08-4349-cr

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-4349-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DEVON SHORTRIDGE,
Defendant-Appellant.

ANTHONY SHORTRIDGE, ANN MARIE SHORTRIDGE, KEITH R. EDWARDS, IMAR ROBINSON, NATALIE MILLER, LOI LANGOTT, SHEILA BARTHOLOMEW, DAWN BURTON,
Defendants.

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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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

The district court (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment on May 15, 2001. Appendix ("App.") 7. On June 19, 2008, the defendant filed a motion under 18 U.S.C. § 3582(c)(2) seeking a modification of his sentence. App. 7. The district court denied the motion in a ruling filed August 27, 2008; that ruling was entered on the docket August 28, 2008. App. 8,39. On September 4, 2008, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). App. 8, 46. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

The defendant was properly categorized a career offender under U.S.S.G. § 4B1.1, but at sentencing, the court granted a downward departure under § 4A1.3 and sentenced him *below* the range that would have been applicable but for the career offender guidelines, *i.e.*, the drug quantity guideline in § 2D1.1.

I. After the Sentencing Commission amended the drug quantity guideline to reduce offense levels for crack cocaine offenses, the defendant moved for a sentence reduction under 18 U.S.C. § 3582(c)(2). Did the district court properly deny this motion when the defendant's pre-departure guidelines range was unaffected by the Sentencing Commission's amendment?[1]

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[1] Nearly the same issue is presented in *United States v. McGee*, No. 08-1619-cr, which was argued by this Office on December 10, 2008, to a panel comprised of U.S. Circuit Judges Pooler, Raggi, and Livingston. *McGee* poses a slightly different factual scenario, because there the district court imposed a sentence within the guidelines range that would have applied absent the career offender designation. Here, by contrast, the court imposed a sentence within an even *lower* range than would have applied absent the career offender designation.

United States Court of Appeals

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Docket No. 08-4349-cr

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal challenges the district court's denial of the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). The defendant moved for a sentence reduction claiming that the Sentencing Commission's recent reduction of the sentencing guidelines for crack cocaine offenses entitled him to a reduced sentence. The district court denied the motion because the defendant's

sentencing range was set by the career offender guidelines, not the crack guidelines.

The district court's decision should be affirmed. The defendant was a career offender and thus he was ineligible for a sentence reduction based on the recent changes to the crack cocaine guidelines.

Statement of the Case

On May 26, 1999, a federal grand jury in New Haven, Connecticut returned an indictment against the defendant, Devon Shortridge, charging him and eight others with conspiracy to possess with intent to distribute and distribution of cocaine base in violation of 21 U.S.C. § 846, and related offenses. App. 4; a superseding indictment was returned by the same grand jury on October 26, 1999, in which several defendants were added. App. 4. On October 25, 2000, the defendant pleaded guilty to a one-count substitute information in which he was charged with conspiracy to possess with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. § 846. App. 6, 9-10.

On May 14, 2001, the district court (Alfred V. Covello, J.) sentenced the defendant to 135 months of imprisonment and five years of supervised release. App. 7, 31-32, 34-35.

On June 19, 2008, the defendant filed a motion for a reduction of sentence under 18 U.S.C. § 3582(c)(2). App. 7. The district court denied that motion in a ruling dated August 27, 2008. App. 89, 39-45. The ruling entered

August 28, 2008, App. 8, and the defendant filed a timely notice of appeal on September 4, 2008, App. 8, 46.

The defendant is in custody serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The defendant's plea and sentencing

On May 26, 1999, a federal grand jury returned an indictment against the defendant charging him and eight others with violating 21 U.S.C. § 846 (conspiracy to possess with intent to distribute and distribution of cocaine base) and related charges. App. 4. Thereafter, on October 26, 1999, the grand jury returned a superseding indictment in which several additional defendants were added. App. 4. On October 25, 2000, the defendant pleaded guilty to a one-count substitute information in which he was charged with conspiracy to possess with intent to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. § 846. App. 6, 9-10.

In preparation for sentencing, the United States Probation Office prepared a Pre-Sentence Report ("PSR"). The PSR concluded that the defendant's offense and relevant conduct involved 494 grams of cocaine base and, using the 2000 Sentencing Guidelines manual, set his base offense level at 34. *See* U.S.S.G. § 2D1.1(c)(3) (2000) (base offense level of 34 for offenses involving at least 150 grams, but less than 500 grams, of cocaine base). PSR ¶ 35.

The PSR also detailed the defendant's lengthy criminal history and concluded, as relevant here, that because of the defendant's prior convictions, he qualified as a career offender under sentencing guideline § 4B1.1. PSR ¶¶ 41, 46, 48. This conclusion raised his offense level from 34 to 37 under § 4B1.1(b)(A) and thus resulted in a total offense level of 34 after a three-level reduction for acceptance of responsibility. PSR ¶¶ 42. The defendant's complete criminal history points were not tallied in the report,[2] as his career offender designation placed him in criminal history category VI, resulting in a sentencing guidelines range of 262-327 months. PSR ¶ 68; Sentencing Table.

At sentencing, the defendant conceded that no evidentiary hearing was necessary as to any of the facts and findings as presented in the PSR, App. 13-14, and the

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[2] The defendant incorrectly claims that, based on the five criminal history points listed in paragraphs 45-48 of the PSR for his four prior convictions, he would have fallen into criminal history category III – and accordingly that his "non-career offender guideline computation" would have been the intersection of offense level 31 and category III: namely, 135-168 months. Def. Br. 4 n.4. This calculation fails to consider the fact that – as the PSR properly observed at paragraph 48 – the defendant committed the present offense while on probation for his most recent previous conviction. According to U.S.S.G. § 4A1.1(d), that fact would entail the addition of two more criminal history points, for a total of **7** points, yielding a criminal history category IV. The intersection of offense level 31 and criminal history category IV is 155-188 months, as the prosecutor properly stated to the district court at sentencing, JA 28-30.

district court thus passed upon three objections filed by the defendant. The district court overruled an objection to information in the PSR linking him to a May 13, 1998, controlled purchase of 28 grams of cocaine base, App. 26; overruled an objection to a recitation in the PSR of the length of a sentence previously served by the defendant, App. 27; and sustained an objection to comments in the PSR regarding the defendant's sister and her employment status. App. 27. The district court also adopted the guidelines calculation set forth in the PSR, again, without objection from the defendant. App. 31.

The only contested issue at sentencing was the defendant's request for a downward departure. The defendant argued that his guidelines calculation, based on his designation as a career offender, overstated the seriousness of his criminal history. He accordingly asked for a downward departure under sentencing guideline § 4A1.3 and *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001). App. 17-23.

The district court recognized that it had authority to grant a downward departure when a criminal history calculation overstated the seriousness of the defendant's criminal history. It identified the factors it could consider in making a decision on the departure, including the amount of drugs involved in prior offenses, the defendant's role in prior offenses, the sentences for prior offenses, and the amount of time the defendant served for prior offenses as compared to the sentencing range calculated for the present offense. App. 5, 27-31.

As applied in this case, the district court concluded that these factors warranted a downward departure. Indicating that criminal history category VI significantly over-represented the seriousness of the defendant's criminal history, the district court afforded him a three-level horizontal departure. App. 28. (As explained above in note 2, the court's three-level horizontal departure went *below* criminal history category IV, which would have been otherwise applicable.) The court reviewed the defendant's criminal history and observed that while he had three prior convictions, they involved a total of one ounce and two ten-dollar bags of marijuana. App. 28. The court also concluded that the defendant had not played a lead role in any of the prior offenses. App. 29. Upon examination of the sentences previously imposed on the defendant, the court determined that all had been suspended, except for six months the defendant had served on one prior to its disposition. App. 29. With respect to sentences the defendant had previously served, the court noted that the defendant had never served any time following a conviction, and had served six months in pre-trial because he had been unable to post a bond. App. 29. Considering these factors together, the court concluded that a vertical departure downward of three levels was also warranted. App. 30. These departures resulted in a guidelines range of 135 to 168 months. App. 31. As the prosecutor noted at the time of sentencing, this post-departure range was below the guidelines range of 151-188 months that would have applied but for the career offender designation. JA 28-30.

The district court sentenced the defendant to 135 months of imprisonment, the bottom of the post-departure guidelines range. App. 31. The district court made no reference to the drug guidelines range which would have been applicable had the defendant not been determined to be a career offender. The defendant filed no appeal.

B. The defendant's motion under 18 U.S.C. § 3582(c)(2)

On June 19, 2008, the defendant, through counsel, filed a motion under 18 U.S.C. § 3582(c)(2). He sought a reduction in his sentence based upon a change to the crack cocaine guidelines that were passed by the Sentencing Commission on November 1, 2007, and made retroactive for all defendants as of March 3, 2008. App. 7.

The district court denied the defendant's motion in a ruling filed August 27, 2008. App.8, 39-45. The court noted that "[a] reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) is 'not authorized . . .[if] the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision'," citing U.S.S.G. § 1B1.10(a)(2)(B) and Application Note 1(A). App. 41-42. Quoting U.S.S.G. § 1B1.10(b)(1), the district court wrote that, "[t]o determine eligibility for a sentencing reduction, 'the court 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.' The court must 'substitute *only* the amendments listed . .

. for the corresponding guideline provisions that were applied when the defendant was sentenced and *shall leave all other guideline application decisions unaffected.*'" App. 42 (emphasis added by the district court; citation omitted). The court pointed out that, in this case, the defendant's guideline calculation under the amendment would begin at level 32, to reflect the amendment, but would then be increased to 37 under the career offender guideline, and adjusted downward by three levels to reflect his acceptance of responsibility, to level 34, with a career offender criminal history category of VI. This would yield an applicable guideline range of 262-327 months, which is the same as the range as calculated before the amendment. App. 42-43. The court then reasoned that, since the applicable guideline range is unchanged by the amendment, the defendant is ineligible for relief, again citing U.S.S.G. § 1B1.10(a)(2)(B) and Application Note 1(A). App. 43.

Summary of Argument

I. The defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Under that section, a sentence may be reduced only when it was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Here, the Sentencing Commission amended the crack cocaine sentencing guidelines to reduce offense levels for crack cocaine offenses and accordingly the defendant's *base* offense level was reduced. But that is of no moment here because the defendant was properly – and indisputably – categorized as a career offender. Because of that

designation, the defendant's "sentencing range" was set by the career offender guidelines in § 4B1.1, not the crack guidelines, and thus the new crack guidelines have no impact on his sentencing range.

That the district court granted a departure under § 4A1.3 from the career offender guidelines down to a range where the post-departure offense level was the same as what would have been called for by the crack guidelines does not change this conclusion. Although several district courts have held that under this scenario a defendant is entitled to a sentence reduction, those courts have uniformly failed to note that this conclusion is inconsistent with the Sentencing Commission's policy statement and hence unauthorized by the statute. *See* 18 U.S.C. § 3582(c)(2) (permitting a sentencing reduction based on subsequent amendments to the sentencing guidelines only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"). Moreover, it bears note that the defendant was sentenced to a term of imprisonment based on a post-departure range that was ultimately *lower* than the range that would have been applicable absent a career-offender designation, because the court departed to a criminal history category III – which was one level lower than would have been dictated by the criminal history points accrued by virtue of his prior convictions and his having committed the present offense while on probation.

Argument

I. The district court properly denied the defendant's motion for a reduced sentence under 18 U.S.C. § 3582.

A. Governing law and standard of review

1. Section 3582(c)(2) and the new crack guidelines

"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). However, under 18 U.S.C. § 3582(c)(2), a district court may reduce a defendant's sentence under very limited circumstances:

> [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.

18 U.S.C. § 3582(c)(2).

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 the amendment in a concluded case.[3] 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).[4] *See* U.S.S.G. App. C, Amend. 712. Revised § 1B1.10(a), which became effective on March 3, 2008, provides, in relevant part:

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[3] 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."

A guideline amendment may be applied retroactively only when expressly listed in § 1B1.10(c). *See*, *e.g.*, *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997); *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995) (per curiam).

[4] In April, the Commission further revised § 1B1.10(c) to reflect that a subsequent Amendment to the crack guidelines (changing the way combined offense levels are determined in cases involving crack and one or more other drugs), effective May 1, 2008, would be applied retroactively. U.S.S.G. App. C, Amend. 715. Although this change has no impact on the current case, the current version of § 1B1.10 incorporating this change, is reproduced in the Addendum.

(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.

The amendment in question in this case is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.[5] On December 11, 2007, the Commission added Amendment 706 to the list of amendments identified in § 1B1.10(c) that may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713.

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

Previously, the Commission had set the crack offense levels in § 2D1.1 above the range that included the mandatory minimum sentence. Under the amendment, the Commission has set the offense levels so that the resulting guideline range includes the mandatory minimum penalty triggered by that amount, and then set corresponding offense levels for quantities that fall below, between, or above quantities which trigger statutory mandatory minimum penalties. For example, a trafficking offense involving five grams of crack cocaine requires a statutory

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

mandatory minimum sentence of five years imprisonment. *See* 21 U.S.C. § 841(b)(1)(B). Therefore, the revised guideline applies an offense level of 24 to a quantity of cocaine base of at least five grams but less than 20 grams; at criminal history category I, this level produces a range of 51-63 months (encompassing the 60-month mandatory minimum).

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 guideline 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 guideline 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.

2. Standard of review

This Court has not yet established the appropriate standard of review for decisions on motions for relief under 18 U.S.C. § 3582(c)(2). *Cortorreal*, 486 F.3d at 743. The Eleventh Circuit, however, has held that in cases reviewing rulings on motions under § 3582(c)(2), it will review *de novo* issues of statutory interpretation and "legal conclusions regarding the scope of [the district court's] authority under the Sentencing Guidelines." *United States v. Moore*, 541 F.3d 1323, 2008 WL 4093400, *2 (11th Cir. Sept. 5, 2008) (quoting *United States v. White*, 305 F.3d 1264, 1267 (11th Cir. 2002) (per curiam)), *pet'n for cert.*

filed, No. 08-7610 (Nov. 26, 2008). *See also United States v. Young*, 247 F.3d 1247, 1251 (D.C. Cir. 2001) (reviewing *de novo* a legal question presented by motion under § 3582(c)(2)). At the same time, the Eleventh Circuit reviews for abuse of discretion a district court's decision denying a motion for a reduction of sentence under § 3582(c)(2). *United States v. Moreno*, 421 F.3d 1217, 1219 (11th Cir. 2005) (per curiam); *United States v. Vautier*, 144 F.3d 756, 759 n.3 (11th Cir. 1998); *see also Cortorreal*, 486 F.3d at 743 (citing cases applying abuse of discretion standard); *United States v. Rodriguez-Pena*, 470 F.3d 431, 432 (1st Cir. 2006) (per curiam) (reviewing denial of § 3582(c)(2) motion for abuse of discretion).

B. Discussion

1. The defendant is ineligible for a sentence reduction under § 3582(c)(2) because the new crack guidelines do not lower his guidelines range.

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant's sentence may *only* be reduced when he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." A reduction, moreover, is allowed only when "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* In its revisions to § 1B1.10, the Commission, consistent with the statutory directive that a reduction should occur only where the defendant's sentencing range was lowered, made clear that a sentencing court is not

authorized to reduce a defendant's sentence when a retroactive amendment does not result in lowering the applicable sentencing range for the defendant. Specifically, subsection (a)(2)(B) of the policy statement provides: "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 . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." U.S.S.G. § 1B1.10(a)(2)(B) (emphasis added).

In this case, the defendant's guideline calculation did not rest on the provision regarding crack cocaine in § 2D1.1, which has been amended. Under the version of § 2D1.1 in effect at the time of sentencing, the defendant's base offense level for the crack offense was 34; that would be reduced to 32 under Amendment 706. But because the defendant was a career offender, based on his prior convictions for drug trafficking offenses, his base offense level increased to 37 pursuant to § 4B1.1. Stated differently, the defendant's status as a career offender trumped his guidelines as a drug dealer. The career offender enhancement is unaffected by Amendment 706. Accordingly, the defendant's offense level, and resulting applicable sentencing range, remain unchanged from the time of sentencing.

Courts agree that where, as is the case here, application of the pertinent amendment does not result in a different sentencing range, no reduction of sentence may occur. *See, e.g.*, *United States v. McFadden*, 523 F.3d 839, 840-41

(8th Cir. 2008) (per curiam) (upholding denial of motion under crack amendment when amendment would not change defendant's guidelines range); *United States v. Gonzalez-Balderas*, 105 F.3d 981, 984 (5th Cir. 1997) (although a retroactive amendment reduced the defendant's offense level, the new level (44) still required the sentence of life imprisonment which was imposed, and the district court properly denied the motion summarily); *United States v. Townsend*, 98 F.3d 510, 513 (9th Cir. 1996) (per curiam) (although a retroactive amendment to the career offender guideline changed the definition of a statutory maximum, the amendment did not benefit the defendant given that the maximum penalty for his offense was the same under either definition, and thus the guideline range was the same); *United States v. Dorrough*, 84 F.3d 1309, 1311-12 (10th Cir. 1996) (the district court did not abuse its discretion in denying the § 3582(c)(2) motion, where an alternative means of sentencing permitted by the applicable guideline produced the same offense level that applied earlier); *United States v. Armstrong*, 347 F.3d 905, 908 (11th Cir. 2003) (the district court correctly denied motion, where the defendant's offense level was not altered by the subject of the retroactive amendment); *United States v. Young*, 247 F.3d 1247, 1251-53 (D.C. Cir. 2001) (district court properly denied motion where the sentence was actually based on considerations not affected by the retroactive guideline amendment).

The plain language of § 3582(c)(2) confirms that the defendant, sentenced under the career offender guidelines, is not entitled to a sentence reduction in light of

Amendment 706. Section 3582(c)(2) limits relief to cases where the term of imprisonment was "based on" a "sentencing range" that has subsequently been lowered. 18 U.S.C. § 3582(c)(2). Here, although the defendant's *base offense level* in § 2D1.1 was lowered by Amendment 706, his final offense level, and hence his *sentencing range*, was determined by the career offender guideline in § 4B1.1, which was not impacted by Amendment 706. Thus, he was not sentenced based on a sentencing range that was subsequently lowered as required to obtain relief under § 3582(c)(2). *See Moore*, 541 F.3d at 1327 ("The defendants' base offense levels under § 2D1.1 played no role in the calculation of these ranges. Thus, Amendment 706's effect on the defendants' base offense levels would not lower the sentencing ranges upon which their sentences were based.").

In other words, as succinctly explained by the Eighth Circuit:

> [The defendant] was sentenced as a career offender, and his sentencing range was therefore determined by § 4B1.1, not by § 2D1.1. Although the Sentencing Commission lowered the offense levels in USSG § 2D1.1(c) related to crack cocaine drug quantities, it did not lower the sentencing range for career offenders under USSG § 4B1.1, which is what set [the defendant's] sentencing range. [The defendant] has therefore not met the eligibility requirements for a reduction in his sentence. *See* § 3582(c)(2) (allowing resentencing for defendants who were originally "sentenced . . .

> based on a sentencing range that has subsequently been lowered by the Sentencing Commission"). Application of Amendment 706 would not lower [the defendant's] applicable guideline range.

United State v. Thomas, 524 F.3d 889, 890 (8th Cir. 2008) (per curiam).

This result is also consistent with the Sentencing Commission's revised policy statement, a consistency mandated by statute. *See* 18 U.S.C. § 3582(c)(2) (allowing a sentence reduction "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"). The Commission's policy statement provides, in § 1B1.10(a)(2)(B), that a sentence reduction "is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if . . . an amendment . . . does not have the effect of lowering the defendant's applicable guideline range." Accordingly, as explained above, because the defendant's applicable *guideline range* was not lowered by Amendment 706, a sentence reduction to account for that Amendment would be inconsistent with the policy statement and hence inconsistent with the statute.

The Application Notes to the revised policy statement further confirm this reading of the statute and policy statement. In Application Note 1(A), the Sentencing Commission explained that a sentence reduction is not authorized when "an amendment . . . is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range

because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)." Here, while the Amendment is applicable to the defendant because it reduces his base offense level, it does not have the effect of lowering his "applicable guideline range because of the operation of another guideline," *i.e.*, the career offender guideline. § 1B1.10, Application Note 1(A). Accordingly, as explained by the Sentencing Commission, a sentence reduction in this context "is not consistent with [the] policy statement and therefore is not authorized under 18 U.S.C. § 3582(c) . . . ." § 1B1.10(a)(2)(B). *See also Moore*, 541 F.3d at 1327-28 (describing policy statement and Application Note 1(A)).

The two appellate courts that have addressed the career offender scenario in published opinions both reached the same conclusion. *See, e.g.*, *Moore*, 541 F.3d at 1327-28; *Thomas*, 524 F.3d at 889; *United States v. Tingle*, 524 F.3d 839, 840 (8th Cir. 2008) (per curiam).[6] *See also United*

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[6] Although only the Eighth and Eleventh Circuits have expressly addressed this issue in published opinions, three other circuits have issued unpublished orders reaching the same conclusion. *See, e.g.*, *United States v. Johnson*, 2008 WL 4189662 (5th Cir. Sept. 11, 2008) (per curiam) (not precedential); *United States v. Thompson*, 2008 WL 3974337 (3d Cir. Aug. 28, 2008) (per curiam) (not precedential; summary affirmance because "this appeal presents no substantial question"); *United States v. Gray*, 271 Fed. Appx. 304, 306 fn.* (4th Cir. 2008) (per curiam) (not precedential); *United States v. Bronson*, 267 Fed. Appx. 272, 274-75 (4th Cir. (continued...)

States v. Liddell, 543 F.3d 877, 2008 WL 4149750, at *3 n.3 (7th Cir. 2008) (stating in dicta that a defendant who was sentenced under the career offender guidelines could not benefit from the recent amendments to the crack guidelines).

In sum, because Amendment 706 did not reduce the guideline range applicable to the defendant, he is not entitled a reduction under § 3582(c)(2) based on that Amendment.

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[6] (...continued)
2008) (per curiam) (not precedential).

2. That the district court granted a departure from the career offender range at the time of the original sentencing does not make the defendant eligible for a sentence reduction under the new crack guidelines.

Despite this straightforward application of the statute and policy statement, the defendant contends that he is entitled to a reduction under the new crack guidelines because, at the original sentencing, the district court granted him a downward departure under U.S.S.G. § 4A1.3, after finding that the career offender designation overstated the seriousness of his criminal history. According to the defendant, he is entitled to a reduction because the court's departure authority was exercised to sentence him at the level that would have applied in the absence of the career offender designation, *i.e.*, the level mandated by the drug quantity guidelines. (As pointed out above, this contention is slightly inaccurate, because the district court departed down to criminal history category III, even though the defendant would have fallen within category IV absent the career offender designation. Accordingly, it is more accurate to say that the the defendant was sentenced within a range based on the *offense level* that would have applied based on § 2D1.1., and absent the career offender provisions.)

The defendant's argument is based primarily on two district court cases from other districts around the country: *United States v. Poindexter*, 550 F. Supp.2d 578 (E.D. Pa. 2008); and *United States v. Nigatu*, 2008 WL 926561 (D. Minn. Apr. 7, 2008). These cases hold that when a district

court departs downward from the career offender guideline to the guideline dictated by drug quantity, the defendant is entitled to a sentence reduction under 18 U.S.C. § 3582(c)(2). *See Poindexter*, 550 F. Supp.2d at 581-82; *Nigatu*, 2008 WL 926561, *1-2. *See also Moore*, 541 F.3d at 1329-30 (stating in dicta that a reduction would be authorized when a district court granted a downward departure under § 4A1.3 from the career offender guidelines to the drug quantity guideline); *United States v. Collier*, 2008 WL 4204976, *3 (E.D. Mo. Sept. 5, 2008) (granting reduction to defendant who was career offender but who received a lower sentence that court concluded was "based on" the drug quantity guideline); *United States v. Ragland*, 568 F. Supp.2d 19, 20 (D.D.C. July 31, 2008) (approving reduction based on prior departure from career offender guideline to crack guideline, but noting that government did not oppose departure to this extent); *United States v. Clark*, 2008 WL 2705215, *1 (W.D. Pa. July 7, 2008) (approving reduction based on prior departure from career offender guideline to crack guideline; noting that government had agreed to the reduction). *But see United States v. Menafee*, 2008 WL 3285254 (D. Conn. Aug. 7, 2008) (denying departure even though career offender was given a downward departure to the crack guidelines at time of sentencing).

The defendant's reliance on these cases is misplaced for two reasons. First, these cases are not controlling on this Court. Second, and more importantly, these cases are not persuasive because the reductions they approve are inconsistent with the Sentencing Commission's policy statement. *See* 18 U.S.C. § 3582(c)(2) (authorizing a

sentence reduction based on an amendment to the sentencing guidelines when such a reduction "is consistent with applicable policy statements issued by the Sentencing Commission"). In a nutshell, the policy statement authorizes sentence reductions only when a defendant's *pre*-departure guidelines range has been reduced by a subsequent amendment. By contrast, the defendant's cases authorize reductions based on a conclusion that a defendant's *post*-departure guidelines range has been reduced. Critically, *none* of the cases relied on by the defendant acknowledge this inconsistency, much less attempt to address it.

Section 1B1.10(a)(2)(B) provides that a sentence reduction "is not consistent with this policy statement . . . if [a retroactive amendment] does not have the effect of lowering the defendant's *applicable guideline range*." (emphasis added). The defendant's argument rests on the premise that the phrase "applicable guideline range" in this section refers to a *post*-departure guideline range. Thus, under the defendant's theory, his guidelines range was lowered because his post-§ 4A1.3 departure range (*i.e.*, his crack guidelines range) was lowered by Amendment 706.

A careful reading of the complete policy statement, however, demonstrates that the defendant's reading is wrong. The phrase "applicable guideline range" in § 1B1.10(a)(2)(B) refers to the defendant's *pre*-departure guidelines range.

To read the language as defendant's theory suggests would render large parts of § 1B1.10(b)(2) meaningless.

Section § 1B1.10(b)(2)(A) sets forth a basic limitation on sentence reductions under § 3582(c)(2), providing that in general, a court cannot sentence a defendant "to a term that is less than the minimum of the amended guideline range." This general rule is subject to an exception, however, as set forth in § 1B1.10(b)(2)(B):

> 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 . . . 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.

In context, the language in this exception referring to the "guideline range applicable to the defendant at the time of sentencing" must refer to the *pre*-departure guideline range. If this language referred to the *post*-departure guideline range, then this exception would only apply in a limited set of cases, namely, those cases where a district court had imposed a non-guidelines sentence under *Booker* and § 3553(a). (For defendants sentenced before *Booker*, there was no legally authorized way for a district court to sentence a defendant below a *post*-departure guideline range, and hence this exception – authorizing a reduction "comparably less than the amended guideline range" would have no effect.) And yet it is clear from the

structure of § 1B1.10(b)(2)(B) that it contemplates application in many "non-*Booker*" cases, *i.e.*, where a district court has imposed a sentence below the applicable guideline range by some method other than a *Booker* non-guidelines sentence. That other method is a departure.

This reading of § 1B1.10(b)(2)(B) is confirmed by the Sentencing Commission's commentary. Application Note 3 describes the application of § 1B1.10(b)(2)(B) and provides an example that confirms that the "applicable guideline range" is the *pre*-departure guideline range:

> 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 subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended

> guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In other words, the Sentencing Commission understood that some defendants were sentenced based on departures from the "applicable guideline range" and provided explicit guidance to district courts on how to apply the sentence reduction in those cases. This express guidance, however, makes clear that departures from the applicable guideline range are not relevant until it has been determined that a defendant is eligible for a reduction – an eligibility that is only triggered by an amendment that lowers the defendant's pre-departure, applicable guideline range.

Here, although the defendant's *post*-departure guideline range was lowered by Amendment 706, that is irrelevant under the policy statement. The relevant inquiry is whether the defendant's pre-departure guideline range was lowered, and here, there is no dispute that it was not. Because Amendment 706 did not lower the defendant's applicable guideline range, he is ineligible for a sentence reduction under § 3582(c)(2).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: December 23, 2008

Respectfully submitted,

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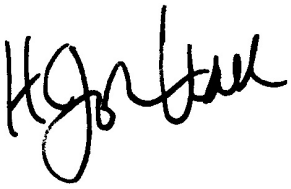

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ADDENDUM

18 U.S.C. § 3582(c)(2)

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

(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.

Commentary

Application Notes:

1. *Application of Subsection (a).*–

(A) *Eligibility.*–Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of

lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) *Factors for Consideration.*–

(i) *In General.*–Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(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 such 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 in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. *Application of Subsection (b)(1).*–In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. *Application of Subsection (b)(2).*–Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection

(b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

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 subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. *Supervised Release.*–

(A) *Exclusion Relating to Revocation.*–Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) *Modification Relating to Early Termination.*–If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under

the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, 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."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and 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."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and

the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts

should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

* So in original. Probably should be "to fall above the amended guidelines".