09-1559-cr(L)

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-1559 (L)
09-2147-pr(CON), 09-2188-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

MILTON ROMAN, also known as Justice, JESSE CIVIDANES, ELUID RIVERA, also known as Smoke, also known as Smokey, WILFREDO ABRAHANTE,

(For continuation of Caption, See Inside Cover)

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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Defendants,

EDUARDO MEDINA COLON, RICHARD ORTIZ, also known as Cabessa,

Defendants-Appellants.

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Statement of Jurisdiction

This is a consolidated appeal from judgments entered in the United States District Court for the District of Connecticut (Peter C. Dorsey, J.), which had subject matter jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3582(c), and 28 U.S.C. § 2255.

On January 21, 2009, the district court denied the defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c). On April 16, 2009, the district court denied the defendant's motion for relief under 28 U.S.C. § 2255.

On April 27, 2009, the defendant filed both a motion seeking permission to file a late notice of appeal concerning the § 3582(c) ruling and a late notice of appeal of the § 3582(c) ruling. On May 22, 2009, the district court granted the defendant's motion for an extension of time to file his appeal.

With respect to the district court's ruling denying the defendant's § 2255 petition, the defendant filed a timely notice of appeal on May 18, 2009, pursuant to Fed. R. App. P. 4(a), which provides for a sixty-day deadline from the entry of a civil judgment. On May 18, 2009, the defendant also filed a motion for the issuance of a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B), and on May 27, 2009, the district court granted that motion via electronic order.

Statement of Issues Presented for Review[1]

I. Did the district court err in denying the defendant's motion for a modification of his sentence pursuant to 18 U.S.C. § 3582(c)?

II. Was the defendant deprived of his right to effective assistance of counsel because his attorney, who convinced the district court to impose a sentence that was nearly seven years below the bottom of the career offender guideline range, did not specifically ask the court to apply the powder cocaine guidelines?[2]

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[1] The appeal involving co-defendant Eduardo Colon (09-1559) was consolidated with these two appeals. Colon's counsel filed an *Anders* brief on September 9, 2009, and the Government subsequently filed a motion for summary affirmance as to his appeal.

[2] Although the defendant sets forth only one issue for review in this consolidated appeal, it appears to the Government that he is actually raising two issues: a challenge to the district court's denial of his § 3582(c) motion and a challenge to the district court's denial of his § 2255 petition.

United States Court of Appeals

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Docket Nos. 09-1559 (L)
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UNITED STATES OF AMERICA,

Appellee,

-vs-

RICHARD ORTIZ, also known as Cabessa,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In February 2006, the Drug Enforcement Administration ("DEA") used a cooperating witness ("CW-1") to engage in two separate controlled purchases of single ounce quantities of cocaine base from the defendant, Richard Ortiz. In March 2006, in an unrelated investigation, two Wallingford, Connecticut police officers arrested the defendant after finding him in possession of

more than two ounces of powder cocaine and three loaded, semi-automatic pistols.

The defendant was subsequently charged in two separate federal indictments. One indictment charged the defendant with two counts of distribution of five grams or more of cocaine base. Given that the defendant had sustained at least one prior drug felony conviction, the Government filed a second offender notice pursuant to 18 U.S.C. § 851, thereby increasing the statutorily mandated minimum term of incarceration to 120 months.

The second indictment charged the defendant with one count of possession of a firearm by a convicted felon, and one count of possession with the intent to distribute cocaine.

The defendant pleaded guilty to one of the distribution counts from the first indictment, and to the felon-in-possession count in the second indictment.

At sentencing, the district court found that the 262-327 month guideline range set forth in the Pre-Sentence Report ("PSR") was too high and imposed a non-guideline sentence of 180 months' incarceration. The defendant never appealed his conviction or sentence; instead, he filed separate motions to: (1) vacate his sentence under 28 U.S.C. § 2255 and (2) modify his sentence under 18 U.S.C. § 3582(c). The district court denied both motions and granted a certificate of appealability as to the § 2255 petition.

In this consolidated appeal, the defendant claims that the district court erred in denying his § 3582(c) motion and in rejecting his ineffective assistance of counsel claim. He asserts that the district court should have applied the powder cocaine guidelines under U.S.S.G. § 2D1. For the reasons that follow, the district court's rulings denying the § 3582(c) motion and the § 2255 petition should be affirmed.

Statement of the Case

On October 4, 2006, a federal grand jury sitting in Bridgeport returned an indictment against the defendant and thirty-four others charging a host of narcotics offenses. The defendant was charged in counts fifteen and sixteen with distributing five grams or more of cocaine base on February 2 and 6, 2006, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2. A26-A39.[3]

On May 22, 2007, a federal grand jury sitting in New Haven returned a separate, two-count indictment against the defendant. Count one charged that on March 21, 2006, the defendant possessed cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Count two charged the defendant with being a felon in

[3] The defendant's appendix will be cited as "A" followed by the page number.

possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). GA4-GA7.[4]

On October 4, 2007, the defendant pleaded guilty to count fifteen of the first indictment (distribution of five grams or more of cocaine base) and to count two of the second indictment (felon in possession of a firearm). A47-A107 (plea transcript). Prior to the guilty plea, the Government filed a second offender notice under 21 U.S.C. § 851 based on the defendant's multiple prior felony narcotics convictions, increasing the mandatory minimum penalty on the narcotics conviction from five to ten years. GA11-GA13, A63-A70.

On March 4, 2008, the district court (Peter C. Dorsey, J.) sentenced the defendant to concurrent terms of 180 months' incarceration on the narcotics conviction and 94 months' incarceration on the firearms conviction, followed by a total effective term of eight years' supervised release. A22-A24, A165, GA8-GA10. The defendant did not file a notice of appeal.

On November 24, 2008, the defendant filed a motion for retroactive application of the amended crack cocaine sentencing guidelines pursuant to 18 U.S.C. § 3582(c). The district court denied that motion in a written ruling of January 21, 2009. GA82-90, A174-A175. On April 27, 2009, the defendant filed a motion seeking permission to file a late notice of appeal, A1-A3, as well as a late notice

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[4] The Government's appendix will be cited as "GA" followed by the page number.

of appeal. A1-A3. On May 22, 2009, the district court granted the defendant's motion for an extension of time to file his appeal. A18.

During the pendency of the defendant's § 3582(c) motion, the defendant also filed a § 2255 petition. The district court denied the petition in a written ruling on April 16, 2009. GA22-GA41, A176-A179. On May 18, 2009, the defendant filed the notice of appeal and a motion for a certificate of appealability. GA46-GA47, GA108. On May 27, 2009, the district court granted the certificate of appealability. A21.

Statement of Facts

A. Factual basis

Had the two cases against the defendant gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Government's March 3, 2008 sentencing memorandum (GA66-GA71) and the PSR[5] (sealed appendix):

1. The narcotics conviction

The DEA began its investigation of the defendant after learning from a confidential source that the defendant was distributing ounce quantities of cocaine base. The investigation had started with controlled purchases from a co-defendant, Benigno Malave, and it was quickly

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[5] The Government will cite to the PSR directly.

determined through physical surveillance and other information that the defendant was Malave's drug supplier. GA66.

On February 2, 2006, law enforcement officials directed a cooperating witness ("CW-1") to contact the defendant and arrange for a controlled purchase of two ounces of crack cocaine. Previously, CW-1 had advised the DEA that because he/she did not know the defendant, Malave had offered to introduce CW-1 for a $100 fee. CW-1 therefore contacted Malave and asked to be introduced for the purpose of purchasing two ounces of crack cocaine. At Malave's instruction, CW-1, accompanied by an undercover officer, met Malave at his residence in Meriden, Connecticut. They followed Malave to the defendant's residence. The defendant met Malave and CW-1 at the rear door of the residence. The defendant did not have two ounces of crack cocaine to sell, however. Instead, the defendant sold one ounce of crack to CW-1 for $800. After the purchase, CW-1 paid Malave the $100 introduction fee. *See* PSR ¶ 14; GA67-GA68.

On February 6, 2006, the DEA instructed CW-1 to contact the defendant and arrange the purchase of another ounce of crack cocaine. CW-1 then contacted the defendant using the cell phone number that the defendant had provided during the drug transaction of February 2, 2006. CW-1 and the undercover officer subsequently met with the defendant at the rear entrance to the defendant's residence and completed the one ounce transaction. CW-1 again paid the defendant $800 in DEA funds for the ounce of crack. During the transaction, the defendant told CW-1

that he could handle any quantity of crack that CW-1 wanted. *See* PSR ¶ 15; GA68.

2. Firearms conviction

On March 21, 2006, in an unrelated law enforcement matter, two Wallingford police detectives began following a tan 2005 Chevrolet Equinox registered under plate 933SXE to a Raylene Pollock of Meriden because they suspected that the occupants were engaging in drug transactions. The officers had observed the vehicle arrive at a residence, stop for a brief time while one of the male occupants went inside for approximately twenty seconds, and depart as soon as the male returned to the vehicle. There were two occupants in the vehicle: a driver and a front seat passenger. As the detectives continued to follow the vehicle, they learned that its registration had expired on February 5, 2006. The officers followed the vehicle to the rear of a small strip of businesses located at 108 Quinnipiac Street, Meriden. There, the officers saw the defendant – who was driving the Equinox - exit and walk to an abandoned car, where he retrieved a backpack from the trunk. The defendant then placed the backpack in the rear seat of the Equinox. *See* PSR ¶ 16; GA68-GA69.

The detectives approached and identified themselves as police officers. Both the defendant and the front seat passenger began to make furtive movements. The defendant had not yet gotten back into the vehicle and reached for his waist area. The passenger was moving around in the front seat compartment of the vehicle. The officers detained both individuals and conducted pat

downs. The officers found approximately two ounces of what appeared to be powder cocaine wrapped in paper and electrical tape and stuffed in the defendant's pocket. The defendant admitted that the contraband was powder cocaine and, moreover, that it was his. The passenger was identified as Alejandro Ortiz, the defendant's brother. A search of the backpack revealed a variety of contraband, including about ten grams of a substance that appeared to be cocaine packaged in small baggies. The backpack also contained drug packaging material, three digital scales and other drug paraphernalia. *See* PSR ¶ 16; GA69.

The officers then searched the second vehicle, which was identified as a Hertz rental car. They opened the trunk and found another backpack similar to the one that the defendant had removed from the trunk. Inside the backpack were three loaded handguns: (1) a Colt, model MK IV, .45 caliber semi-automatic pistol bearing serial number FL02004E; (2) a Ruger, model P89, 9 millimeter semi-automatic pistol, bearing serial number 31005730; and (3) a Ruger, model P89, 9 millimeter semi-automatic pistol, bearing serial number 30433198. The officers also found a ballistics vest in the trunk. According to the trace summary reports provided by the Bureau of Alcohol, Tobacco and Firearms ("ATF"), all three firearms had been sold to an out-of-state dealer prior to their recovery in this case. The Ruger bearing serial number 304-33198 was sold to a dealer in New Hampshire in 1992. The Colt bearing serial number FL02004E was sold to a dealer in New Jersey in 1993. The Ruger bearing serial number 310-05730 was sold to a dealer in Vermont in 1995. *See* PSR ¶ 17; GA69-GA70.

The Hertz rental agreement revealed that the car was rented by the same woman who was the registered owner of the Chevrolet Equinox, Raylene Pollack. Pollack has been identified as the defendant's girlfriend. The defendant was also listed as an authorized driver on the Hertz rental car agreement. The firearms were preserved for fingerprints and tested at the state forensics laboratory. Although no latent fingerprints were found on the items tested, palm prints matching the defendant's palm print were lifted from the back edge of two of the magazines loaded inside two of the seized firearms. GA70.

The defendant waived his *Miranda* rights at the police station and, at first, admitted that the guns, drugs and bulletproof vest found in the rental vehicle belonged to him. He later denied ownership of these items and claimed that an unidentified third party owned them. The defendant claimed that this third party was storing the firearms in the rental vehicle because the third party was "hot." Without being prompted, the defendant volunteered that his fingerprints would be on the guns because he "played with them this morning." After he was arrested, the defendant had a panic attack and was taken to the hospital. GA70.

While at the hospital, FBI Special Agent Genaro Medina and DEA Special Agent Anastas Ndrenika interviewed the defendant. He appeared willing to cooperate, and the agents transported him back to the Wallingford Police Department. The defendant made a recorded telephone call to his alleged supplier and ordered 250 grams of powder cocaine. During the conversation,

the defendant tried to suggest that the firearms seized from the rental vehicle belonged to this supplier, but the supplier did not understand the defendant. He did, however, agree to come and meet the defendant in the same parking lot where the rental vehicle had been parked. When the individual arrived, the agents stopped him. They found no drugs or contraband in his vehicle, but did find a tire iron underneath his feet. They identified the supplier's residence, received consent to search it, but found no narcotics there. He was not arrested. GA71.

B. Sentencing proceedings

The Probation Officer determined that the base offense level, under Chapter Two of the November 1, 2007 Sentencing Guidelines, was 30 because the defendant was involved in distributing approximately 56.64 grams of cocaine base. *See* PSR ¶ 23. The PSR also concluded that the defendant was a career offender based on his three prior convictions for sale of narcotics and sale of a controlled substance. *See* PSR ¶ 29. After a three-level reduction for acceptance of responsibility, *see* PSR ¶ 30, the adjusted offense level was 34. *See* PSR ¶ 31.

As to criminal history, the PSR concluded that because the defendant was a career offender, his criminal history category was VI. *See* PSR ¶ 43. The PSR also pointed out that, even without the career offender designation, the defendant would be in Criminal History Category VI because he had accumulated twenty-two criminal history points. *See* PSR ¶ 43. At an adjusted offense level of 34 and a Criminal History Category VI, the defendant faced

a guideline incarceration range of 262-327 months. *See* PSR ¶ 72.

The defendant raised several arguments at sentencing in support of a request for a sentence of 120 months' incarceration. First, he objected to the PSR's reliance on his May 2, 2002, sale of narcotics conviction to establish his status as a career offender because that conviction arose from a guilty plea under the *Alford* doctrine. GA48. He did not, however, challenge his two separate 1995 convictions for sale of narcotics and sale of a controlled substance, and acknowledged in court that those two convictions, standing alone, qualified him for treatment as a career offender. A135. In addition, the defendant filed a separate sentencing memorandum requesting a non-guideline sentence of 120 months of imprisonment because the incarceration range suggested by the career offender guideline was excessive. GA61-GA65. In the alternative, the defendant argued in another, separate sentencing memorandum that his criminal history was overstated. GA52-GA60. The defendant maintained that the district court should use the guideline range that would have applied without the career offender designation, which, under the November 1, 2007 amended guidelines, would have been 130-162 months' incarceration, based on an adjusted offense level of 27 and a Criminal History Category VI. GA53.

In response, the Government sought a sentence within the 262-327 month guideline range set forth in the PSR. GA72. The Government argued that the defendant had six prior arrests for drug distribution, three prior felony

convictions for drug distribution, and was on parole when he committed the instant offenses. GA75-GA76. The Government also pointed out that the offense conduct was very serious given that the defendant regularly sold in excess of ounce quantities of cocaine base and had possessed three loaded firearms in connection with his drug dealing activities. GA76. Finally, the Government presented evidence that, in 2005, the defendant had used a firearm to attempt to murder another man and that, three days after the attempted murder, the defendant succeeded in killing this individual. GA76-GA78. The Government presented this evidence in support of its argument that a sentence within the 262-327 month guideline range was appropriate and in response to the defendant's request for a substantial downward departure to 120 months' incarceration. GA79, A114-A115, A117.

On March 4, 2008, the district court conducted a sentencing hearing. It confirmed with the defendant that he had read the PSR and did not have any additional objections, other than those raised in his sentencing memoranda. A136, A141. The defendant conceded that, despite his objection to one of his qualifying convictions, he was still a career offender based on his other qualifying convictions. A133, A135. He also conceded that he was subjected to an adjusted guideline range of 262-327 months' incarceration under the career offender guidelines. A141-A142. The Government did not have any objections, but pointed out that the PSR should be amended to set forth the correct guideline range for the felon in possession count, which was 92-115 months' incarceration. A138, A141. Judge Dorsey invited

comments from both counsel and raised the question of whether the career offender guideline range was too high to accomplish the goals of sentencing under 18 U.S.C. § 3553(a). A142-A144.

Defense counsel submitted letters from the defendant and the defendant's mother, and argued that a sentence within the guideline range was too high and would frustrate any attempts by the defendant to rehabilitate himself while incarcerated. A146-A147. The defendant addressed the court, expressed deep regret at having let down his family and his children, and indicated that he planned to take advantage of the various educational and vocational programs available in federal prison. A149.

The Government argued in support of a sentence within the 262-327 month guideline range, pointing out that the defendant had been arrested on ten prior occasions, six of which were for drug distribution, and had sustained three prior drug distribution felony convictions. A151. The defendant had been on state parole when he committed the instant offense. A151. The Government further argued that the offense conduct was very serious in that it involved the distribution of large quantities of crack cocaine and the knowing possession of three loaded firearms in connection with drug dealing. A152-A153. Finally, the Government relied on the proposed testimony from three different witnesses to argue that, in 2005, the defendant fired several shots at another individual in an attempt to kill him. A154-A155. The Government pointed out that, even if the district court applied the Chapter Two amended guidelines to the defendant, instead

of the career offender guidelines, he would still face a sentence of 130 months on the drug conviction, and a potential 92 month consecutive sentence on the unrelated firearms conviction. A156.

The district court imposed a non-guideline term of 180 months' imprisonment and eight years' supervised release on the drug conviction, and a concurrent guideline sentence of 94 months' incarceration on the firearms count. A165. In doing so, the court adopted the PSR's conclusion that the defendant was a career offender, but found that the career offender guideline range was excessive. A165. Specifically, in an amended written judgment, the court concluded:

> The following sentence is imposed pursuant to the Sentencing Reform Act of 1984. The criminal record includes 4 minor marijuana possession charges and two unspecified drug possession charges. Suggestive of amounts for personal use. His career offender status doubles his guideline range and is regarded as excessive and more th[an] is necessary to comply with 18 USC § 3553a. Defendant faces a state prosecution which is likely to add to the sentence imposed which is regarded as reasonable to achieve the purposes of 18 USC § 3553a.

A25. At the sentencing hearing, the court explained that the primary reason for its imposition of a non-guideline sentence was that the 262-327 month guideline range provided for by the career offender guidelines was greater

than necessary to satisfy the goals of sentencing. A165. The court acknowledged that the defendant had accumulated 22 criminal history points, but opined that many of these points came from relatively minor convictions. A163. The court also determined that the defendant appeared to have made positive steps toward rehabilitation, at least in his ability to recognize the importance of being a good father and a role model, and that a sentence within the advisory guideline range would likely destroy the progress that the petitioner had made. A162.

C. § 3582 proceedings

On November 24, 2008, the defendant filed a motion for a reduction in his sentence, pursuant to 18 U.S.C. § 3582(c). GA108. Specifically, he asked that the district court give him the benefit of the reduction in the crack cocaine guidelines under U.S.S.G. § 2D1.1, which took effect on November 1, 2007 and became retroactive as of May 1, 2008. GA108.

On December 16, 2008, the Government submitted its response to the defendant's motion. GA14. It argued that the defendant should not receive any sentence reduction because the district court had already applied the amended November 1, 2007 crack cocaine guidelines and because the district court had correctly determined that the defendant was a career offender, so that his guideline range was governed by U.S.S.G. § 4B1.1. GA15. As to the defendant's firearms conviction, the Government

explained that the guideline range in that case had been determined under U.S.S.G. § 2K2.1, not § 2D1.1. GA15.

On January 21, 2009, the district court denied the defendant's § 3582(c) motion in a two-page written ruling. A174. It found that the defendant's Chapter Two guideline range for the drug conviction had been calculated under the November 1, 2007 amended sentencing guidelines. A174. It also found that, because the defendant was a career offender, the Chapter Two amendments were irrelevant. A174. The district court further stated that it had imposed a non-guideline sentence that had not been based on any particular guideline range. A175.

D. § 2255 proceedings

On March 2, 2009, the defendant filed a motion pursuant to 28 U.S.C. § 2255, GA22-GA41, and argued that his trial attorneys were ineffective for failing to advocate that he should have been sentenced based on the powder cocaine guidelines, not the crack cocaine guidelines. GA27-GA30. Specifically, the defendant claimed that because he pleaded guilty to distributing "cocaine base," and not "crack cocaine," he should not have been subjected to the guideline ranges applicable to "crack cocaine." GA27-GA30.

The Government responded on March 12, 2009. GA91. First, the Government argued that the defendant's petition was procedurally barred because he failed to raise the claim at sentencing or on direct appeal. GA102-

GA104. Second, the Government argued that the petition lacked merit because the defendant's trial attorneys had been effective. GA104-GA106. In this regard, because the defendant had been sentenced as a career offender, his guideline range under Chapter Two was irrelevant, as was any argument that his guideline range should have been calculated based on the powder cocaine guidelines. GA104. Moreover, the defendant's trial counsel had successfully persuaded the district court to impose concurrent sentences that resulted in a total effective sentence 82 months below the advisory guideline range notwithstanding the defendant's status as a career offender. GA105.

The district court dismissed the petition in a written ruling on April 16, 2009. A176. The court aptly described the defendant's claim as one alleging that "his guilty plea to distributing 5 grams or more of cocaine base does not constitute a guilty plea to distributing 5 grams or more of crack." A177. The court rejected this claim because it "ignores the fact that at his plea hearing, [the defendant] clearly pled guilty to the offense of distributing 5 grams or more of crack, rendering [his] semantic distinction between cocaine base and crack irrelevant for purposes of this case." A177. Indeed, the district court found that the word "crack" was used nineteen times during the plea colloquy to describe the drug offense to which the defendant pleaded guilty. A177; *see* A50-A51, A57, A65-A66, A73-A74, A93-A94, A95-A96, A100. Judge Dorsey determined that because the defendant "knowingly, repeatedly and under oath indicated his understanding that he was pleading guilty to distributing crack, he cannot now

contend that he did not intend to plead to that offense and be sentenced accordingly." A177. The court explained, "While there may be a distinction in some instances between cocaine base and crack, in [the defendant's] case, the terms were clearly used synonymously and interchangeably because there was no question that the substance that [the defendant] had distributed was indeed crack." A177-A178. Continuing, Judge Dorsey emphasized that during the plea colloquy he specifically explained to the defendant that the penalties for distributing crack cocaine were higher than those for distributing powder cocaine, and the defendant had indicated he understood the difference. A178; *see* A73-A74. Concluding, the district court determined that the defendant's counsel had not been ineffective and, in particular, that his counsel "did not fail to raise any non-frivolous argument on his behalf with respect to his plea or sentence."[6] A178.

Summary of Argument

I. The district court properly denied the defendant's § 3582(c) motion because it had already applied the November 1, 2007 crack cocaine amendments to its Chapter Two guideline calculation for the defendant and

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[6] Although the district court made note of the Government's arguments that (1) the petition was procedurally barred and (2) any application of the Chapter Two powder cocaine guidelines would have been irrelevant due to the defendant's status as a career offender, it did not resolve these issues. A178.

because it ultimately sentenced the defendant as a career offender and without regard to the Chapter Two guideline range.

II. The district court properly dismissed the defendant's § 2255 petition because the defendant's counsel was effective and was able to convince the district court to impose a term of incarceration that was 82 months below the guideline range set forth in the PSR.

Argument

I. The district court properly denied the defendant's motion for reduction in sentence pursuant to 18 U.S.C. § 3582(c)

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

"'A district court may not generally modify a term of imprisonment once it has been imposed.'" *United States v. Martinez*, 572 F.3d 82, 84 (2d Cir. 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 in 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.[7]

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[7] 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.* (continued...)

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). *See* U.S.S.G. App. C, Amend. 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—

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[7] (...continued)
Thompson, 70 F.3d 279, 281 (3d Cir. 1995) (per curiam).

(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 amendments in question in this case are Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses, and Amendment 715, effective May 1, 2008, which changed the way combined offense levels are determined in cases involving crack and one or more other drugs.[8] 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. The Commission later amended § 1B1.10(c) to make Amendment 715 apply retroactively, effective May 1, 2008. U.S.S.G. App. C, Amend. 716.

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

In Amendments 706 and 715, 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-to-1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory mandatory minimum penalties, it 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.

1. 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*, 572 F.3d at 84 (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).

C. Discussion

The district court properly denied the defendant's § 3582(c) motion. First, the court actually applied the amended November 1, 2007 crack cocaine guidelines to the defendant. In calculating the Chapter Two guideline range, the court found that the base offense level for a quantity of 50 to 150 grams of crack cocaine was 30, which reflects the amendments to § 2D1.1 set out in the November 1, 2007 amendments.

Second, the district court concluded – and the defendant does not disagree – that the defendant was a career offender. As a result, the 262-327 month career offender guideline range was the appropriate starting point in the court's sentencing analysis. In rejecting the defendant's § 3582 motion, the court explained that, although it decided to impose a non-guideline sentence of 180 months' incarceration, its decision was not based at all on the Chapter Two guideline range, so that the difference between the powder cocaine and crack cocaine guideline ranges under Chapter Two was entirely irrelevant to the sentencing determination.

To the extent the defendant is arguing that he should have received some additional modification to his Chapter Two guideline range, beyond the two-level reduction provided for by the November 1, 2007 amendments, his claim is foreclosed by the Supreme Court's recent decision in *Dillon v. United States*, 2010 WL 2400109 (S. Ct. June 17, 2010). In *Dillon*, the Court held that the holding in *United States v. Booker*, 543 U.S. 220 (2005), did not apply to a § 3582(c) proceeding and, therefore, does not require U.S.S.G. § 1B1.10(b) to be treated as an advisory guideline. *Dillion*, at *7-*8. Specifically, the Court held:

> Given the limited scope and purpose of § 3582(c)(2), we conclude that proceedings under that section do not implicate the interests identified in *Booker*. Notably, the sentence-modification proceedings authorized by § 3582(c)(2) are not

> constitutionally compelled. We are aware of no constitutional requirement of retroactivity that entitles defendants sentenced to a term of imprisonment to the benefit of subsequent Guidelines amendments. Rather, § 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.

Id. at *7.

The *Dillion* Court further held that a § 3582(c) proceeding is limited in scope and only allows the district court to correct the portion of the sentence affected specifically by the guideline amendment at issue:

> As noted, § 3582(c)(2) does not authorize a resentencing. Instead, it permits a sentence reduction within the narrow bounds established by the Commission. The relevant policy statement instructs that a court proceeding under § 3582(c)(2) "shall substitute" the amended Guidelines range for the initial range "and shall leave all other guideline application decisions unaffected." § 1B1.10(b)(1). Because the aspects of his sentence that Dillon seeks to correct were not affected by the Commission's amendment to § 2D1.1, they are outside the scope of the proceeding

> authorized by § 3582(c)(2), and the District Court properly declined to address them.

Id. at *9.

Given the Supreme Court's decision in *Dillon*, the defendant here is foreclosed from seeking any additional sentence reduction under § 3582(c) beyond the two-level reduction provided for by the November 1, 2007 amendments to the crack cocaine guidelines.

II. The district court properly rejected the defendant's claim that his counsel ineffectively failed to argue at sentencing that the Chapter Two powder cocaine guidelines applied

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

To obtain collateral relief under 28 U.S.C. § 2255, an aggrieved defendant must show that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Section 2255 essentially codifies the common-law writ of habeas corpus in relation to federal criminal offenses. Habeas corpus relief is an extraordinary remedy and should only be granted where it is necessary to redress errors that, were they left intact, would "inherently result in a complete

miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962). The strictness of this standard embodies the recognition that collateral attack upon criminal convictions is "in tension with society's strong interest in [their] finality." *Ciak v. United States*, 59 F.3d 296, 301 (2d Cir. 1995); *see also Strickland v. Washington*, 466 U.S. 668, 693-94 (1983) (recognizing the "profound importance of finality in criminal proceedings").

Although, in general, a writ of habeas corpus will not be allowed to do service for an appeal, *see Reed v. Farley*, 512 U.S. 339, 354 (1994), "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003). A person challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. The ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections, as "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

In *Strickland*, the Supreme Court held that a defendant who challenges his lawyer's effectiveness must establish

(1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's unprofessional errors actually prejudiced the defense. *Id.* at 688.

> To satisfy the first, or "performance," prong, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance," [*Strickland*, 466 U.S.] at 690, and to satisfy the second, or "prejudice," prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Brown v. Artuz, 124 F.3d 73, 79-80 (2d Cir. 1997). A defendant must meet both requirements of the *Strickland* test to demonstrate ineffective assistance of counsel. If the defendant fails to satisfy one prong, the court need not consider the other. *Strickland*, 466 U.S. at 697. "The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Linstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001).

"A court of appeals reviews a district court's denial of a 28 U.S.C. § 2255 petition *de novo*." *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir. 2004); *Coleman v. United States*, 329 F.3d 77, 81 (2d Cir. 2003). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698; *see also United States*

v. Monzon, 359 F.3d 110, 119 (2d Cir. 2004); *United States v. Schwarz*, 283 F.3d 76, 90-91 (2d Cir. 2002). Findings of historical fact are upheld unless clearly erroneous, while conclusions of law are reviewed *de novo*. *See Monzon*, 359 F.3d at 119; *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir. 1998) (per curiam).

C. Discussion

The defendant improvidently argues that his trial counsel was ineffective for failing to argue that the powder cocaine guidelines – instead of the crack cocaine guidelines – applied to his case. This claim fails for several reasons.

First, as discussed above, there was no dispute at sentencing that the defendant was a career offender and, therefore, subject to the career offender guidelines under U.S.S.G. § 4B1.1. Although the defendant challenged one of his qualifying convictions, he did not challenge the other two and acknowledged that they would be sufficient to establish his status as a career offender. A133, A135. The defendant also did not challenge the district court's finding that the correct guideline range in this case was 262 to 327 months. A133, A135. For this reason, the Chapter Two guideline determination was completely irrelevant. Indeed, in denying the defendant's § 3582 motion, the district court stated that its ultimate sentence was a non-guideline sentence and, therefore, was not based on any specific guideline range. A174-A175.

In his brief, the defendant erroneously suggests that he was sentenced based on the crack cocaine guidelines under U.S.S.G. § 2D1.1. For example, at page five of his brief, the defendant submits that his guideline calculation was based on "a base offense level of 30" under "§ 2D1.1(c)(5)." At page six, the defendant contends that the guideline calculation set forth in the PSR was "based on the drug quantity." And at page nine, the defendant argues that the district court sentenced him "pursuant to the Sentencing Guidelines relating to crack cocaine." These assertions are simply incorrect. The PSR and the district court expressly determined that the defendant was a career offender and, therefore, calculated his guideline range under § 4B1.1, without regard to crack cocaine guidelines set forth in § 2D1.1. A132, A142.

In this same vein, the defendant also relies on this Court's decision in *McGee* to argue that the district court's imposition of a non-guideline sentence entitles him to a sentence reduction. *See* Def's Brief at 21. In *McGee*, however, the defendant was ultimately sentenced based on the Chapter Two crack cocaine guidelines. *See id.*, 553 F.3d at 229-230. In the case at bar, by contrast, the district court imposed a non-guideline sentence without regard to the crack cocaine guidelines in § 2D1.1.[9] A177-A178.

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[9] Moreover, had the district court been influenced by the crack cocaine guidelines under § 2D1.1, the defendant would not have been entitled to relief under *McGee* because, in calculating the Chapter Two guidelines, Judge Dorsey applied the November 1, 2007 amendments.

Second, as the district court found, the sentencing argument suggested by the defendant in his § 2255 petition and on appeal would have been frivolous. In this case, there was no meaningful difference between the use of the terms "crack cocaine" and "cocaine base." In the plea agreement, the defendant admitted that he had twice distributed "cocaine base," but, during the plea canvass, the defendant acknowledged many times that he had possessed and distributed "crack cocaine." A50-51, A57, A65-A66, A73-A74, A93-A94, A95-A96, A100. As the district court concluded, the terms were used in this case "synonymously and interchangeably because there was no question that the substance that [the defendant] had distributed was indeed crack." A177-A178.

Third, the defendant's trial counsel was successful in convincing the sentencing court to impose a term of incarceration that was 82 months below the guideline range. Given the very serious nature of the offenses of conviction, coupled with the defendant's dismal criminal history, counsel's performance in securing 82 months of leniency is aptly characterized as remarkable as opposed to ineffective. After all, the defendant had: (1) accumulated 22 criminal history points; (2) committed the federal offenses while on parole; and (3) been involved both in distributing large quantities of crack cocaine and possessing multiple loaded firearms in connection with his drug trafficking. Counsel's advocacy was highly effective, moreover, because had the defendant been successful in convincing the district court to impose the mandatory minimum 120 month sentence on the drug conviction, he still would have faced a potential, consecutive 92 month

guideline sentence on the unrelated felon-in-possession conviction. It is against this backdrop, where defense counsel convinced the district court to impose a total effective sentence of 180 months – in the face of a 262-327 month guideline range *and* the real potential for a consecutive sentence on the gun count – his advocacy becomes patent.

At bottom, counsel's sentencing arguments served the defendant well. The defendant cannot satisfy either the performance or the prejudice prongs of *Strickland*.

Conclusion

For the foregoing reasons, the district court's decisions denying the defendant's § 3582(c) motion and his § 2255 petition should be affirmed.

Dated: July 12, 2010

Respectfully submitted,

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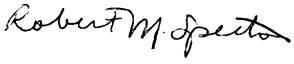

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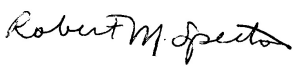
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,508 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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ADDENDUM

Title 18, United States Code, Section 3582(c)

(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.