

08-5917-cr(L)

To Be Argued By:
H. GORDON HALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 08-5917-cr (L)
08-5948-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

GERALD DRIFFIN, also known as Jajuan Driffin, also
known as Nut; DEPAUL CRUDUP, also known as
Correctional Officer Peace,
Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

NORA R. DANNEHY
*United States Attorney
District of Connecticut*

H. GORDON HALL
SANDRA S. GLOVER (*of counsel*)
Assistant United States Attorneys

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Statement of Jurisdiction

The district court (Hon. Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment as to Driffin on August 26, 2005, Driffin Joint Appendix (“D.J.A.”) 20, and as to Crudup on August 31, 2005, Crudup Joint Appendix (“C.J.A.”) 15.

On April 30, 2008, Driffin filed a motion under 18 U.S.C. § 3582(c)(2) seeking a modification of his sentence. D.J.A. 21. The district court denied the motion in a ruling filed November 21, 2008; that ruling was entered on the docket November 25, 2008. D.J.A. 22, 85-87. On December 1, 2008, Driffin filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). D.J.A. 22, 88.

In a memorandum filed June 19, 2008, Crudup requested a reduction of his sentence under 18 U.S.C. § 3582(c)(2). The district court denied the request in a ruling entered on November 19, 2008. C.J.A. 17, 87-89. On December 4, 2008, Crudup filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). C.J.A. 17, 90.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Driffin and Crudup were both properly categorized as career offenders under U.S.S.G. § 4B1.1. At sentencing for both defendants, the district court granted downward departures from the career offender guidelines, but those departures were not tied to the drug quantity guidelines. After the Sentencing Commission amended the drug quantity guideline to reduce offense levels for crack cocaine offenses, the defendants requested sentence reductions under 18 U.S.C. § 3582(c)(2). Did the district court properly deny these motions when the defendants' original sentences were based on the career offender guidelines, not the crack cocaine guidelines?

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Preliminary Statement

This appeal challenges the district court's denial of the defendants' motions for sentence reductions under 18 U.S.C. § 3582(c)(2). Both defendants entered pleas of guilty to crack cocaine conspiracy charges, and were sentenced pursuant to the career offender provision in

U.S.S.G. § 4B1.1. At sentencing, the district court granted downward departures to both defendants, but those departures were not based on, or tied to, the drug quantity guidelines. Subsequently, after the Sentencing Commission reduced the base offense levels for crack cocaine offenses under § 2D1.1 and made those changes retroactive, both defendants requested sentence reductions under 18 U.S.C. § 3582(c), claiming that the Sentencing Commission's reduction of the sentencing guidelines for crack cocaine offenses entitled them to relief. The district court denied the motions of both defendants because the defendants' sentences were based on the career offender guidelines in U.S.S.G. § 4B1.1, and not on the crack cocaine guidelines in U.S.S.G. § 2D1.1.

The district court's judgments in both cases should be affirmed. Neither defendant was sentenced based on a sentencing range that was subsequently lowered by the Sentencing Commission, and a reduction of either sentence would be inconsistent with the applicable policy statement of the Sentencing Commission. The district court's decisions should therefore be affirmed.

Statement of the Case

On April 27, 2004, a federal grand jury in New Haven, Connecticut returned an indictment against 50 individuals,¹ including the defendants here, Gerald Driffin, and DePaul Crudup, charging Driffin, Crudup and others with one count of conspiracy to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(iii). D.J.A. 4, C.J.A. 4.

On April 4, 2005, Driffin pleaded guilty to a one-count substitute information charging him with conspiracy to possess with intent to distribute at least 5 but less than 20 grams of cocaine base. D.J.A. 19, 24. On August 18, 2005, the district court (Hon. Janet C. Hall, J.) sentenced Driffin to 100 months of imprisonment and five years of supervised release. D.J.A. 20, 72, 81-83. On April 30, 2008, Driffin filed a motion for a reduction of sentence under 18 U.S.C. § 3582(c)(2). D.J.A. 21. The district court denied that motion in a ruling dated November 21, 2008. D.J.A. 22, 85-87. The ruling entered November 25, 2008, and Driffin filed a timely notice of appeal on December 1, 2008. D.J.A. 22, 88.

On March 2, 2005, Crudup pleaded guilty to a one-count substitute information charging him with conspiracy to possess with intent to distribute at least 5 but less than 20 grams of cocaine base. C.J.A. 13, 19. On August 24, 2005, the district court (Hon. Janet C. Hall, J.) sentenced

¹ The charges against one of the original 50 defendants were dismissed, as that individual was found to be a minor.

Crudup to 100 months of imprisonment and five years of supervised release. C.J.A. 14, 15, 58, 66-68. Following sentencing, Crudup responded to an order to show cause issued by the district court by requesting a reduction of sentence under 18 U.S.C. § 3582(c)(2). C.J.A. 17, 69. The district court denied that request in a ruling dated November 18, 2008. C.J.A. 19, 87-89. Crudup filed a timely notice of appeal on December 4, 2008, C.J.A.17, 90.

The defendants are in custody serving the sentences imposed.

Statement of Facts and Proceedings Relevant to this Appeal

A. Driffin's plea and sentencing

On April 27, 2004, a federal grand jury in New Haven, Connecticut returned an indictment against 50 individuals, including Gerald Driffin, charging Driffin with one count of conspiracy to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(iii). D.J.A. 4. On April 5, 2005, Driffin pleaded guilty to a one-count substitute information charging him with conspiracy to possess with intent to distribute at least 5 but less than 20 grams of cocaine base. D.J.A.19, 24.

In preparation for sentencing, the United States Probation Office prepared a Pre-Sentence Report ("Driffin PSR"). The PSR stated that Driffin stipulated to relevant

conduct of at least 5 but less than 20 grams of crack cocaine and, using the 2001 Sentencing Guidelines manual, set his base offense level at 26. *See* Driffin PSR ¶ 44; U.S.S.G. § 2D1.1(c)(7) (2001) (base offense level of 26 for offenses involving at least 5 grams, but less than 20 grams, of crack cocaine).

The PSR also detailed Driffin's lengthy criminal history and concluded, as relevant here, that because of his prior convictions, he qualified as a career offender under sentencing guideline § 4B1.1. Driffin PSR ¶ 64. This conclusion raised his offense level from 26 to 34 under § 4B1.1 and thus resulted in a total offense level of 31 after a three-level reduction for acceptance of responsibility. Driffin PSR ¶¶ 51, 52. Driffin's criminal history placed him in criminal history category VI (a conclusion also required by his career offender designation), resulting in a sentencing guidelines range of 188-235 months. Driffin PSR ¶ 105; Sentencing Table.

At sentencing, Driffin objected to the mention of his use of a firearm in paragraph 62 of the PSR, and the court ordered that the paragraph be removed. D.J.A. 28-31. There was no further objection to the facts and findings as presented in the PSR, and the district court thus adopted those findings. D.J.A. 31. The district court also adopted the guidelines calculation set forth in the PSR, again, without objection from Driffin. D.J.A. 31, 34.

The only contested issue at sentencing was Driffin's request for a downward departure. Driffin argued that his guidelines calculation, based on his designation as a career

offender, overstated the seriousness of his criminal history and accordingly asked for a downward departure under sentencing guideline § 4A1.3. D.J.A. 35-50, 54-55.

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. D.J.A. 70. The district court concluded that the nature of Driffin's prior offenses, and the sentences he served for them, warranted a downward departure. D.J.A. 68-70. The court reviewed Driffin's criminal history and observed that while he had numerous prior convictions, they involved relatively small quantities of drugs and resulted in relatively short sentences as compared to the sentence he faced under the career offender guidelines. *Id.* Finally, the court noted that there was no evidence of violent behavior in Driffin's past. D.J.A. 70. Considering these factors together, the court elected to "depart for overstatement of criminal history but only the one level under the guideline to category five." *Id.*

The district court next addressed Driffin's conduct since his arrest. D.J.A. 71. The court was impressed by Driffin's ability to remain drug-free for the 14 months between his release and his sentencing. *Id.* The court reasoned that "someone who has for more than half of his life had a daily sizeable drug addiction who has for now over a year not tested positive on it (sic) even one occasion is to me extraordinary." *Id.* In light of this conclusion, the district court granted a further downward departure for extraordinary rehabilitation. *Id.*

Based on these departures and in consideration of the factors outlined in 18 U.S.C. § 3553(a), the district court sentenced Driffin primarily to 100 months' imprisonment. D.J.A. 72.

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

On April 30, 2008, Driffin 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. D.J.A. 21, 84.

The district court denied Driffin's motion in a ruling dated November 21, 2008. D.J.A. 22, 85-87. The court noted that Driffin was "ineligible for a retroactive sentence reduction because the crack-cocaine amendments do not 'have the effect of lowering the defendant's applicable guideline range.'" D.J.A. 86 (quoting U.S.S.G. § 1B1.10(a)(2)(b)). The court held that the applicable guideline range was the pre-departure guideline range. *Id.* Since the amendments "changed neither the career offender provisions, nor § 4A1.3, they did not lower the applicable guideline range." D.J.A. 87. Accordingly, the court denied Driffin's motion. *Id.*

C. Crudup's plea and sentencing

On April 27, 2004, a federal grand jury in New Haven, Connecticut returned an indictment against 50 individuals, including DePaul Crudup, charging Crudup with one count

of conspiracy to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(iii). C.J.A. 4. On March 2, 2005, Crudup pleaded guilty to Count One of a substitute information charging him with conspiracy to possess with intent to distribute at least 5 but less than 20 grams of cocaine base. C.J.A.13, 21.

In preparation for sentencing, the United States Probation Office prepared a Pre-Sentence Report (“Crudup PSR,” which is included in the Government’s Sealed Appendix). The PSR calculated Crudup’s base offense level pursuant to U.S.S.G. § 2D1.1 to be 32.² Crudup PSR ¶ 41. The PSR also detailed Crudup’s criminal history and concluded that because of his prior convictions, he qualified as a career offender under sentencing guideline § 4B1.1. Crudup PSR ¶¶ 47, 63. This conclusion raised his offense level to 34, and thus resulted in a total offense level of 31 after a three-level reduction for acceptance of responsibility. Crudup PSR ¶¶ 48, 49. Crudup’s criminal history placed him in criminal history category VI, Crudup PSR ¶ 63, (a conclusion also required by his career offender designation), resulting in a sentencing guidelines range of 188-235 months. Crudup PSR ¶ 85; Sentencing Table.

² The district court noted that this calculation was in error and that based on the amount of drugs involved, the defendant’s base offense level pursuant to U.S.S.G. § 2D1.1 would have been 26. C.J.A. 27-28. As the district court noted, however, this error was irrelevant because of the court’s finding that Crudup was a career offender.

At sentencing, Crudup raised no objections to the facts and findings as presented in the PSR, and the district court thus adopted those findings. C.J.A. 22-23. The district court also adopted the guidelines calculation set forth in the PSR, again, without objection from Crudup. C.J.A. 28.

The government moved for a downward departure for reasons unrelated to the quantity of cocaine attributable to Crudup. C.J.A. 29-35. The district court granted this motion. C.J.A. 35. Based on this departure and in consideration of the factors outlined in 18 U.S.C. § 3553(a), the district court sentenced Crudup to 100 months' imprisonment. C.J.A. 14, 15, 58, 66-68.

D. Crudup's request for relief under 18 U.S.C. § 3582(c)(2)

In response to an order to show cause issued by the district court, Crudup requested that the court reduce his sentence under 18 U.S.C. § 3582(c)(2) 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. C.J.A. 17, 69.

The district court denied Crudup's motion in a ruling filed November 18, 2008. C.J.A. 17, 87-89. The court stated that Crudup would only be eligible for a reduction if the amendments would "have the effect of lowering the defendant's applicable guideline range within the meaning of § 1B1.10(a)(2)(B). C.J.A. 88-89 (quotation marks and citation omitted). While the court ruled that the pre-

departure range was the ‘applicable guidelines range,’ it went on to explain that “even if this court were to conclude that the ‘applicable guidelines range’ was actually the post-departure guidelines range, [the defendant] still would be entitled to no reduction.” C.J.A. 89. According to the court, this was because “the only departure [the defendant] received, and the extent of that departure, had absolutely nothing to do with the crack-cocaine quantity guidelines.” *Id.* (footnote omitted).

Summary of Argument

Both of the defendants are ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Under that section, a sentence may be reduced if (1) it was “based on a sentencing range that has subsequently been lowered by the Sentencing Commission,” and (2) the reduction is “consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* Here, both defendants were sentenced based on sentencing ranges set by the career offender guidelines, which have not been lowered by the Sentencing Commission. That the district court afforded Driffin and Crudup departures from the career offender guidelines does not change this conclusion, as there is nothing in the record to suggest that the defendants’ sentences were in any way “based on” sentencing guidelines which have been lowered by the Sentencing Commission, here, the crack cocaine sentencing guidelines. Further, sentencing reductions for the defendants would not be consistent with applicable Sentencing Commission policy statements. Accordingly, the district court’s decisions declining to grant the

defendants sentence reductions under 18 U.S.C. § 3582(c)(2) should be affirmed.

Argument

I. The district court properly denied the defendants' requests for reduced sentences under 18 U.S.C. § 3582 because their original sentences were not "based on" U.S.S.G. § 2D1.1

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.”” *United States v. Martinez*, No. 08-3454-cr, 2009 WL 2004208, at *2 (2d Cir. July 13, 2009) (per curiam) (quoting *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.

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 (3rd 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
(continued...)

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

- (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

⁴ (...continued)
May 1, 2008, would be applied retroactively. U.S.S.G. App. C, Amend. 715. However, this change has no impact on the current case.

- (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.

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

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 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

“The determination of whether an original sentence was ‘based on a sentencing range that was subsequently lowered by the Sentencing Commission,’ 18 U.S.C. § 3582(c)(2), is a matter of statutory interpretation and is thus reviewed *de novo*.” *Martinez*, 2009 WL 2004208, at *1 (citing *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009)). *See also United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam).

B. Discussion

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant who was sentenced “based on” on a guideline range that was subsequently lowered may qualify for a reduced sentence. Driffin and Crudup argue that their original sentences were “based on” the crack cocaine (cocaine base) guidelines within the meaning of § 3582(c)(2) and that they are therefore eligible for sentence reductions under Amendment 706. Careful examination of the record as to each defendant, and the relevant precedent, however, show that this is not the case. While the district court departed from the career offender guideline at the sentencings of each of the defendants, there is nothing in the record of either proceeding to suggest that either sentence ultimately imposed was in any way derived from U.S.S.G. § 2D1.1. Accordingly, they are both ineligible for sentence reductions under § 3582(c)(2).

This Court’s recent decision in *United States v. Martinez*, 2009 WL2004208, controls this case. In

Martinez, the Court considered the case of a defendant who was convicted of a crack cocaine offense, and sentenced pursuant to the career offender guidelines in U.S.S.G. § 4B1.1. The defendant sought a sentence reduction under 18 U.S.C. § 3582(c) based on the amendment to the crack cocaine guidelines, and the district court denied the reduction. In upholding the district court's denial of relief, this Court observed that

reducing a defendant's sentence pursuant to § 3582(c) is only appropriate if (a) the defendant was sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" and (b) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission."

Martinez, 2009 WL 2004208, at *2 (quoting 18 U.S.C. § 3582(c)(2)).

With respect to the first prong of this analysis, this Court held that the defendant was sentenced under the career offender guideline, not the crack cocaine guideline, and thus was not sentenced "based on a Guidelines range that has been 'subsequently lowered' by the Sentencing Commission." *Id.* Relying on its earlier decision in *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009), this Court explained that the defendant's

career offender designation and § 4B1.1 "subsumed and displaced" § 2D1.1, the "otherwise applicable range" . . . [and the defendant's] . . . sentence was

therefore not “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.”

Martinez, 2009 WL 2004208, at *2 (quoting *Williams*, 551 F.3d at 185).

Turning to the second question, the Court held that because the amendment to the crack cocaine guidelines did not lower the defendant’s applicable guideline range, “[i]t would . . . be inconsistent with § 1B1.10 to permit reduction of [the defendant’s] sentence on the basis of [that] amendment,” and accordingly not permitted by § 3582(c)(2). *Id.* at *4.

In the course of its decision in *Martinez*, this Court distinguished *United States v. McGee*, in which it held that a defendant who qualified as a career offender but was granted a departure at sentencing could still be eligible for a reduced sentence under § 3582 and the crack guideline amendments if he was “ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines.” 553 F.3d at 230. As explained by the *Martinez* Court, a reduction in *McGee* was appropriate because there the district court had found that the career offender status overstated the defendant’s criminal history and “‘explicitly stated that it was departing from the career offender sentencing range to the level that the defendant *would have been in absent the career offender status* calculation and consideration.’” *Martinez*, 2009 WL 2004208, at *2 (quoting *McGee*, 553 F.3d at 227). In other words, although “*McGee could have* been sentenced under

§ 4B1.1,” *id.*, a review of the record made it “apparent that McGee was sentenced ‘based on’ [§ 2D1.1],” *McGee*, 553 F.3d at 227.

A review of the record in the cases of Driffin and Crudup provides no such “apparent” evidence that either of their sentences were based on the crack cocaine guidelines.

As to Driffin, similar to the sentencing court in *McGee*, the district court departed from the career offender guideline pursuant to § 4A1.3 for overstatement of criminal history. D.J.A. 70. Unlike the *McGee* court, however, the district court did not afford Driffin a vertical departure back down to the crack guideline range. Rather, the district court here departed “only the one level under the guideline to [criminal history] category five.” D.J.A. 70. The district court then granted a vertical departure based on the defendant’s extraordinary rehabilitation. D.J.A. 71. The end result was a sentence of 100 months’ imprisonment. D.J.A. 72. While the court did not specify the range under which Driffin was sentenced, there was no explicit statement – or any other evidence – that the court had relied upon the crack cocaine guideline. In fact, no further mention of his sentencing range as computed under § 2D1.1 was made.

The case of Crudup is similar. Crudup’s sentence did not rest on the provision regarding crack cocaine in Section 2D1.1, which has been amended. Crudup was a career offender, based on his prior convictions for other drug trafficking offenses, and accordingly his base offense

level was set at 34 pursuant to Section 4B1.1. At sentencing, the district court departed downward based on factors unrelated to drug quantity, and ultimately sentenced Crudup to 100 months' imprisonment. C.J.A. 29-35, 58. At no point did the district court indicate that the defendant's sentence was based on the crack cocaine guidelines. Indeed, in its ruling finding Crudup ineligible for a sentence reduction based on the crack amendments, the district court explicitly stated that "the only departure Crudup received, and the extent of that departure, had absolutely nothing to do with the crack-cocaine quantity guidelines." C.J.A. 89.

Both cases are in sharp contrast with the situation in *McGee*, where the sentencing court stated specifically that it was applying the defendant's crack cocaine guidelines range. Absent such a statement, and in Crudup's case, in light of the district court's express statement to the contrary, it cannot be argued that Driffin or Crudup was "ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." *McGee* 553 F.3d at 230. Therefore, the current cases do not fall under the narrow holding of *McGee*. The district court did not depart back down to the "defendant's initially applicable crack cocaine guidelines range," *id.* at 229 n.2, nor did it explicitly base the defendants' sentences on Section 2D1.1.

With no evidence that the defendants here were sentenced under the crack guidelines as in *McGee*, these cases fall squarely within the rule of *Martinez*. Under *Martinez*, "a defendant convicted of crack cocaine

offenses but sentenced as a career offender under U.S.S.G. § 4B1.1 is not eligible to be resentenced under the amendments to the crack cocaine guidelines.” 2009 WL 2004208, at *3. Moreover, because the crack amendments did not lower either defendant’s guidelines range, it “would . . . be inconsistent with U.S.S.G. § 1B1.10(a) to permit reduction of [their] sentence[s] on the basis of the amendments to the crack cocaine guidelines.” *Id.*, at *4. Accordingly, as career offenders sentenced under the career offender guidelines, both Driffin and Crudup are ineligible for reduced sentences under § 3582(c)(2).

In response, the defendants here make four main arguments. *First*, Driffin argues that this Court should apply a more expansive reading of the term “based on” as it is used in 18 U.S.C. § 3582 and hold that a defendant could receive the benefit of Amendment 706 even where his sentence was not “explicitly” derived from the crack cocaine guideline range. This approach was not adopted by *McGee*, and indeed, was expressly rejected in *Martinez*, 2009 WL 2004208, at *3. In *Martinez*, this Court approved the Third Circuit’s holding that “the term “sentencing range” clearly contemplates the end result of the overall guideline calculations, not the series of tentative results reached at various interim steps in the performance of that calculus.” *Id.* (quoting *United States v. Mateo*, 560 F.3d 152, 155 (3rd Cir. 2009)). Accordingly, the fact that the sentencing court “consulted” the crack cocaine guidelines in calculating a defendant’s offense level is simply irrelevant if the defendant was ultimately sentenced as a career offender. *Id.* (quoting *Mateo*, 560 F.3d at 155).

Second, Driffin relies on several district court cases to argue that as long as § 2D1.1 “played a role” in the determination of the original sentence, a reduction should be granted. *See, e.g., United States v. Collier*, No. 05-cr-313, 2008 WL 4204976, at *3 (E.D.Mo. Sept. 5, 2008); *United States v. Poindexter*, 550 F. Supp. 2d 578, 581 (E.D.Pa. 2008). Unlike the present case, however, the record in each of these cases provided at least some evidence that the court had actually relied on the Drug Quantity Table in sentencing the defendant, making those cases more like *McGee* than *Martinez*.

In *Poindexter*, for example, just as in *McGee*, at sentencing, the district court departed down from the career offender guideline to the § 2D1.1 offense level, the level “which [the defendant] would have faced absent the career offender designation.” 550 F. Supp. 2d at 581. On this record, the district court concluded that the defendant had not been sentenced as a career offender and that indeed, the crack cocaine guidelines “played a role” in the calculation of the defendant’s sentence. *Id.* at 580-81. Furthermore, the *Poindexter* court departed from the career offender guideline range solely based on the determination that it overstated the defendant’s criminal history. On these facts, this case falls squarely within the rule of *McGee*, which held that a sentence reduction is appropriate if the defendant was ultimately explicitly sentenced under the crack cocaine guidelines. *See McGee*, 553 F.3d at 229 n.3 (citing *Poindexter* as case coming to same conclusion as *McGee*).

The *Collier* decision, too, falls squarely within the *McGee* framework. *See id.* (citing *Collier* as case coming to same conclusion as *McGee*). In *Collier*, the court concluded that § 2D1.1 had “played a role” in the sentencing calculation because it used the defendant’s crack cocaine guideline range as a “starting point for the defendant’s sentence.” 2008 WL 4204976, at *3. Further, in its Statement of Reasons, the *Collier* court specified that it adopted the reasoning of the defense counsel’s sentencing memorandum which “urged the [c]ourt to consider defendant’s guidelines range without the career offender designation.” *Id.* at *4 n.1. Thus, the *Collier* court relied on more than a coincidental resemblance between the defendant’s crack cocaine guidelines range and the sentence ultimately imposed when it determined that the defendant’s sentence was “based on” § 2D1.1. In other words, just as in *McGee*, the defendant was not sentenced as a career offender, *see id.* at * 2 (“The Court did not sentence *Collier* under the career offender guideline”), but rather was sentenced based on the crack cocaine guidelines.

Because *Poindexter* and *Collier* are analogous to *McGee*, they are simply inapposite to Driffin’s (or Crudup’s) appeal. *See supra* at 18-21 (distinguishing instant cases from *McGee*). In Driffin, the district court did not specify the defendant’s post-departure offense level, and certainly made no mention of the Drug Quantity Table or § 2D1.1. Similarly, in Crudup, there was no mention of § 2D1.1, much less an “explicit” statement that the defendant was being sentenced under that provision. Moreover, unlike *Poindexter* and *Collier* where the courts

departed primarily on overstatement of criminal history, in both Driffin and Crudup, the district court departed downward based primarily on other factors. There is no basis in the record from either case to conclude that the court considered the crack cocaine guidelines in setting the defendant's sentence, and certainly no "explicit" statement that it had done so. In fact, with respect to Crudup, the district court expressly rejected any claim that it had based Crudup's sentence on the crack guidelines. C.J.A. 89 ("[T]he only departure Crudup received, and the extent of that departure, had absolutely nothing to do with the crack-cocaine quantity guidelines."). In the absence of such an "explicit" statement, neither Driffin nor Crudup fall within the *McGee* rule. Their cases are controlled by *Martinez*.

Third, Crudup argues that because the district court considered the sentences of his co-defendants, which were based on § 2D1.1, in determining his sentence, the crack cocaine guidelines indirectly "played a role" in his sentence. This argument is foreclosed by *McGee* and by the record in this case. The *McGee* Court allowed a sentence reduction for a career offender only because the district court "ultimately explicitly sentenced" the defendant under the crack cocaine range, 553 F.3d at 230, but here there was no such explicit statement. More significantly, the record in this case precludes any argument that Crudup's sentence was based on the crack guidelines. When the district court ruled that Crudup was ineligible for a sentence reduction, it explicitly stated that his sentence had *not* been based on the crack guidelines. C.J.A. 89.

Finally, both Driffin and Crudup argue, at least to some extent, that, because their ultimate sentences ended up in the crack cocaine range, their sentences were “based on” that range. But as this Court held in *United States v. Williams*, 551 F.3d at 185, as to mandatory minimum sentences, and in *Martinez*, 2009 WL 2004208, at *2, with regard to §4B1.1, once the new range applied – whether determined by the statutory mandatory minimum or the career offender guideline – it “subsumed and displaced” § 2D1.1 as the applicable range. At that point, the defendant’s sentence was no longer “based on” the § 2D1.1 range, even if, as in *Williams*, the ultimate sentence ended up at a point within the crack quantity range that would have applied absent the controlling guideline. *Williams*, 551 F.3d at 185; *Martinez*, 2009 WL 2004208, at *2.

Moreover, this Court made clear in *McGee* that a career offender is only entitled to a sentence reduction when the district court “ultimately explicitly sentenced based on” the crack quantity guidelines. 553 F.3d at 230. Here, where in both cases the district court departed based on factors that had no relation to the crack quantity guidelines, where the district court made no explicit mention of those guidelines when setting the sentence, and where, in Crudup’s case, the district court expressly stated that it did not sentence based on the crack guidelines, the mere fact that the defendant’s sentence *coincidentally* arrived within the range that would have applied by applying the crack quantity guidelines is not enough to bring these cases within the rule of *McGee*. In the absence of an express statement that they were being sentenced

under the crack cocaine guidelines, Driffin and Crudup were sentenced under the career offender guidelines, and as such are ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

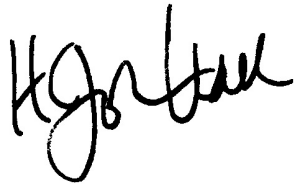
CONCLUSION

For the foregoing reasons, the judgments of the district court should be affirmed as to Driffin and Crudup.

Dated: August 4, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is written in a cursive, flowing style.

H. GORDON HALL
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

Jacqueline Bonneau
Law Student Intern

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.