09-4154-cr

To Be Argued By:
SANDRA S. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-4154-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOHN MOCK III, also known as Dinky,
Defendant-Appellant,

JESSE JAMES BELK, also known as Jesse Johnson,
Defendant.

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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Statement of Jurisdiction

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The court originally entered a final judgment against the defendant on January 8, 1998. Appendix ("A") 10.

On April 20, 2009, the defendant filed a *pro se* motion under 18 U.S.C. § 3582(c)(2) seeking a reduction of his sentence. A13. The district court denied the motion in a ruling entered on June 24, 2009. A13, A59. On October 2, 2009, the defendant filed a notice of appeal. A13, A60.

Although the defendant's notice of appeal was untimely under Fed. R. App. P. 4(b), the time limits in that rule are not jurisdictional. *United States v. Frias*, 521 F.3d 229, 231-34 (2d Cir.), 129 S. Ct. 289 (2008). In light of an apparent ambiguity in the record on when the *pro se* defendant received a copy of the district court's ruling, the Government waives any challenge to the timeliness of the notice of appeal in this case.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

I. Did the district court properly deny the defendant's motion under 18 U.S.C. § 3582(c)(2) for a sentence reduction based on the newly revised crack cocaine sentencing guidelines when the defendant was sentenced – without objection – under the career offender guidelines, even though the district court never announced at sentencing that the defendant was being sentenced as a career offender?

II. For the first time in this appeal from the denial of his § 3582(c)(2) motion, the defendant argues that the district court committed error at his sentencing twelve years ago by failing to announce in open court that he was a career offender. Did the district court plainly err in failing to correct this alleged error when ruling on the defendant's motion under § 3582(c)(2)?

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Preliminary Statement

The defendant, John Mock III, appeals from the district court's denial of his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on the revised crack cocaine sentencing guidelines. The defendant was sentenced under the career offender guidelines, however, not the crack cocaine guidelines. Accordingly, under this Court's

decision in *United States v. Martinez*, 572 F.3d 82 (2d Cir. 2009) (per curiam), the district court properly denied his motion for a sentence reduction. This conclusion holds even though the district court never uttered the words "career offender" at the defendant's sentencing. There was no dispute at sentencing that the defendant's guidelines were based on the career offender guidelines, and hence there is no question now that he is ineligible for a sentence reduction based on the revised crack cocaine guidelines.

As an alternative argument, the defendant claims – for the first time on appeal – that his case should be remanded to correct an alleged error from his 1998 sentencing hearing. According to the defendant, the district court's failure to announce in open court that he was a career offender requires a remand. This argument is without merit. A proceeding under § 3582(c)(2) is not a full re-sentencing, much less a substitute for a direct appeal to correct errors in the original sentencing proceeding. Section 3582(c)(2) authorizes only a reduction in a term of imprisonment based on a subsequently lowered sentencing guidelines range; it does not permit a district court to reconsider sentencing issues beyond the newly lowered guidelines range. The district court's judgment should be affirmed.

Statement of the Case

On January 7, 1997, a federal grand jury returned an indictment that charged the defendant with conspiracy to possess with the intent to distribute crack cocaine and heroin (Count 1), possession with the intent to distribute crack cocaine (Count 2), and possession with the intent to distribute heroin (Count 3), in violation of 21 U.S.C. §§ 841(a)(1) and 846. A4, A14-15. The defendant pleaded guilty to Count 2 of the indictment on October 17, 1997. A9. On January 6, 1998, the district court (Ellen Bree Burns, J.) sentenced the defendant primarily to 212 months' imprisonment. A9-10, A33, A35-36.

On April 20, 2009, the defendant filed a *pro se* motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). A13. The district court denied this motion in a ruling entered June 24, 2009. A13, A59. The defendant filed a notice of appeal on October 2, 2009. A13, A60. As noted above, *see* Statement of Jurisdiction, the Government waives any challenge to the timeliness of the defendant's notice of appeal.

The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The defendant's conviction and sentence.

On January 7, 1997, a federal grand jury sitting in Bridgeport, Connecticut returned an indictment charging the defendant with conspiracy to possess with the intent to distribute crack cocaine and heroin in violation of 21 U.S.C. §§ 841(a)(1) & 846 (Count 1), possession with the intent to distribute crack cocaine in violation of 21 U.S.C. § 841(a)(1) (Count 2), and possession with the intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) (Count 3). A14-15.

On October 17, 1997, the defendant pleaded guilty to Count 2 of the indictment. A9, A16-23. As set forth in the plea agreement signed that day, the defendant agreed to plead guilty to possession with the intent to distribute more than five grams of crack cocaine. A16. As relevant to this appeal, the plea agreement set forth the parties' agreement on a stipulated guidelines range of 188 to 235 months. The plea agreement further set out the guidelines calculations used to reach that range, noting that the defendant's offense level was 34 under U.S.S.G. § 4B1.1(B) "[b]ecause the defendant is a career offender." A19. The parties both agreed not to seek any departures from the calculated range, and in fact, agreed to jointly recommend a 188-month sentence, while expressly noting that this joint recommendation was not binding on the district court. A19.

After the defendant pleaded guilty, the United States Probation Department prepared a Pre-Sentence Report. The PSR calculated the defendant's offense level as 34 using the career offender guideline in U.S.S.G. § 4B1.1(B). PSR ¶ 27. After subtracting three levels for acceptance of responsibility, the PSR concluded that the defendant's offense level was 31. PSR ¶¶ 28-30. The defendant's criminal history placed him in Criminal History Category VI. PSR ¶¶ 31-45. With an offense level of 31 and a Criminal History Category VI, the PSR calculated a guidelines range of 188-235 months' imprisonment. PSR ¶ 65. The defendant objected to two paragraphs in the PSR: (1) the PSR's failure to set forth the parties' sentencing recommendation as described in the plea agreement, and (2) the drug quantity calculation. *See* Second Addendum to the PSR.

The district court held a sentencing hearing for the defendant on January 6, 1998. A9-10, A24-34. The court began the proceeding by addressing the defendant's two objections to the PSR. With respect to the sentencing recommendation, the court found no reason to modify the PSR because the sentencing recommendation was addressed in an addendum to the PSR and in the plea agreement, which was itself attached to the PSR. A26. Turning to the defendant's challenge to the drug quantities, the court noted the defendant's disagreement but found no need to resolve the issue because "[i]t has no impact on the guideline calculation, in any event." A27. Defense counsel agreed that it had no impact on the guidelines calculation. A27.

After this exchange with counsel, the court addressed the defendant personally, asking whether he had read the PSR and discussed it with his lawyer. A27. The defendant responded, "Yes, ma'am" to both questions. A27. The court then asked the defendant, "[o]ther than the matters that [your lawyer] brought to my attention, is there any correction that you feel should be made in the report?" A27-28. The defendant responded, "No, ma'am." A28.

At the conclusion of this colloquy with the defendant, the defendant's lawyer spoke on his behalf. She opened her statement by expressly endorsing the PSR's calculation of the defendant's guidelines range: "I concur with the probation officer's determination of the guideline range in this case, 188 to 235, ..." A28. The balance of her comments were directed towards encouraging the court to sentence the defendant to 188 months' imprisonment, as jointly recommended by the parties. A28-31.

Counsel for the Government spoke briefly, A31-32, and then the court responded to both parties, explaining the reasoning for its decision to reject the parties' sentencing recommendation and sentence the defendant to 212 months' imprisonment:

> Well, certainly, I gather everyone recognizes that this defendant has a problem with drugs and that is an explanation perhaps for his conduct but in the Court's view, it's not an excuse.
>
> Given the magnitude of his criminal conduct in the last several years and the kinds of things that he

was responsible for: A couple of robberies; a couple of assaults and, parenthetically, I would notice that the victim of those assaults in both cases were women which says something about the defendant also, I think; a number of narcotics convictions; larceny; possession of a stolen firearm; burglary; and then actually seeing to the introduction of drugs into prison, in the jail where he was being held for purposes of distributing drugs in jail, an escape from jail and during the course of his freedom after that escape, engaging in further criminal conduct.

It's a very serious criminal record and while I appreciate your argument that drug problem is probably the root cause of it, I don't think that that suggests he should be given especially easy treatment as a result.

I have a lot of defendants who come before us with the same guidelines but not all of them have the serious criminal history that this defendant has.

I don't think that 188 months is an appropriate sentence in this case, notwithstanding the recommendation of the government and the defense counsel jointly. I think something in addition to that is required to reflect the seriousness of the defendant's conduct.

> Accordingly, he's committed to the custody of the Bureau of Prisons for a period of 212 months . . . .

A32-33.

After imposing a sentence of 212 months' imprisonment, 4 years' supervised release, and a $100 special assessment, the court asked, "Is there anything further?" Both parties responded, "No, your Honor." A33-34. *See also* A35-36 (judgment).

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

On April 20, 2009, the defendant filed a *pro se* motion for sentence reduction under 18 U.S.C. § 3582(c)(2). In this motion, the defendant contended that he was entitled to a reduced sentence based on the changes to the crack cocaine sentencing guidelines which were passed by the Sentencing Commission on November 1, 2007 and made retroactive for all defendants. A13, A41-48.

In a succinct ruling entered June 24, 2009, the district court denied the defendant's motion for a sentence reduction. A13, A59. As the court explained, "[b]ecause defendant was sentenced as a career offender and did not receive a downward departure, he is ineligible in accordance with U.S.S.G. § 1B1.10, comment, for a sentence reduction, and the motion . . . is denied." A59.

This appeal followed.

Summary of Argument[1]

I. The district court properly denied the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on the new crack guidelines because the defendant was not sentenced under those guidelines. The defendant was sentenced as a career offender, with no departures, and as such, he is ineligible for a sentence reduction as this Court held in *United States v. Martinez*, 572 F.3d 82 (2d Cir. 2009) (per curiam). As the *Martinez* Court explained, the amendments to the crack guidelines did not result in the career offender guidelines being lowered, so the district court was without authority under § 3582(c)(2) to reduce the defendant's sentence. The fact that the district court did not utter the words "career offender" at sentencing does not change this conclusion. There was no dispute at sentencing that the defendant was a career offender – indeed, he had agreed he was a career offender in his plea agreement, and his lawyer expressly endorsed the PSR's calculation of his guidelines range using the career offender guidelines – and

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[1] The issue discussed in Part II of this brief is squarely before the Supreme Court in *Dillon v. United States*, No. 09-6338 (U.S.) (arg. Mar. 30, 2010); the Supreme Court's decision in that case is likely to address questions pertinent to the consideration of questions in Part I as well. In addition, this Court has before it at least one case raising the same question as that presented in Part II of this brief. *See United States v. Castillo*, No. 09-0758-cr (2d Cir.) (on submission May 17, 2010).

accordingly, he is not now eligible for a sentence reduction under the new crack cocaine guidelines.

II. The defendant's argument – raised for the first time in this appeal – that the case should be remanded to correct an alleged error in his 1998 sentencing hearing also should be rejected. The defendant contends that the district court violated the "open court" requirement of 18 U.S.C. § 3553(c) when it failed to announce that he was a career offender at sentencing, and effectively asks this Court to re-open his sentencing to correct that error. But the propriety of the defendant's original sentencing proceeding is not before this Court. The only question here is whether the defendant was eligible for a sentence reduction under § 3582(c)(2) and the new crack cocaine guidelines. A proceeding under § 3582(c)(2) is not a full re-sentencing, much less a substitute for a direct appeal. Accordingly, the district court's failure to correct the alleged "open court" violation was not error at all, much less plain error.

Moreover, even if there were some error in the court's original implementation of § 3553(c) at sentencing, the defendant has not shown that the error affected his substantial rights. Even if the court failed to state openly that the defendant was a career offender at sentencing, the record reveals that there was no dispute over this topic. For the same reason, any failure by the district court to correct an error that would have had no impact on the defendant's sentence cannot be said to impact the fairness, integrity, or public reputation of the proceedings. The district court's judgment should be affirmed.

Argument

I. The defendant is ineligible for a sentence reduction based on the new crack cocaine sentencing guidelines because he was sentenced under the career offender guidelines, not the crack cocaine guidelines.

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.'" *Martinez*, 572 F.3d at 84 (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.[2]

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

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[2] 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).

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 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.[3] 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.

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, 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.

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*, 572 F.3d at 84 (citing *United States v. Williams*, 551 F.3d 182, 185 (2d Cir.

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

2009)); *see also United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam).

B. Discussion

This Court's recent decision in *Martinez* 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)(2) 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)(2) 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, 572 F.3d at 84 (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 *Williams*, 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."

Id. at 85 (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 U.S.S.G. § 1B1.10(a) to permit reduction of [the defendant's] sentence on the basis of [that] amendment[]," and accordingly not permitted by § 3582(c)(2). *Id.* at 86; *see also United States v. Savoy*, 567 F.3d 71, 73-74 (2d Cir.) (per curiam) (policy statement limiting extent of sentence reduction to the amended guideline range was mandatory and binding on district courts), *cert. denied*, 130 S. Ct. 342 (2009).

Here, just as in *Martinez*, the defendant was sentenced as a career offender. Although the PSR noted that the defendant's base offense level under the drug quantity guideline of § 2D1.1 was 28, PSR ¶ 21, the PSR adjusted this offense level to 34 because the defendant's prior convictions marked him as a career offender under § 4B1.1, PSR ¶ 27. After subtracting three levels from the career offender level for acceptance of responsibility, PSR

¶¶ 28-29, the defendant's total offense level was 31, and his Criminal History Category was VI. *See* PSR ¶¶ 30, 45. These values yielded a sentencing guidelines range of 188-235 months' imprisonment, Sentencing Table, and the defendant was sentenced to 212 months' imprisonment, squarely within the career offender guideline range. A33.

Because the defendant was sentenced as a career offender, the career offender guideline "subsumed and displaced" § 2D1.1, *Martinez*, 572 F.3d at 85, and he was not sentenced "based on a Guidelines range that has been 'subsequently . . . lowered' by the Sentencing Commission." *Id.* at 84 (quoting 18 U.S.C. § 3582(c)(2)). Moreover, because the amendments to the crack guidelines did not lower the defendant's applicable guidelines range, "[i]t would . . . be inconsistent with . . . § 1B1.10(a) to permit reduction of [the defendant's] sentence on the basis of [that] amendment[]." *Id.* at 86.

The district court's failure, at the defendant's 1998 sentencing hearing, to announce that the defendant was being sentenced as a career offender does not undermine the conclusion that the defendant was in fact sentenced as a career offender. As a preliminary matter, the defendant's agreement in 1998 that he should be sentenced as a career offender forecloses any argument now that he was *not* sentenced as a career offender. *See United States v. Womack*, 985 F.2d 395, 400 (8th Cir. 1993) (holding that "a defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal") (internal quotation omitted); *United States v. Cook*, 447 F.3d 1127, 1128 (8th Cir.

2006) (holding that a defendant waived his right to contest a sentence enhancement by entering into a plea agreement that called for that enhanced penalty). Specifically, the defendant agreed, both in his plea agreement and at sentencing, A19, A28, that he should be sentenced under the career offender guidelines; that agreement waives any argument that he was not in fact sentenced as a career offender.

Putting aside the defendant's waiver, however, the overwhelming and undisputed evidence demonstrates that the defendant was sentenced as a career offender even if the district court did not utter the words "career offender" at sentencing. First, the parties agreed that the defendant qualified as a career offender and reduced that agreement to writing in the plea agreement. A19. Second, the PSR concluded that the defendant qualified as a career offender, PSR ¶ 27, and the defendant raised no objection to that conclusion, *see* A27 (defendant stating at sentencing that he had no objection to the PSR). Third, at sentencing, the defendant's lawyer expressly stated that she agreed with the PSR's calculation of the guidelines range, a range calculated using the career offender guidelines. *See* A28 ("I concur with the probation officer's determination of the guideline range in this case, 188 to 235, ..."). With this evidence of an undisputed agreement on the applicability of the career offender guidelines, the district court sentenced the defendant squarely within those guidelines. A33. And finally, just two days later, the district judge signed the Statement of Reasons, in which the court stated that it had adopted the

guidelines "as set forth in the Presentence Report." A38. In short, the defendant was sentenced as a career offender.

In sum, the defendant was sentenced as a career offender and under *Martinez*, he is ineligible for a sentence reduction under § 3582(c)(2) based on the crack cocaine guidelines.

II. The district court did not commit plain error by failing to correct an alleged error in the defendant's 1998 sentencing hearing when it ruled on the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2).

A. Governing law and standard of review

The governing law is set forth in section I.A.1. above.

When a defendant raises an issue for the first time on appeal, this Court reviews for plain error. Fed. R. Crim. P. 52(b). Under plain error review, this Court can reverse only if there is (1) an error (2) that is plain (3) which affected the substantial rights of the defendant (4) and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See United States v. Johnson*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732-36 (1993); *United States v. MacPherson*, 590 F.3d 215, 218-19 (2d Cir. 2009); *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007).

Error is "[d]eviation from a legal rule" that has not been waived. *Olano*, 507 U.S. at 732-33. That error must

be "'clear' or, equivalently, 'obvious' . . . under current law." *Id.* at 734 (internal citations omitted). An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except "in the rare case" where it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted). The error must have affected substantial rights, that is, "must have been prejudicial . . . hav[ing] affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. When those three conditions are met, an appellate court may exercise its discretion to correct the error "but only if . . . the error seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceedings." *Johnson*, 520 U.S. at 467 (internal quotation marks and citations omitted).

B. Discussion

The defendant argues that the district court violated the "open court" requirement during his sentencing and thus that this case should be remanded "for compliance with the open court requirement, analysis of his criminal history, and reconsideration of his motion for a sentence reduction." Brief at 8. As described above, the defendant is ineligible for a sentence reduction, and aside from this passing reference, he makes no argument to explain how or why his criminal history should be re-analyzed. *See Hicks v. Baines*, 593 F.3d 159, 166 n.5 (2d Cir. 2010) (holding that conclusory allegations, with no explanation,

analysis or developed argument, are forfeited on appeal). Thus, the defendant's argument reduces to the claim that his sentencing should be re-opened to allow the district court to comply with the open court requirement of 18 U.S.C. § 3553(c).

This claim, raised for the first time on appeal, does not meet the stringent standards for plain error review. *First*, and most fundamentally, there was no error in failing to re-consider the defendant's sentence because a proceeding under 18 U.S.C. § 3582(c)(2) is simply the wrong place to make an argument about an error at the original sentencing proceeding. Section 3582(c)(2) provides a "limited exception[]" to the general rule that "'a district court may not generally modify a term of imprisonment once it has been imposed.'" *McGee*, 553 F.3d at 226 (quoting *Cortorreal*, 486 F.3d at 744). Under the express terms of this limited exception, a defendant is entitled to relief under § 3582(c)(2) "only . . . 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*, 572 F.3d at 84 (quoting § 3582(c)(2)).

In short, a defendant's right to relief under this statute arises only when the Sentencing Commission lowers a guidelines range. Given this limited triggering event,"it would be quite incongruous, to say the least, if section 3582(c)(2) provided an avenue for sentencing adjustments wholly unrelated to such an amendment." *United States v.*

Lafayette, 585 F.3d 435, 438 (D.C. Cir. 2009). If construed this way, "every retroactive Guidelines amendment would carry a significant collateral windfall to all affected prisoners, reopening every aspect of their original sentences." *Id.*

Moreover, such an interpretation would be inconsistent with the Sentencing Commission's policy statement. In its recently revised policy statements, the Sentencing Commission made clear that proceedings under § 1B1.10 and § 3582(c)(2) "do not constitute a full resentencing of the defendant." § 1B1.10(a)(3). Furthermore, in subsection (b)(1) the policy statement explicitly directs that "[i]n 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 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."

And as this Court has repeatedly held, the restrictions in § 1B1.10 are mandatory and must be respected. *See Savoy*, 567 F.3d at 73-74 (policy statement's restriction requiring that any sentence reduction be within the amended guideline range when the original sentence was within the pre-amendment range is mandatory; noting that § 3582 not a full resentencing); *Williams*, 551 F.3d at 186 (guidelines policy statement mandatory). In *Williams*, for instance, this Court held that the defendant was ineligible for a sentence reduction under § 3582(c)(2) because his

sentence ultimately had not been based on the cocaine base guidelines. 551 F.3d at 185-87. The Court referred to the policy statement in § 1B1.10 and its application notes, and held: "We are bound by the language of this policy statement because Congress has made it clear that a court may reduce the terms of imprisonment under § 3582(c) only if doing so is 'consistent with applicable policy statements issued by the Sentencing Commission.'" *Id.* at 186 (quoting 18 U.S.C. § 3582(c)(2)).

This interpretation of § 3582(c)(2) is fully consistent with the holdings of other courts that have made plain that a § 3582(c)(2) sentence-reduction proceeding is not a full resentencing at which a district court may re-examine all prior sentencing issues. Instead, such a proceeding is limited to the court's substitution of the amended guideline range for the original range used at sentencing, and a determination as to whether to grant a reduction. *See United States v. Styer*, 573 F.3d 151, 153-54 (3d Cir.) (holding that § 3582 proceeding is not a full resentencing and that courts must consider only the retroactive amendment and leave all other guidelines determinations alone; rejecting claim that defendant was entitled to an evidentiary hearing on § 3582 motion), *cert. denied*, 130 S. Ct. 434 (2009); *United States v. Doublin*, 572 F.3d 235, 238-39 (5th Cir.) (per curiam) (noting differences between § 3582 proceeding and full sentencing; holding that § 3582 is not a full resentencing and that § 1B1.10 is mandatory), *cert. denied*, 130 S. Ct. 517 (2009); *United States v. Evans*, 587 F.3d 667, 670-74 (5th Cir. 2009) (citing cases concerning mandatory application of guidelines policy statement; rejecting argument challenging criminal history

score because a § 3582 motion is not appropriate vehicle); *United States v. Metcalfe*, 581 F.3d 456, 459 (6th Cir. 2009) ("[W]e emphatically agree that § 3582(c)(2) is not an 'open door' that allows any conceivable challenge to a sentence."); *United States v. Young*, 555 F.3d 611, 614-15 (7th Cir. 2009) (§ 3582 proceeding is not a full resentencing and therefore does not require an evidentiary hearing); *United States v. Harris*, 574 F.3d 971, 972-73 (8th Cir. 2009) (§ 3582 is not a full resentencing and not a "'do-over'" of original sentencing; district court precluded under policy statement from reconsidering other guidelines applications, such as the consecutive nature of the sentence); *Lafayette*, 585 F.3d at 438-39 (holding that § 3582 permits courts only to consider consequences of guidelines changes and does not reopen other elements of a sentence).

In short, the defendant may not now attack other elements of his sentence by invoking the district court's limited jurisdiction under § 3582(c)(2). The question before this Court is whether the defendant is eligible in the first instance for a sentence reduction under § 3582(c)(2). If he is not, this Court has no jurisdiction to nevertheless order that the district court reconsider a portion of his original sentence.

Moreover, even if this Court could review the district court's original sentencing decision for compliance with the open court requirement of 18 U.S.C. § 3553(c), there would be no error, and certainly no "plain" error, in this case. *See Villafuerte*, 502 F.3d at 211 (holding that "plain error analysis in full rigor applies to unpreserved claims

that a district court failed to comply with § 3553(c)"). Here, just as in *Villafuerte*, the district court gave several reasons on the record for the sentence it imposed. The court considered the defendant's argument for a lenient sentence based on his drug problem, but then described his lengthy and "serious" criminal record, and concluded that that record required a significant sentence. A32-33. In the course of this discussion, the court explained why it rejected the parties' joint recommendation for a 188-month sentence. A33. *Compare Villafuerte*, 502 F.3d at 212 (holding that court's alleged error in failing to explain its sentence under § 3553(c) certainly not plain where court responded to defendant's arguments for non-guidelines sentence, and stated that it found guidelines sentence appropriate). And although the district court did not announce in open court that the defendant was a career offender, the defendant points to no decision from this Court requiring this specific utterance to satisfy § 3553(c). On this record, it can hardly be said that the district court's purported failure to be more expansive or to announce that the defendant was a career offender was "plain" error.

But even if there were some cognizable error in the district court's failure to correct an alleged violation of the "open court" requirement, the defendant cannot show that any such error affected his substantial rights, or that the failure to correct such an error would impact the fairness, integrity or public reputation of the judicial proceedings. *MacPherson*, 590 F.3d at 218-19. As described above, the defendant agreed that he should be sentenced as a career offender and he was in fact sentenced as a career offender, even if the district court failed to state in open court that it

was sentencing him as a "career offender." *See supra* at 18-19. Accordingly, any failure by the district court had absolutely no impact on the judgment, and thus there is no basis for concluding that the error affected the fairness, integrity or public reputation of the proceedings. "Indeed, it would be the reversal of a conviction such as this which would have that effect. Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470 (internal quotations and citations omitted).

Because a § 3582(c)(2) proceeding is not the place for re-considering alleged errors in the original sentencing process, and because the alleged error here had no impact on the defendant's sentence, the defendant's request for a remand should be denied.

Conclusion

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

Dated: April 9, 2010

Respectfully submitted,

NORA R. DANNEHY
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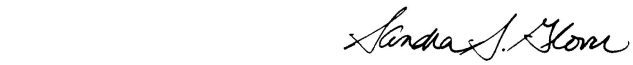

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ADDENDUM

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.

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.

28 U.S.C. § 994. Duties of the Commission

* * *

(u) 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.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Mock

Docket Number: 09-4154-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 4/9/2010) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 9, 2010

CERTIFICATE OF SERVICE

09-4154-cr USA v. Mock

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I also certify that the original and five copies were also shipped via Hand delivery to:

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Notary Public:

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Sworn to me this

April 9, 2010

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Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

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