

MAY 07 2008

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>ROBERT LEON MERTENS,</p> <p>Defendant - Appellant.</p>

No. 07-30077

D.C. No. CR-03-00073-EJL

MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Submitted May 5, 2008**
Seattle, Washington

Before: ALARCÓN, GRABER, and RAWLINSON, Circuit Judges.

Defendant Robert Leon Mertens appeals the district court’s holding, on remand from this court, that it would not have imposed a different sentence under the now-advisory United States Sentencing Guidelines. We affirm.

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

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

1. The district court correctly interpreted our "limited remand" as a remand pursuant to the procedures announced in United States v. Ameline, 409 F.3d 1073 (9th Cir. 2005) (en banc). See United States v. Mertens, 166 F. App'x 955, 958 (9th Cir.) (unpublished disposition) ("Our decision in United States v. Moreno-Hernandez, 419 F.3d 906 (9th Cir. 2005), obliges us to order a limited remand to the district court."), cert. denied, 547 U.S. 1158 (2006). Although we cited Moreno-Hernandez, not Ameline, the former case interpreted and applied the latter.

2. We decline to exercise our discretion to reach Defendant's argument concerning crack cocaine, raised for the first time in a post-briefing letter. See United States v. Schiff, 379 F.3d 621, 630 (9th Cir. 2004) (holding that we may decline to reach an issue raised for the first time on appeal). Our decision does not prejudice Defendant's right to seek re-sentencing through the procedures set forth at 18 U.S.C. § 3582(c)(2).

AFFIRMED.