

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALEKSANDR MALIMON,

Defendant-Appellant.

No. 16-30251

D.C. No. 3:10-cr-00396-SI-3

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Argued and Submitted November 8, 2017
Portland, Oregon

Before: FERNANDEZ, W. FLETCHER, and MELLOY,** Circuit Judges.

Aleksandr Malimon appeals the district court's denial of his 18 U.S.C. § 3582(c)(2) motion. We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

At oral argument, the government conceded that the district court’s “anticipatory reduction,” granted at Ordonez’s original sentencing in anticipation of a Guidelines-lowering amendment that had yet to take effect, was not encompassed in the Guidelines calculation under U.S.S.G. § 1B1.1(a) but was instead either a variance or departure. It further conceded that under U.S.S.G. § 1B1.10, the “applicable guidelines range” calculation includes only the U.S.S.G. § 1B1.1(a) factors and expressly excludes variances and departures. *See* U.S.S.G. § 1B1.10 cmt. 1(A). For this reason, Malimon has not been granted a reduction under 18 U.S.C. § 3582(c)(2) and continues to be eligible for a reduction. Malimon preserved the above argument by raising it in his written motion to modify sentence. The error was not harmless. *See* U.S.S.G. § 1B1.10 cmt. 1(B)(iii). We therefore reverse and remand to the district court to determine whether and to what extent a reduction in sentence is warranted. On remand, the district court may take into account, in determining the sentence to be imposed, Malimon’s post-sentencing conduct. *See id.*

REVERSED AND REMANDED.