was awaiting receipt of the defendant's progress reports while in prison. JA 28, 29.

On December 1, 2008, the defendant's progress reports from the Bureau of Prisons were filed with the court and posted on PACER. GA 15, 17-28. The reports explain the defendant's disciplinary record, including the following: (1) on July 20, 2000, he was involved in a fist fight with another inmate while at the Federal Correctional Institution in Ray Brook, New York, for which he received

25 days of disciplinary segregation and a transfer to another facility, GA 20-25; (2) on July 17, 2002, he was again involved in a fist fight that included punching another inmate with a closed fist, resulting in minor injuries, this time while at the Federal Correctional Institution in Cumberland, Maryland, GA 26; and (3) on May 28, 2006, he was involved in an assault with serious injury while at the U.S. Penitentiary in Beaumont, Texas, GA 18, 27. Also, as of June 6, 2008, the defendant was in the Special Housing Unit at the U.S. Penitentiary in Allenwood, Pennsylvania. GA 17.

On December 22, 2008, the district court determined that the defendant was eligible for a sentence reduction, but declined to grant his § 3582(c)(2) motion. The court calculated the defendant's new guideline range with the two-level reduction to be 210-262 months. In determining whether to reduce the sentence, the court explained that it had to consider the factors set forth in 18 U.S.C. § 3553(a), including the need to protect the public from further crimes of the defendant. The court explicitly considered both the defendant's prior criminal history and his post-conviction conduct while in prison. The court found that the defendant was in criminal history category VI, which included "six convictions in instances where the defendant robbed a victim, at gunpoint, and two convictions for assault of a female victim." JA 43. The court also found that while in prison since his conviction in this case, the defendant had been involved in an assault with serious injury in May 2006, and two fights with other inmates (July 2000 and July 2002), one of which resulted in 25 days of disciplinary segregation and a transfer from

the prison, and as of June 6, 2008 was serving his sentence in a Special Housing Unit. JA 44. The court wrote that the defendant's prior criminal record and his behavior while incarcerated "indicates the need to protect the public from further crimes." JA 44. After noting that the defendant's current 262-month sentence was at the top of the new guideline range, the court declined to reduce his sentence and denied the motion. JA 44.

Summary of Argument

The district court correctly resolved the defendant's motion for a sentence reduction under § 3582(c)(2) and did not abuse its discretion in denying the motion without a hearing. The court fulfilled all relevant procedural requirements in ruling on the motion. In accordance with the Sentencing Guidelines and the text of § 3582(c)(2), the district court calculated the new sentencing guideline range, considered the factors set forth in 18 U.S.C. § 3553(a), and articulated reasons for denying the motion.

The defendant was not entitled to a hearing on his § 3582(c)(2) motion under the Sentencing Guidelines, the Federal Rules of Criminal Procedure, or relevant case law. In general, § 3582(c)(2) motions may be decided without conducting hearings given the limited scope of the motion for a sentence reduction. Moreover, Fed. R. Crim. P. 43 provides that a defendant has no right to be present for a § 3582(c)(2) proceeding – a rule that sensibly avoids the substantial administrative burden that would fall on the Bureau of Prisons if defendants had a right to appear at such proceedings.

The defendant had sufficient notice that the court would consider his post-conviction conduct from the text of the Guidelines, the Government's memorandum, and the docketing of his Bureau of Prisons reports. The reports were filed on PACER three weeks before the court ruled on the defendant's motion, and so he had sufficient opportunity to respond to their contents. His claim on appeal that the court's denial of his motion without a hearing denied him due process is unsupported by the facts and the law.

Finally, any claimed error in declining to conduct a hearing was harmless. The court expressed concern about the defendant's extraordinarily violent criminal history and post-conviction conduct, and the defendant has not pointed to any evidence he would have submitted at a hearing to challenge the information contained in the Bureau of Prisons reports. Accordingly, the defendant has offered no basis for concluding that a hearing would have changed the final ruling. As a result, even if this Court should determine that the district court abused its discretion in deciding the § 3582(c)(2) motion without first holding a hearing, the defendant's appeal should fail.

ARGUMENT

I. The district court did not abuse its discretion in denying the defendant's § 3582(c)(2) motion for a sentence reduction without a hearing.

The defendant's sole contention on appeal is that the district court erred by denying his § 3582(c)(2) motion

without first conducting a hearing, and he requests that this Court remand with instructions that the district court "provide at least a limited hearing." Def. Br. 7. The defendant contends that given the importance of his post-conviction conduct to the district court's decision, the court should have conducted a hearing at which the defendant could address this conduct in person. This argument is meritless and should be rejected.

A. Governing law and standard of review

1. 18 U.S.C. § 3582(c)(2)

"A district court may not generally modify a term of imprisonment once it has been imposed." *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam). Indeed, this Court has noted that "Congress has imposed stringent limitations on the authority of courts to modify sentences, and courts must abide by those strict confines." *United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998). This has been characterized as a jurisdictional limitation on the power of federal courts. *See United States v. Regalado*, 518 F.3d 143, 150-51 (2d Cir. 2008) (per curiam) (noting in dicta that § 3582(c)(2) gives district courts jurisdiction to modify a sentence).

One limited exception to the rule prohibiting district courts from modifying a final sentence is in 18 U.S.C. § 3582(c)(2), which provides:

> [I]n the case of a defendant who has been sentenced to a term of imprisonment based on a

> sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.

A § 3582(c)(2) motion "is not a do-over of an original sentencing proceeding where a defendant is cloaked in rights mandated by statutory law and the Constitution." *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999). That is, the motion does not provide "a second opportunity to present mitigating factors to the sentencing judge" or to challenge "the appropriateness of the original sentence," but rather "is simply a vehicle through which appropriately sentenced prisoners can urge the court to exercise leniency to give certain defendants the benefits of an amendment to the Guidelines." *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995).

In § 1B1.10 of the Guidelines, the Sentencing Commission has identified the amendments that may be applied retroactively pursuant to this authority, and articulated the proper procedure for implementing those amendments in a concluded case.

Section 1B1.10 is based on 18 U.S.C. § 3582(c)(2), and also implements 28 U.S.C. § 994(u), which provides: "If

the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

On December 11, 2007, the Commission issued a revised version of § 1B1.10, which emphasizes the limited nature of relief available under 18 U.S.C. § 3582(c)(2). *See* U.S.S.G. App. C, Amend. 712.

Revised § 1B1.10(a), which became effective on March 3, 2008, provides, in relevant part:

> (a) *Authority*. –
>
> (1) *In General*.– In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
>
> (2) *Exclusions*.– 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 (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) *Limitation*.– Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement *do not constitute a full resentencing* of the defendant.

U.S.S.G. § 1B1.10(a) (emphasis added).

Section 1B1.10(b) sets forth procedures for deciding whether a sentence reduction is appropriate and limits the extent of any departure based on a guideline amendment that applies retroactively.

The Sentencing Commission's policy statement provides that a district court, when considering whether a reduction is warranted, "shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines . . . had been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b)(1). The statement provides also that, but for exceptions not applicable here, "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)." U.S.S.G. § 1B1.10(b)(2)(A) (emphasis added). Also, the Commission made clear that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." U.S.S.G. § 1B1.10(a)(3). *See United States v. Savoy*, 567 F.3d 71, 73 (2d Cir. 2009) (per curiam).

The commentary to § 1B1.10 lists factors for consideration in determining "(I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction." Those factors include:

> (ii) *Public Safety Consideration.*– The court shall 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 in determining: (I) whether a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
>
> (iii) *Post-Sentencing Conduct.*– The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

Application Note 1(B), U.S.S.G. § 1B1.10 (Factors for Consideration).

These considerations are consistent with the statutory requirement of 18 U.S.C. § 3582(c)(2) that courts consider the factors set forth in 18 U.S.C. § 3553(a) in determining sentence reductions.

Under Federal Rule of Criminal Procedure 43(b)(4), a defendant "need not be present" when the proceeding involves a reduction of sentence under 18 U.S.C. § 3582(c). *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000).

2. The amended crack guidelines

The amendment in question in this matter is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.[2]

In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine offenses. The Commission reasoned that, putting aside its stated criticism of the 100:1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory mandatory minimum penalties, the Commission could respect those mandatory penalties

[2] Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

while still reducing the offense levels for crack offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706.

The final result of the amendment is a reduction of two levels for each of the ranges set in the Guidelines for crack offenses. At the high end, the Guidelines previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more; a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36. At the low end, the Guidelines previously assigned level 12 to a quantity of less than 250 milligrams. That offense level now applies to a quantity of less than 500 milligrams.

On December 11, 2007, the Commission added Amendment 706 to the list of amendments in § 1B1.10(c) which may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713. *Id.* Congress has delegated to the Sentencing Commission the sole authority to permit the retroactive application of a guideline reduction, and no court may alter an otherwise final sentence on the basis of such a retroactive guideline unless the Sentencing Commission expressly permits it. *See, e.g.*, *Savoy*, 567 F.3d at 73-74; *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997).

3. Standard of review

This Court recently held that "abuse of discretion is the appropriate standard of review to apply to a district court's ruling on a motion under 18 U.S.C. § 3582(c)(2)." *United*

States v. Borden, 564 F3d 100, 104 (2d Cir. 2009). The Court in *Borden* wrote that

> [b]ecause the statute states that a district court *may* reduce the term of imprisonment, it clearly allows for a district court to exercise its discretion when considering a motion to reduce a sentence brought pursuant to § 3582(c)(2). Accordingly, we join our sister circuits in holding that we review a district court's decision to deny a motion under 18 U.S.C. § 3582(c)(2) for abuse of discretion.

564 F.3d at 104. This Court has held that to identify an abuse of discretion, "we must conclude that a challenged ruling rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions." *United States v. Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006) (internal quotation marks omitted); *see also Borden*, 564 F.3d at 104.[3]

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[3] The case defendant cites at page five of his brief to support a *de novo* standard of review for § 3582(c)(2) cases merely articulates the well-established rule that it reviews issues of law *de novo*, issues of fact under the clearly erroneous standard, mixed questions of law and fact either *de novo* or under the clearly erroneous standard, and discretionary decisions for abuse thereof. *United States v. Thorn*, 446 F.3d 378, 387 (2d Cir. 2006). The Government does not, of course, dispute *Thorn*'s holding in that regard. Rather, as this Court held in *Borden*, the proper standard of review of § 3582(c)(2) motions is abuse

(continued...)

B. Discussion

The district court did not abuse its discretion in denying the defendant's § 3582(c)(2) motion because his criminal record and conduct while in prison indicated the need to protect the public from further crimes. The defendant had no right to a hearing or to appear before the court in connection with his motion for a sentence reduction under § 3582(c)(2). District courts have considerable discretion in adjudicating § 3582(c)(2) motions, as confirmed by policy statements in the Sentencing Guidelines, the Federal Rules of Criminal Procedure, and the relevant case law. In this particular case, the defendant had notice and an opportunity to respond to all factors considered by the district court in its decision. In any event, any hypothetical error in deciding the motion without a hearing was certainly harmless in light of the defendant's extraordinarily violent criminal history and continuing misconduct in prison, as well as the defendant's failure to point to any evidence he would have submitted at a hearing to challenge the information contained in the Bureau of Prisons reports.

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[3] (...continued)
of discretion.

1. The district court properly exercised its discretion in denying the defendant's § 3582(c)(2) motion without a hearing.

In this case, the district court's decision fully complied with the requirements of both § 3582(c)(2) and the Sentencing Guidelines. The court calculated the new guideline range (210-262) as required by U.S.S.G. § 1B1.10(b), JA 43, and articulated its reasons for leaving the defendant with a sentence at the top of the new range, JA 44. These reasons were appropriately derived from the factors set forth in § 3553(a), particularly the need for the sentence "to protect the public from further crimes of the defendant." 18 U.S.C. §§ 3582(c)(2), 3553(a). Specifically, the court described the defendant's violent criminal history and violent conduct while incarcerated, and it concluded that these factors indicated an ongoing need to protect the public. JA 44.

The defendant asserts that the district court should not have denied his motion without first holding a hearing. Although the Government's memorandum referenced how post-conviction conduct may be considered without referencing the specific conduct, the defendant claims that he "had no way of knowing prior to [the district court's] decision that [post-conviction conduct] would be considered." Def. Br. 6. He argues that "[n]ot giving the defendant the opportunity, at least through counsel, to address these issues, in even a limited hearing, was a denial of due process." *Id*. This argument is flawed because (1) in general, a defendant has no constitutional or statutory right to a court hearing on a § 3582(c)(2) motion,

much less to be present at such a hearing; and (2) in this case the defendant had ample notice that the Bureau of Prisons reports were presented to the district judge as part of the § 3582(c)(2) calculus, yet he never sought to respond to them either before or after the court issued its decision.

A district court is afforded considerable discretion in deciding whether to hold hearings in deciding the wide variety of issues that come before it. *See, e.g., United States v. Doe*, 537 F.3d 204, 213 (2d Cir. 2008) (affirming district court's denial of motion to withdraw guilty plea without hearing, where defendant did not present "significant questions" about validity of plea); *Contino v. United States*, 535 F.2d 124, 128 (2d Cir. 2008) (holding that district court did not abuse its discretion in denying § 2255 motion without holding evidentiary hearing, where defendant did not present colorable claim of ineffective assistance of counsel); *United States v. Amico*, 486 F.3d 764, 779 (2d Cir. 2007) (affirming district court's decision not to hold evidentiary hearing before rejecting Fifth Amendment claim that defendant was coerced by probation officer into answering questions); *United States v. Finley*, 245 F.3d 199, 203 (2d Cir. 2001) (holding that district court did not abuse its discretion in denying defendant's request for evidentiary hearing on admissibility of identification evidence).

Likewise, with respect to sentencing, this Court has long held that a sentencing court "enjoys broad discretion on the decision of whether an evidentiary hearing is necessary, and the Due Process Clause does not mandate

that the court conduct a full-blown evidentiary hearing." *United States v. Zagari*, 111 F.3d 307, 330 (2d Cir. 1997) (internal quotation marks and citation omitted). The policy statements to the Guidelines recognize that the central concern when resolving a dispute about a sentencing factor is to afford the parties "an adequate opportunity to present information to the court regarding that factor." U.S.S.G. § 6A1.3(a). A sentencing court has discretion to "determine the appropriate procedure" for resolving such a dispute, and its choice of procedure should be guided by "the nature of the dispute, its relevance to the sentencing determination, and applicable case law." U.S.S.G. § 6A1.3 background cmt. In cases where an evidentiary hearing is not necessary, a court may conclude that "[w]ritten statements of counsel or affidavits of witnesses may be adequate under many circumstances." *Id*.

The broad discretion afforded to a district court in other contexts is not lessened when the court is presented with a § 3582(c)(2) motion, which does not involve a full re-sentencing. Indeed, the defendant does not cite any case showing that he was entitled to a hearing on his § 3582(c)(2) motion.[4] This is because the federal courts

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[4] The defendant cites four cases in which district courts held hearings with respect to § 3582(c)(2) motions for sentence reduction. Def. Br. 5. None of these cases, however, suggests that courts must grant hearings for all such motions. They simply reflect the unremarkable fact that some courts, in the context of exercising their (continued...)

that have directly considered the issue have uniformly concluded that defendants have no constitutional or statutory right to a hearing in connection with motions filed under § 3582(c)(2). *See, e.g.*, *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995); *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999); *United States v. Young*, 555 F.3d 611, 615-16 (7th Cir. 2009); *United States v. Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009) (noting that where defendant was ineligible for § 3582(c) sentence reduction, "the district court did not

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[4] (...continued)
discretion under § 3582(c)(2), have held hearings. *See*, *e.g.*, *Quesada-Mosquera v. United States*, 243 F.3d 685, 686 (2d Cir. 2001) (per curiam) (district court's denial of a § 3582(c)(2) motion at a hearing where the defendant raised impermissible post-conviction rehabilitation efforts); *United States v. Jordan*, 162 F.3d 1, 2 (1st Cir. 1998) (defendant's § 3582(c)(2) motion, which was granted, was accompanied by a motion for a downward departure under U.S.S.G. § 5K2.0, which the court properly denied at a hearing); *United States v. McBride*, 283 F.3d 612, 613 (3d Cir. 2002) (court held limited hearing where defendant asked in the context of § 3582(c)(2) motion to be resentenced in accordance with *Apprendi*, which the court found to be outside the scope of a sentence modification under § 3582); *United States v. Black*, 523 F.3d 892 (8th Cir. 2008) (per curiam) (district court held hearing on § 3582(c)(2) motion and reduced 70-month sentence to 60-month statutory mandatory minimum).

abuse its discretion in ruling on [the defendant's] motion without the appointment of counsel or an evidentiary hearing"). *But cf. United States v. Byfield*, 391 F.3d 277, 280-81 (D.C. Cir. 2004) (district court erred in denying § 3582(c)(2) motion without a hearing where facts concerning the court's decision were "reasonably in dispute").[5]

The facts here are strikingly similar to those in the Seventh Circuit case of *United States v. Young*, 555 F.3d 611 (7th Cir. 2009). In *Young*, the defendant contested the district court's decision not to reduce his sentence under § 3582(c)(2) without conducting a hearing based on its consideration of the defendant's post-conviction misconduct while in prison. *Id.* at 612, 614. The court held that a § 3582(c)(2) proceeding "does not trigger the same procedural protections that apply at sentencing." *Id.* at 614. This recognition is consistent with the Sentencing Guidelines' provision that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement *do not constitute a full resentencing* of the defendant." U.S.S.G. § 1B1.10(a) (emphasis added).

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[5] *Byfield* is distinguishable from this case because it involved a factual dispute – namely, whether sugar used as a cutting agent for cocaine base is ingestible – that governed the applicability of a Sentencing Guidelines amendment to the defendant's conduct at issue. 391 F.3d at 279-81. It has long been established that the existence of a factual dispute can justify the need for a hearing. *See generally United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). In this case, by contrast, there is no such factual dispute, and the defendant's motion was properly decided without a hearing.

To the extent that the defendant's brief can be read as asserting an entitlement to appear before the district court in connection with his § 3582(c)(2) motion, Def. Br. 5, none exists. Rule 43(b)(4) of the Federal Rules of Criminal Procedure explicitly provides that a defendant "need not be present" when the proceeding involves a reduction of sentence under 18 U.S.C. § 3582(c)(2).[6] Federal courts of appeals addressing this issue have held that a defendant has no constitutional or statutory right to be present in connection with a motion filed under § 3582(c)(2). *See, e.g.*, *Legree*, 205 F.3d at 730; *Tidwell*, 178 F.3d at 949. As the Seventh Circuit has noted, this principle "makes good practical sense because a defendant, in the federal penal system, often is hundreds if not thousands of miles away from the courthouse where his sentence was originally imposed." *Tidwell*, 178 F.3d at 949. Transporting, housing, and holding hearings for widely scattered defendants affected by Amendment 706 would not only impose tremendous costs unwarranted by the limited nature of § 3582(c)(2) proceedings, but would also delay the granting of relief under the amendment. Therefore, the defendant was not entitled to appear before the district court in connection with his motion for reduction of sentence.

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[6] The Advisory Committee Notes concerning the 1998 amendments to Rule 43 state that a defendant's presence is not required at a § 3582(c)(2) proceeding because such a proceeding is analogous to a proceeding for correction or reduction of sentence under Rule 35, at which a defendant's presence is not required.

Against this backdrop, the district court did not abuse its discretion in denying the defendant's § 3582(c)(2) motion without a hearing. The defendant had ample notice that his Bureau of Prisons reports were being sought, that they could be considered by the court, and that they were ultimately presented to the court for its consideration. Despite this notice, the defendant never sought to respond to them either before or after the court denied his motion.

First, the Probation Office issued an addendum to the PSR, dated March 8, 2008, noting that it had not yet received from the Bureau of Prisons the defendant's progress reports while in prison. JA 29. Second, the Government argued that the court could, when deciding the defendant's sentence reduction motion, take his post-sentencing conduct into consideration once received from the Bureau of Prisons. JA 28, 29. At the time, the Government did not know whether the Bureau of Prisons information would be favorable or unfavorable to the defendant. Third, the defendant's Bureau of Prison progress reports, which detail the defendant's violent conduct while in prison, were filed with the court on December 1, 2008, and posted on PACER. GA 16, 17. The filing of the defendant's Bureau of Prisons reports on the public record a full three weeks before Judge Burns's ruling provided the defendant with notice of the "specific instances of misconduct" that would be considered by the Judge, and with ample time to respond. Moreover, with the advent of electronic case filing, the court sends all counsel an e-mail notification of all new docket entries, including filings. The defendant made no response to the reports after their filing, nor did he ask the court to

reconsider its decision[7] which relied, in part, on the reports. As a result, the defendant has suffered no procedural injustices in the adjudication of his § 3582(c)(2) motion.

Again, this conclusion is supported by the Seventh Circuit's decision in *Young*. There, the court held that "there is no *entitlement* to notice and an additional opportunity to be heard whenever the court is inclined to deny an unopposed § 3582(c)(2) motion." *Young*, 555 F.3d at 615. The court in *Young* affirmed the district court's denial of a § 3582(c)(2) motion where a defendant did not request an opportunity to investigate or contest prison misconduct incidents in the PSR addendum that was disclosed prior to denial of his motion. *Id*. at 615-16. As in *Young*, the defendant here never submitted anything to challenge the Bureau of Prisons information that was publicly filed. Having foregone that opportunity in the district court, he cannot now complain of a lack of due process.

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[7] A motion for reconsideration is to be filed and served within 10 days of the filing of the decision or order from which relief is sought and is to include a memorandum setting forth the matters or controlling decisions that are thought to have been overlooked in the court's initial decision or order. D. Conn. L. Civ. R. 7 (applicable to criminal cases by D. Conn. L. Crim. R. 1).

2. Any claimed error in declining to hold a § 3582(c)(2) hearing was harmless.

There is no reason to believe that, had the district court conducted a hearing pursuant to the defendant's § 3582(c)(2) motion, its decision would have been any different. This Court has recognized the applicability of harmless error analysis to sentencing of involuntarily absent defendants, *United States v. Arrous*, 320 F.3d 355, 361 (2d Cir. 2003), and specifically when the defendant's presence would not have affected the outcome, *United States v. Pagan*, 785 F.2d 378, 380-81 (2d. Cir. 1986). Other circuits have also found harmless error in similar circumstances. *Arrous*, 320 F.3d at 362. If harmless-error analysis applies at sentencing, where the defendant has a right to be present under Fed. R. Crim. P. 43, then it should apply *a fortiori* to § 3582(c)(2) proceedings where there is no such right.

In this case, the defendant contends that he would have disputed the Bureau of Prisons reports about his misconduct in a hearing, and presented evidence of his participation in a drug rehabilitation program. Def. Br. 5-6. The defendant has not identified with specificity what evidence he would have offered concerning his misconduct while in prison had the court held a hearing. In not conducting a hearing, the court did not abuse its discretion because the defendant has failed to identify what he would have offered at such a hearing. *United States v. Banks*, 464 F.3d 184, 192 (2d Cir. 2006) (holding that district court did not abuse its discretion in declining to hold evidentiary hearing at sentencing, in part because defendant failed "to identify what, if any, evidence he

might have submitted at a future hearing to challenge" the district court's conclusion).

Moreover, as argued above, the defendant had an opportunity to make these arguments in his memorandum supporting his § 3582(c)(2) motion as well as between the time that the Bureau of Prisons reports were docketed and the time that Judge Burns ruled on his motion. Regardless, had he made them at a hearing, it is unlikely that Judge Burns would have ruled differently. The Bureau of Prisons reports included the signed statements of prison officials describing the defendant's violent post-conviction conduct in prison. The defendant does not describe any mitigating circumstances in his brief other than his participation in a drug rehabilitation program while in prison. The court's concern was with the defendant's continued use of violence, not drugs.

Given these facts, and the extraordinary violence that permeated the defendant's criminal history and that concerned Judge Burns, there is no reason to believe that a hearing would have altered the court's ruling on the defendant's § 3582(c)(2) motion. *See* JA 43. As a result, even assuming the district judge abused her discretion in failing to grant the defendant a hearing, any error was certainly harmless.

CONCLUSION

For the foregoing reasons, the district court's order denying the defendant's § 3582(c)(2) motion should be affirmed.

Dated: July 17, 2009

Respectfully submitted,

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ADDENDUM

18 U.S.C. § 3582. Imposition of a sentence of imprisonment

* * *

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

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

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

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

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

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

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.

U.S.S.G. § 1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.--

(1) In General.--In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.--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 (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.--Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.--

(1) In General.--In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitations and Prohibition on Extent of Reduction.--

(A) In General.– Except as provided in subdivision (B), 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.

(B) Exception.--If the original term of imprisonment imposed was less than the term of imprisonment provided by the

guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) Prohibition.--In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.--Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

Federal Rule of Criminal Procedure 43. Defendant's Presence.

(a) **When Required**. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

(1) the initial appearance, the initial arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(b) **When Not Required**. A defendant need not be present under any of the following circumstances:

(1) **Organizational Defendant**. The defendant is an organization represented by counsel who is present.

(2) **Misdemeanor Offense**. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(3) **Conference or Hearing on a Legal Question**. The proceeding involves only a conference or hearing on a question of law.

(4) **Sentence Correction**. The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) **Waiving Continued Presence.**

(1) **In General**. A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) **Waiver's Effect**. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Gregory

Docket Number: 09-0312-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/17/2009) and found to be VIRUS FREE.

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July 17, 2009

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