

08-3626-cr

To Be Argued By:
MICHAEL J. GUSTAFSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-3626-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ALEX TERON, RAMON ROJAS, ISRAEL ANDUJAR,
FERNANDO ARTAVIA, SHAWNDELL ASKEW,
SHIRLEY BRADLEY, JASON CALVO, VICTOR
CARRASQUILLO, JUAN REYNOSO, SHANNON
DOUCETTE, EDWIN GONZALEZ, JOSUE MEDINA,
JASON RIVERA, VICTOR RIVERA, also known as
Daisy, KERRY WARD,

Defendants,

JEFFREY LORENZO,
Defendant-Appellant.

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

=====
BRIEF FOR THE UNITED STATES OF AMERICA
=====

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Statement of Jurisdiction

The district court (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On March 31, 2008, the defendant, *pro se*, filed a motion pursuant to 18 U.S.C. § 3582(c)(2) to reduce his sentence. On April 25, 2008, the defendant's attorney filed a second motion to modify the judgment. The district court denied these motions on May 13, 2008. A: 1-3.¹ The defendant, through counsel, filed a motion to reconsider on June 3, 2008. A: x (docket # 450). The district court denied that motion on the merits on June 30, 2008. A: x (docket # 456), A: 4. On July 18, 2008, the defendant filed a notice of appeal and also a request for an extension of time to file a notice of appeal. A: xi (docket ## 462, 464). On July 25, 2008, the district court granted the request for the extension of time to file the Notice of Appeal. A: xi (docket # 468). The defendant moved for reconsideration again on July 24, 2008, A: xi (docket # 466) and the district court denied that request on the merits on August 1, 2008, A: xi (docket # 470), A: 5. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

¹ The defendant filed an addendum with his brief. Each page has been numbered "A-#" and record citations herein will be to that page numbering. The Government has filed the Pre-Sentence Report ("PSR"), which includes the Superseding Indictment and plea agreement as attachments.

Statement of Issue Presented for Review

Did the district court abuse its discretion by denying the defendant's motion for a sentence reduction based on the recently amended cocaine base ("crack") guidelines where the court correctly determined that the defendant's sentencing range had not changed because after the amendment, he no longer qualified for the mitigating role cap contained at U.S.S.G. § 2D1.1(a)(3)?

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal challenges the district court's denial of the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) following the Sentencing Commission's reduction of the sentencing guidelines for crack cocaine offenses. The district court determined that because, after the amendments, the defendant was no longer eligible for the mitigating role cap contained in U.S.S.G. §§ 2D1.1(a)(3) and 3B1.2, his sentencing range had not been reduced by the amendments to the crack cocaine guidelines and, therefore, he was not eligible for a sentence reduction under § 3582(c)(2).

The district court's decision should be affirmed. The defendant's original adjusted offense level was 25, and the amended adjusted offense level remained at 25 after application of the amended crack cocaine guidelines. Consequently, because the amended crack guidelines did not result in a reduced sentencing guideline range for the defendant, he was ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

Statement of the Case

On September 6, 2001, a federal grand jury sitting in Bridgeport, Connecticut returned an indictment against the defendant, Jeffrey Lorenzo, and thirteen others for violations of federal narcotics laws. A: iii (docket # 1). On October 4, 2001, the same grand jury returned a superseding indictment. A: v (docket # 89); PSR pp. 34-43 (superseding indictment). The superseding indictment added two defendants to the case and charged that the

defendant and fifteen others conspired to distribute cocaine base (“crack”) in violation of 21 U.S.C. § 846. The defendant was also charged in two substantive counts for distributing five grams or more of crack cocaine on March 7 and 8, 2001. A: v (docket # 89); PSR pp. 34-35, 38-39 (superseding indictment).

On May 21, 2003, the defendant pleaded guilty and stipulated that his relevant conduct involved between 50 and 150 grams of cocaine base. A: vii (docket # 324); PSR ¶ 6; PSR p. 29 (plea agreement). The defendant faced a sentencing range of 110 to 137 months of imprisonment based on an adjusted offense level 25 and a Criminal History Category (CHC) VI. PSR ¶¶ 22-29, 31-45. On August 15, 2003, the court sentenced the defendant to the bottom of this range, 110 months, to be followed by four years of supervised release. A: ix (docket ## 350, 352).

On March 31, 2008, the defendant filed a *pro se* motion for a reduction of sentence under 18 U.S.C. § 3582(c)(2). A: x (docket # 443). On April 25, 2008, the defendant’s attorney filed a second motion to modify the judgment, on the same basis. A: x (docket # 445). The district court denied these motions in a ruling on May 13, 2008. A: 1-3. The defendant filed a motion for reconsideration on June 3, 2008, A: x (docket # 450), and the district court denied that motion on June 30, 2008, A: x (docket # 456), A: 4. On July 18, 2008, the defendant filed a notice of appeal and a motion for an extension of time to file a notice of appeal, which the district court granted on July 25, 2008. A: xi (docket ## 462, 464, and 468). The defendant moved for reconsideration again on July 24, 2008. A: xi (docket

466). The court denied that request on the merits on August 1, 2008. A: xi (docket # 470), A: 5.

The defendant is currently serving his sentence.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The defendant's plea and sentence

On September 6, 2001, a federal grand jury returned an indictment against the defendant charging him and thirteen others with violating 21 U.S.C. § 846 (conspiracy to possess with intent to distribute and distribution of cocaine base) and related charges. Thereafter, on October 4, 2001, the grand jury returned a superseding indictment in which several additional defendants were added. A: iii, v (docket ## 1, 89); PSR pp. 34-43 (superseding indictment). On May 21, 2003, the defendant pleaded guilty and stipulated to relevant drug quantity of 50 to 150 grams of cocaine base. PSR ¶¶ 1, 6; PSR p. 29 (plea agreement). The parties agreed that under the guidelines in effect, this drug quantity produced an offense level of 32, but because the defendant was entitled to a minor role adjustment, his offense level was capped at level 30 by operation of the mitigating role cap found in U.S.S.G. § 2D1.1(a)(3). PSR ¶ 6; PSR pp. 29-30 (plea agreement). The parties further agreed that the defendant was entitled to the following reductions: (1) a two-level minor role adjustment pursuant to U.S.S.G. § 3B1.2 and (2) a three-level adjustment for acceptance of responsibility. PSR ¶ 6; PSR pp. 29-30 (plea agreement). The parties did not enter a stipulation as to the

defendant's criminal history category. PSR p. 30 (plea agreement).

In preparation for sentencing, the United States Probation Office prepared a Pre-Sentence Report. The PSR concluded that the defendant's offense and relevant conduct involved 50 to 150 grams of cocaine base and, using the 2002 Sentencing Guidelines manual, would set his base offense level at 32. *See* U.S.S.G. § 2D1.1(c)(4) (2002) (base offense level of 32 for offenses involving at least 50 grams, but less than 150 grams, of cocaine base). PSR ¶¶ 16, 21, 22. The PSR also noted, however, that pursuant to U.S.S.G. § 2D1.1(a)(3), the defendant's offense level was capped at level 30 because he was entitled to a mitigating role adjustment under U.S.S.G. § 3B1.2. PSR ¶ 22. The PSR then factored a two-level minor role reduction pursuant to U.S.S.G. § 3B1.2(b), PSR ¶ 24, and a three-level reduction for acceptance of responsibility pursuant to § 3E1.1. PSR ¶ 28. Thus, the defendant's adjusted offense level was 25. PSR ¶ 29.

The PSR also detailed the defendant's lengthy criminal history and concluded that the defendant had a CHC VI and, therefore, a sentencing range of 110 to 137 months of imprisonment. PSR ¶¶ 31-45.

On August 15, 2003, the district court accepted the PSR guidelines calculations and sentenced the defendant to 110 months of imprisonment, the bottom of the post-departure guidelines range. A: ix (docket ## 350, 352).

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

On March 31, 2008, the defendant, *pro se*, filed a motion under 18 U.S.C. § 3582(c)(2). He sought a reduction in his sentence based upon a change to the crack cocaine guidelines that were passed by the Sentencing Commission on November 1, 2007, and made retroactive for all defendants as of March 3, 2008. A: x (docket # 443). On April 25, 2008, the defendant's attorney filed a separate motion to modify the judgment, on the same basis. A: x (docket # 445). The government, moreover, filed a Notice of Eligibility that similarly supported the sentencing reduction. A: x (docket # 444), A: 6-13. The government's Notice did not discuss the application of the mitigating role cap contained in § 2D1.1(a)(3), however.

The district court denied the defendant's motion in a ruling filed May 13, 2008. A: 1-3. The court noted that “[a] reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) is ‘not authorized . . . [if] the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision[,]’” citing U.S.S.G. § 1B1.10(a)(2)(B) and Application Note 1(A). A: 2. The court then explained that “[b]ecause the defendant’s applicable guideline range is unchanged by the two-level reduction afforded under Amendment 706, the court concludes that the defendant is ineligible for a reduction in sentence pursuant to 18 U.S.C. § 3582(c).” A: 2.

After confirming that the undisputed sentencing range at the defendant's August 2003 sentencing was 110 to 137 months of imprisonment, based on an adjusted offense level 25 and CHC VI, the district court then calculated an amended guideline range that would have been applicable to the defendant if the amendments to the guidelines were operative at the defendant's 2003 sentencing. In this regard, the court pointed out that the relevant drug quantity of 50 to 150 grams of crack cocaine under the recently amended drug quantity table would begin at level 30, not level 32. The district court then noted that because the defendant was starting at level 30, his drug offense level "would not be further reduced by operation of § 2D1.1(a)(3)." A: 2. Continuing with the new guidelines calculation, the court concluded that after assigning a minor role reduction and crediting the defendant with acceptance of responsibility, the defendant would still have "a total offense level of 25, which is identical to his total offense level determined at [his 2003] sentencing." A: 3. The court then reasoned that since the amendment had not changed the applicable guideline range, the defendant was ineligible for relief, again citing U.S.S.G. § 1B1.10(a)(2)(B) and Application Note 1(A). A: 3.

The defendant moved for reconsideration on June 3, 2008. A: x (docket # 450). The court reconsidered the matter, but denied the motion on the merits on June 30, 2008. A: x (docket # 456), A: 4. On July 18, 2008, the defendant moved for an extension of time to file a notice of appeal, A: xi (docket # 462), and at the same time, filed a notice of appeal, A: xi (docket # 464). On July 24, 2008, the defendant again asked the court to reconsider its ruling

denying his § 3582 motion. A: xi (docket # 466). On July 25, 2008, the district court granted the defendant's motion for an extension of time to file an appeal. A: xi (docket # 468). On August 1, 2008, the court again denied the defendant's motion for reconsideration. A: xi (docket # 470), A: 5.

Summary of Argument

The defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Under that section, a sentence may be reduced only when it was “based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” Here, the Sentencing Commission amended the crack cocaine sentencing guidelines to reduce offense levels for crack cocaine offenses and accordingly the defendant's quantity-based offense level was reduced from level 32 to 30. But that is of no moment here because, with a base offense level 30, the defendant no longer qualified for a mitigating role cap, and hence his guidelines range remained the same. In other words, because the amendment had no impact on his sentencing range, the defendant was not entitled to a sentence reduction under § 3582(c)(2).

The defendant contends that he should be given the two-level reduction from the amended crack guidelines *after* considering the operation of the mitigating role cap, but the guidelines reject this procedure. Specifically, the guidelines provide that the new guideline should be substituted for the corresponding guideline at the original sentencing, but that all other guideline application

decisions should remain the same. U.S.S.G. § 1B1.10(b)(1). Thus, the district court in this case properly substituted the new drug quantity guideline (30), noted that the mitigating role cap of § 2D1.1(a)(3) had no further impact on his offense level, and then applied the remaining adjustments as they had been applied at the defendant's original sentencing to reach the same guidelines range. Accordingly, because the defendant's sentencing range was not lowered by the new crack guidelines, the defendant was ineligible for a sentence reduction.

Argument

I. The district court properly denied the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) because the new crack amendments did not reduce his guidelines range.

The defendant's § 3582(c) motion was based on the premise that the retroactive amendment of the crack cocaine guideline lowered his base offense level from 32 to 30. However, the change in the quantity-based calculation of his offense level ultimately had no impact on his total offense level because under the amended guidelines, the defendant no longer benefitted from the two-level mitigating role cap. At his original sentencing, his base offense level was 30, based on the mitigating role cap of § 2D1.1(a)(3). Under the new amendments, his base offense level remained at 30, by operation of the new quantity guidelines, and the mitigating role cap had no

impact. *See* § 2D1.1(a)(3). In other words, the amended crack guidelines did not reduce his guidelines range.

A. Governing law and standard of review

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

“A district court may not generally modify a term of imprisonment once it has been imposed.” *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam). Indeed, this Court has noted that “Congress has imposed stringent limitations on the authority of courts to modify sentences, and courts must abide by those strict confines.” *United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998). One limited exception to the rule prohibiting district courts from modifying a final sentence is in 18 U.S.C. § 3582(c)(2), which provides:

[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

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. *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).

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.”

On December 11, 2007, the Commission issued a revised version of § 1B1.10 that 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:

(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.

U.S.S.G. § 1B1.10(a).

Section 1B1.10(b) sets forth procedures for deciding whether a sentence reduction is appropriate and limits the extent of any departure based on a guideline amendment that applies retroactively. Section 1B1.10(b)(2), for instance, provides that, with one exception not applicable here, “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).” U.S.S.G. § 1B1.10(b)(2)(A) (emphasis added).

The amendment in question in this matter is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.² In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine offenses. The Commission reasoned that, putting aside its stated criticism of the 100:1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory mandatory minimum penalties, the Commission could respect those mandatory penalties while still reducing the offense levels for crack offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706.

Previously, the Commission had set the crack offense levels in § 2D1.1 above the range that included the mandatory minimum sentence. Under the amendment, the Commission has set the offense levels so that the resulting

² Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

guideline range includes the mandatory minimum penalty triggered by that amount, and then set corresponding offense levels for quantities that fall below, between, or above quantities that trigger statutory mandatory minimum penalties. For example, a trafficking offense involving five grams of crack cocaine requires a statutory mandatory minimum sentence of five years imprisonment. *See* 21 U.S.C. § 841(b)(1)(B). Therefore, the revised guideline applies an offense level of 24 to a quantity of cocaine base of at least five grams but less than 20 grams; at criminal history category I, this level produces a range of 51-63 months (encompassing the 60-month mandatory minimum).

The final result of the amendment is a reduction of two levels for each of the ranges set in the guidelines for crack offenses. At the high end, the guideline previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more; a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36. At the low end, the guideline previously assigned level 12 to a quantity of less than 250 milligrams. That offense level now applies to a quantity of less than 500 milligrams.

On December 11, 2007, the Commission added Amendment 706 to the list of amendments in § 1B1.10(c) that may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713. *Id.* Congress has delegated to the Sentencing Commission the sole authority to permit the retroactive application of a guideline reduction, and no court may alter an otherwise final sentence on the basis of

such a retroactive guideline unless the Sentencing Commission expressly permits it. *See, e.g., Perez*, 129 F.3d at 259.

2. Standard of review

This Court reviews a district court's decision on a motion for relief under 18 U.S.C. § 3582(c)(2) for abuse of discretion. *United States v. Borden*, 564 F.3d 100, 104 (2d Cir. 2009). Where, as here, the district court's decision rests on an interpretation of a statute and the guidelines, this Court reviews the question *de novo*. *United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam); *see also Borden*, 564 F.3d at 104 (a district court abuses its discretion if it bases its decision on "an erroneous view of the law") (quoting *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008)).

B. Discussion

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant's sentence may *only* be reduced when he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." A reduction, moreover, is allowed only when "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* The defendant misreads the clear dictates of § 3582(c)(2) and instead contends that the district court erred in denying his motion because "it is clear that a reduction . . . to 92 months is warranted based upon all of the reasons advanced by the Commission in amending the

crack section to the guidelines. The sentence modification that Mr. Lorenzo sought was fully consistent with the spirit of the Commission's amendments upon this subject of crack[.]" Defendant's Brief at 8. The defendant's invocation of the spirit of the Commission's amendment on the crack-powder disparity is unavailing, however.

In its revisions to § 1B1.10, the Commission, consistent with the statutory directive that a reduction should occur only where the defendant's sentencing range was lowered, made clear that a sentencing court is not authorized to reduce a defendant's sentence when a retroactive amendment does not result in lowering the applicable sentencing range for the defendant. Specifically, subsection (a)(2)(B) of the policy statement provides: "A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore *is not authorized under 18 U.S.C. § 3582(c)(2)* if . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." U.S.S.G. § 1B1.10(a)(2)(B) (emphasis added).

In this case, the amendments to the quantity-based crack cocaine guidelines in § 2D1.1 did not reduce the defendant's guidelines range. Under the version of § 2D1.1 in effect at the time of the defendant's 2003 sentencing, the defendant's base offense level for the crack charge was 30: § 2D1.1(c) set an offense level of 32 based on the drug quantity, but under the mitigating role cap in § 2D1.1(a)(3), his base offense level was capped at 30. Amendment 706 reduced the defendant's quantity-based offense level to 30. However, with a quantity-based

offense level of 30, the defendant no longer qualified for the mitigating role cap under § 2D1.1(a)(3).³ In other words, the defendant's base offense level remained at 30. U.S.S.G. § 1B1.10 directs: "In determining whether . . . a reduction in the defendant's term of imprisonment . . . is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the [amended sentencing guidelines] had been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b)(1).

In short, the guideline amendments reduced the quantity-based portion of the defendant's base offense level. But this reduction changed his eligibility for the mitigating role cap, which is granted after consideration of the base offense level determined by § 2D1.1(c). Therefore, without the mitigating role cap, but with the other reductions he qualified for, the defendant still had an adjusted offense level of 25. Accordingly, because the amended guidelines did not change the defendant's guideline sentence range, he was ineligible for relief under § 1B1.10 and § 3582.

³ The 2002 version of U.S.S.G. § 2D1.1(a)(3) dictates that for crack cocaine offenses courts should apply "the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level **30**." (emphasis in original).

The defendant argues to the contrary, claiming that the two-level reduction should be applied *after* the mitigating role cap. Defendant's Brief at 6.

This suggestion is untenable, however, because the guidelines provide for the exact opposite result. Specifically, § 1B1.10(b)(1), which establishes the procedures for deciding whether a sentence reduction is appropriate and limits the extent of any departure based on a guideline amendment that applies retroactively, provides as follows:

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.

U.S.S.G. § 1B1.10(b)(1).

Several district courts have properly applied this language and concluded that defendants such as Lorenzo

are ineligible for a sentence reduction in the circumstances at bar.

In *United States v. James*, for example, the court denied a sentence reduction to a defendant who was in the same situation as the defendant. 2008 WL 596542 (E.D. Ark. Mar. 4, 2008). When originally sentenced, James, like the defendant here, had a quantity-based offense level of 32, but because he received a mitigating role adjustment pursuant to § 3B1.2, he was eligible for the mitigating role cap under § 2D1.1(a)(3), thus reducing his base offense level to 30. *Id.* at *1. With James's other reductions, his total offense level was 24. James subsequently moved for a reduced sentence under the amended guideline. In addressing the sentence reduction issue, the *James* court explained that in assessing

whether Defendant is eligible for a sentence reduction, the Court must determine the amended guideline range “that would have been applicable to the defendant if the [crack cocaine] amendment[. . . had been in effect at the time the defendant was sentenced.” U.S.S.G. § 1B1.10(b)(1). Additionally, *the Court may only substitute the amended retroactive guideline, in this case § 2D1.1, and “shall leave all other guideline application decisions unaffected.” Id.*

Id. (emphasis added). As applied by the court, this language precluded a reduction for James. The new quantity-based guidelines set his base offense level at 30. *Id.* The court noted, however, that “the lower offense level

render[ed] [James] ineligible for the 2 point mitigating role adjustment . . . because this adjustment applies only if the base offense level is equal to or greater than 32.” *Id.* Therefore, after including all the other reductions for which he still qualified, the defendant continued to have a total offense level of 24. Accordingly, the *James* court found that the defendant was not eligible for a reduced sentence because “[h]is case is one in which application of amended § 2D1.1 does not change the guideline range.” *Id.*

Other courts that have addressed the application of the mitigating role cap in this context have also made the calculations in the exact same manner, first re-calculating the quantity-based offense level according to the amended guidelines in § 2D1.1(c), and then re-examining whether the new offense level – leaving all unamended guidelines in place – entitles the defendant to the benefit of the mitigating role cap. *See United States v. Washington*, 2008 WL 2704604, *1 (E.D. Wis. July 7, 2008) (“The crack cocaine amendments did not change § 2D1.1(a)(3) nor § 3B1.2, and the court may not further adjust Washington’s offense level.”); *United States v. Berroa*, 2008 WL 1741308 (S.D.N.Y. Apr. 11, 2008) (amendments reduced defendant’s quantity-based offense level from 34 to 32, but the mitigating role adjustment continues to apply and cap defendant’s base offense level at 30).

In *Washington*, for instance, the defendant argued that “he should receive a further two-level reduction to be allowed the full credit of the [crack cocaine] amendment.” *Washington*, 2008 WL 2704604, at *1. The court, citing

U.S.S.G. § 1B1.10(a)(2)(B), rejected the argument because “the Sentence Commission prohibits a court to recalculate a sentence that a retroactive amendment does not alter. . . . The crack cocaine amendments did not change § 2D1.1(a)(3) nor § 3B1.2, and the court may not further adjust Washington’s offense level.” *Id.*

Similarly, in *Berroa*, the court explained that “[n]ot every defendant serving a sentence for a crack offense is eligible for a reduced sentence under the amendment.” 2008 WL 1741308, at *1. In denying the defendant’s motion for a sentence reduction, the court observed that “§ 2D1.1(a)(3) of the November 1, 2003 edition of the Guidelines, *which has not been retroactively amended and continues to apply*, again caps Berroa’s base offense level at 30.” *Id.* (emphasis added). More specifically, the *Berroa* court explained as follows:

The amended guideline range is calculated by substituting the amended provisions of § 2D1.1(c) and “leav[ing] all other guideline application decisions unaffected.” *See* U.S.S.G. § 1B1.10(b)(1). If retroactively applying the amendment does not result in a lower applicable guideline range, the court lacks authority to grant a sentence reduction. *See* 18 U.S.C. § 3582(c)(2) (authorizing a sentence reduction only if it “is consistent with applicable policy statements issued by the Sentencing Commission,” i.e. U.S.S.G. § 1B1.10); U.S.S.G. § 1B1.10(a)(2) (stating that “[a] reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not

authorised under 18 U.S.C. 3582(c)(2) if . . . [the amendment] does not have the effect of lowering the defendant’s applicable guideline range”).

Id.

The decisions in *James*, *Washington*, and *Berroa* are consistent with the decisions of other courts around the country. See *United States v. Lovas*, 2009 WL 212422 (D. Minn. Jan. 26, 2009) (amendments reduced offense level from 32 to 30, therefore, the defendant no longer received the benefit of the mitigating role cap); *United States v. Jackson*, 2008 WL 717646 *1 (E.D. Ark. March 17, 2008) (“[T]he Court may only substitute the amended retroactive guideline, in this case § 2D1.1, and ‘shall leave all other guideline application decisions unaffected.’ [U.S.S.G. § 1B1.10(b)(1)].”); *United States v. Lucas*, 2008 WL 559690 (E.D. Ky. Feb. 28, 2008) (under the amended guidelines, defendant no longer eligible for mitigating role cap and guideline range remains the same); *United States v. Feliz-Terrero*, 2008 WL 553110 (D. Me. Feb. 27, 2008) (amendments reduced defendant’s quantity-based offense level from 36 to 34, but the mitigating role cap set his base offense level at 30 both before and after amendment); *United States v. Weems*, 2008 WL 447550 (D. Me. Feb. 19, 2008) (reduction in defendant’s crack cocaine base offense level from 32 to 30 did not ultimately lower the defendant’s guideline range, because after the amendment, defendant was no longer eligible for benefit of mitigating role cap); *Primo v. United States*, 2008 WL 428449, at *4 (E.D.N.Y. Feb. 14, 2008) (after amendment, defendant was no longer eligible for mitigating role cap and

accordingly the amendment did not reduce the applicable guideline range).

In short, these decisions all stand for the basic proposition that a court must deny a defendant's motion to reduce his sentence under the amended guidelines when the guidelines do not change applicable guideline range. *Berroa*, 2008 WL 1741308, at *2 (“Because [defendant’s] applicable guideline range remains the same under the amended Guidelines, a sentence reduction is prohibited under U.S.S.G. § 1B1.10(a) and, consequently, the Court lacks authority to grant one under 18 U.S.C. § 3582(c)(2).”); *James*, 2008 WL 596542, at *2; *Lucas*, 2008 WL 559690, at *2 (“Simply stated, both before and after the amendments, Lucas’ guideline range of imprisonment remains the same.”); *Feliz-Terrero*, 2008 WL 553110, at *1.

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

be inconsistent with the policy statement and hence inconsistent with the statute.

The Application Notes to the revised policy statement further confirm this reading of the statute and policy statement. In Application Note 1(A), the Sentencing Commission explained that a sentence reduction is not authorized when “an amendment . . . is applicable to the defendant but the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum term of imprisonment).” Here, while the Amendment is applicable to the defendant because it reduces his quantity-based offense level from 32 to 30, it does not have the effect of lowering his “applicable guideline range because of the operation of another guideline,” *i.e.*, the mitigating role cap, which does not affect drug quantity offense levels of 30 or lower. § 1B1.10, Application Note 1(A). Accordingly, as explained by the Sentencing Commission, a sentence reduction in this context “is not consistent with [the] policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)” § 1B1.10(a)(2)(B).

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

Finally, the Government notes that the defendant argues in passing that he is entitled to a downward departure pursuant to U.S.S.G. § 5K2.0 in order to reflect

the Sentencing Commission's stated opposition to the 100 to 1 crack-powder disparity. Defendant's Brief at 7. This claim fails for two reasons. First, it is not fully developed and hence an inappropriate ground for relief. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (stating that skeletal arguments do not preserve claims because "[j]udges are not like pigs, hunting for truffles buried in briefs."). Second, this argument betrays a misunderstanding about the appropriate scope of proceedings under § 3582(c)(2), which permit sentencing courts to reduce a sentence only when "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 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."

The limitation imposed by the Sentencing Commission must be respected. *See United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) (holding that sentencing adjustments under § 3582(c)(2) "[do] not constitute a de novo resentencing"); *United States v. Smartt*, 129 F.3d 539, 541-43 (10th Cir. 1997) (declining to consider

collateral attack to sentence as part of motion under § 3582(c)(2)); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (“A § 3582(c)(2) motion is not a second opportunity to present mitigating factors to the sentencing judge, nor is it a challenge to the appropriateness of the original sentence.”).

Accordingly, because the defendant may not raise a collateral attack on his sentence in the course of a proceeding under § 3582(c)(2), and because the crack amendments did not reduce the defendant’s guidelines range, there was no error in the district court’s decision to deny the defendant’s motion for a sentence reduction under 18 U.S.C. § 3582(c)(2).

CONCLUSION

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

Dated: May 27, 2009

Respectfully submitted,

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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.

2D1.1(a)(3) from 2002 guidelines book

(a) Base Offense Level (Apply the greatest):

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level **30**.