

09-0758-cr

To Be Argued By:
PAUL A. MURPHY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-0758-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

ALBERTO CASTILLO,

Defendant-Appellant.

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 (Dorsey, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment as to defendant Alberto Castillo on November 23, 2005. Appellant's Appendix 8 ("A.A. __.").

On August 14, 2008, defendant Castillo filed a motion under 18 U.S.C. § 3582 seeking a modification of his sentence. A.A. 9, 14-15. The district court denied the motion in a ruling filed on October 29, 2008. A.A. 9, 16-17. On January 27, 2009, the defendant filed a motion for reconsideration of the district court's decision to deny his motion for a sentence reduction under 18 U.S.C. § 3582. A.A. 9-10, 18-19. On February 19, 2009, the district court denied the relief requested in the defendant's motion; that order was entered on the docket on February 20, 2009. A.A. 10, 29. On February 25, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A.A. 10, 30.

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

**Statement of Issues
Presented for Review**

1. Whether the district court correctly concluded that the defendant was not eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) because he was a career offender and therefore his sentence was not based on the crack cocaine guidelines.

2. Whether a defendant may seek a remand and full resentencing under *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2009) (per curiam), where the appeal is limited to a challenge to the district court's denial of a sentence reduction under 18 U.S.C. § 3582(c)(2) based on the amended crack cocaine guidelines.

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FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-vs-

ALBERTO CASTILLO,

Defendant-Appellant.

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 conclusion that the defendant, Alberto Castillo, was ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on the amendments to the Sentencing Guidelines applicable to cocaine base ("crack") offenses. The defendant pled guilty to a crack distribution charge and was sentenced pursuant to the career offender provision in U.S.S.G. § 4B1.1. At sentencing, the district court granted the defendant a downward departure, but the reasons for the

departure and the defendant's ultimate sentence were not based on, or tied to, the drug quantity guidelines. Subsequently, after the Sentencing Commission reduced the base offense levels for crack cocaine offenses under § 2D1.1 and made those changes retroactive, the defendant sought a sentence reduction under 18 U.S.C. § 3582(c). The district court denied the motion because the defendant's sentence was based on the career offender guidelines in U.S.S.G. § 4B1.1, and not on the crack cocaine guidelines in U.S.S.G. § 2D1.1.

The defendant sought reconsideration after this Court issued its opinion in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam). The district court denied the relief sought in the motion to reconsider again on the ground that the defendant's sentence was not based on the crack cocaine guidelines.

The district court's judgment should be affirmed. The defendant was not sentenced based on a sentencing range that was subsequently lowered by the Sentencing Commission. As such, § 3582(c)(2) did not authorize the district court to grant a sentence reduction because it would be inconsistent with the applicable policy statement of the Sentencing Commission.

Moreover, the defendant's contention – raised for the first time on appeal – that the Court should order a remand pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), does not satisfy the plain error standard of review and, in any event, is meritless. Unlike *Regalado*, the Court here is considering only whether the

defendant was eligible for a sentence reduction, not the scope of the district court's discretion at sentencing.

Statement of the Case

On November 3, 2004, a federal grand jury sitting in New Haven, Connecticut, returned a four-count superseding indictment against the defendant charging him with three counts of possession with intent to distribute and distribution of cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(C), and one count of possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B). A.A. 5.

On February 1, 2005, the defendant pled guilty to Count Four of the superseding indictment charging him with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B). A.A. 6. On November 21, 2005, the district court sentenced the defendant principally to a term of imprisonment of 120 months followed by a five-year period of supervised release. A.A. 8, 11. The defendant, whose plea agreement contained a waiver of appeal if he was not sentenced to more than 188 months in prison, A.A. 34, did not appeal his sentence.

On August 14, 2008, the defendant filed a motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) based on the amendments to the crack cocaine guidelines. A.A. 9. The district court denied the motion on October 29, 2008. A.A. 9. On January 27, 2009, the defendant

filed a motion for reconsideration of the district court's denial of his motion for a sentence reduction. A.A. 9-10. On February 19, 2009, the district court granted the motion for reconsideration but affirmed its prior ruling denying the defendant's motion for a sentence reduction. A.A. 29. The district court's order was entered on the docket on February 20, 2009. A.A. 10, 29. On February 25, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A.A. 10, 30.

The defendant is currently serving his sentence.

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

This case arose out of the defendant's arrest by officers of the Stamford, Connecticut, police department after they stopped the car he was driving and found in it approximately 32 grams of crack, four grams of cocaine hydrochloride, and assorted evidence of drug-trafficking. *See* Presentence Report ("PSR") ¶¶ 11-15. The motor vehicle stop was the last of several incidents of crack cocaine trafficking by the defendant, including three controlled purchases of narcotics supervised by Stamford police officers with the assistance of a confidential informant. PSR ¶¶ 6-10.

A. The Indictment and Plea Agreement

The defendant was initially charged in federal court on October 14, 2003, when a federal grand jury sitting in the District of Connecticut returned a one-count indictment charging him with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B). A.A. 3. On November 3, 2004, a four-count superseding indictment was returned charging the defendant with three counts of possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(C), and one count of possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B). A.A. 5.

On February 1, 2005, the defendant pled guilty to Count Four of the superseding indictment charging him with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B). A.A. 6.

The parties stipulated in the plea agreement that the defendant's base offense level was 34 because his criminal record classified him as a career offender within the meaning of U.S.S.G. § 4B1.1. A.A. 33. With a three-level reduction for acceptance of responsibility, the parties stipulated that an offense level 31 combined with a criminal history category VI resulted in a guideline imprisonment range of 188 to 235 months. A.A. 33. The plea agreement also contained a waiver of the defendant's right to appeal his sentence if the sentence did not exceed

188 months in prison. A.A. 34. As part of the plea agreement, the defendant agreed not to argue that a sentence of imprisonment of less than 120 months was reasonable, and the Government agreed that a sentence at the bottom of the guideline range, *i.e.*, 188 months, was reasonable. A.A. 33.

B. The Defendant's Sentencing

The PSR noted that the drug quantity at issue involved 32.1 grams of crack and 4.1 grams of cocaine hydrochloride. PSR ¶ 15. Following the Guidelines where multiple types of drugs are involved, it converted those quantities into a marijuana equivalency of 642.82 kilograms, which corresponded to a base offense level under § 2D1.1(c)(6) of 28. PSR ¶¶ 16, 22.

The PSR then examined the defendant's extensive criminal history, PSR ¶¶ 31-50, and concluded that he was a career offender. PSR ¶¶ 28, 51. The defendant's total number of criminal history points was 31, landing him squarely in Criminal History Category VI. PSR ¶ 51. More to the point, the PSR also concluded, consistent with the parties' stipulation, that the defendant's two prior felony narcotics convictions qualified him as a career offender under U.S.S.G. § 4B1.1. PSR ¶¶ 28, 51.

On November 21, 2005, the district court sentenced the defendant principally to 120 months in prison. A.A. 8, 11. The district court concluded that the defendant was a career offender under U.S.S.G. § 4B1.1, resulting in a guideline range of 188 to 235 months. *See* A.A. 16;

Statement of Reasons at 1. The Court then downwardly departed under § 5H1.3 and § 5K2.0 of the Guidelines based on its determination that the defendant suffered from extraordinary mental and emotional conditions and that he was only a mid-level drug dealer. A.A. 11, 29; Statement of Reasons at 2.¹

C. The Motion for Sentence Reduction and Motion to Reconsider

On August 14, 2008, the defendant filed a motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2).

¹ The Government has attempted to obtain a copy of the sentencing transcript to provide to this Court, but has been advised by the district court's court reporting service that the original disk on which the proceeding was to be recorded is blank, so there is nothing from which to derive a transcript.

The Government has obtained the Statement of Reasons signed by the district court at the time it entered judgment, which reflects the guideline range applied by the district court at sentencing and the basis for the district court's departure from that range. The Government is filing herewith the Statement of Reasons and the Presentence Report under seal. The Statement of Reasons reflects that the basis for the departure was (1) the defendant's mental and emotional condition; and (2) the district court's belief that the defendant was only a mid-level drug dealer, which the district court characterized as a mitigating circumstance. These are the very reasons reflected in the district court's ruling on the defendant's motion for reconsideration that is the subject of this appeal. The Government notes that the judgment of conviction lists only the first reason, namely the defendant's mental condition. A.A. 11.

A.A. 9, 14-15. The motion was based on the recently amended crack cocaine guidelines, which had been made retroactive by the Sentencing Commission. A.A. 9, 14-15.

The district court denied the motion for sentence reduction on October 29, 2008. A.A. 9, 16-17. In doing so, the district court concluded that the defendant had been found at sentencing to be a career offender, pursuant to U.S.S.G. § 4B1.1(b), with a resulting guideline range of 188 to 235 months. A.A. 16. The district court further found that the defendant's career offender status precluded him from receiving a sentence reduction because the amendments to the crack cocaine guidelines did not lower the career offender guideline range that governed his sentence. A.A. 16. The district court concluded that 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10(a) did not authorize a sentence reduction where, as here, the applicable amendment to the Guidelines did "not have the effect of lowering the defendant's applicable guideline range." A.A. 16 (quoting U.S.S.G. § 1B1.10(a)).

On January 27, 2009, the defendant filed a motion for reconsideration of the district court's denial of his motion for a sentence reduction. A.A. 9-10, 18-19. The basis for the motion for reconsideration was this Court's decision in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam). A.A. 18-19. Specifically, the defendant argued that, at sentencing, the district court had departed from the career offender guideline range applicable to the defendant "due to Defendant's mental health conditions," and argued that *McGee* permitted a district court in these circumstances to grant a sentence reduction under the new

crack amendments, despite his career offender designation. A.A. 18.

On February 19, 2009, the district court denied the motion for reconsideration. A.A. 10, 29. The district court confirmed its prior conclusion that a sentence reduction was not authorized. A.A. 29. It rejected the argument that *McGee* changed the result, holding that *McGee* authorized a reduction under the crack amendments for a career offender only where the ultimate sentence was “explicitly based on the crack cocaine guidelines.” A.A. 29 (quoting *McGee*, 553 F.3d at 228). The district court went on to distinguish this case from *McGee*, holding that the defendant’s sentence in this case “was not explicitly based on the crack cocaine guidelines.” A.A. 29. Instead, it found that the departure from the applicable career offender guideline range had been based on the defendant’s extraordinary mental and emotional conditions and on the fact that, in the district court’s estimation, the defendant was only a mid-level drug dealer. A.A. 29.

The district court cited U.S.S.G. § 5H1.3 as the basis for the departure based on the defendant’s extraordinary mental and emotional conditions, and cited U.S.S.G. § 5K2.0 as the support for the departure resulting from the defendant’s perceived status as a mid-level drug dealer. A.A. 29. Nowhere did the district court indicate that its sentence was driven by the drug quantity tables applicable to crack offenses in U.S.S.G. § 2D1.1, and, in fact, it took the opportunity to point out that the sentence “was not explicitly based on the crack cocaine guidelines.” A.A. 29.

Summary of Argument

I. The district court correctly concluded that it had no authority to reduce the defendant's sentence under § 3582(c)(2) because the amendments to the crack guidelines did not have the effect of lowering the defendant's sentencing range. The defendant was a career offender under U.S.S.G. § 4B1.1, as the parties stipulated in the plea agreement, and thus his sentence was based on the guideline range in that provision. The amendments to the crack guidelines did not result in the career offender range being lowered, so the district court was without authority under § 3582(c)(2) to reduce the defendant's sentence. *See United States v. Martinez*, 572 F.3d 82 (2d Cir. 2009) (per curiam).

This result is not altered by the fact that the district court ultimately sentenced the defendant below the career offender range. The district court's basis for departing from the career offender range when sentencing the defendant had nothing to do with the otherwise applicable crack guidelines. Instead, the district court departed based on its assessment that the defendant suffered from extraordinary mental and emotional conditions, and that he was no more than a mid-level drug dealer. Unlike the scenario in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam), where the district court departed from the career offender range because it decided to sentence the defendant within the otherwise applicable range based on the quantity of crack at issue, the departures here did not bring into play the crack guidelines. This is so even

though the sentence the district court ultimately settled on would have been within that range.

At bottom, there is nothing in the record to suggest that, had the amended crack guidelines been in place at the time the defendant was sentenced, the sentence in this case would have been any different from what it was. Indeed, in ruling on the defendant's motion for reconsideration, which is the basis for this appeal, the district court made clear that its sentence was not based on the crack guidelines. Accordingly, the defendant was sentenced as a career offender, and because that guideline range was not amended, the district court correctly concluded that the defendant was not eligible for a sentence reduction.

II. The defendant's suggestion – raised for the first time on appeal – that the case should be remanded pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), also should be rejected. *Regalado* has no application to this case, as it dealt with a district court's discretion at sentencing. This case is in a materially different posture. This Court must decide only whether the defendant is *eligible* for a sentence reduction. Because he is not, this Court has no authority to order a remand under *Regalado*. Courts may not disturb a final sentence absent some statutory exception, and the only potentially applicable one here is § 3582(c)(2). As noted, the defendant is ineligible for such a reduction.

Argument

The defendant makes two arguments on appeal: First, he contends that the district court incorrectly concluded that it did not have the authority to reduce his sentence under 18 U.S.C. § 3582(c)(2). He seems to admit that he was a career offender, Brief of Appellant at 2 (“App. Br. ___.”) – as he must, given that he stipulated as much in the plea agreement. A.A. 33. But he contends that because the district court granted a downward departure at sentencing, in reality he was not sentenced as a career offender. He then tries to shoehorn these facts into the holding of *McGee* by arguing that the district court’s downward departure from the career offender guidelines necessarily means that he was sentenced under the drug quantity tables in U.S.S.G. § 2D1.1. App. Br. 6-9. For the reasons set forth below, none of these arguments carries the day.

The defendant also claims that he is entitled to a remand under *Regalado* so the district court may consider whether the 100-to-1 ratio applied by Congress to crack and powder cocaine offenses should apply here. This argument was never raised in the district court, and is without merit anyway.

I. The district court correctly denied the defendant’s request for a sentence reduction under 18 U.S.C. § 3582 because his original sentence was not “based on” U.S.S.G. § 2D1.1.

A. Governing law and standard of review

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

“A district court may not generally modify a term of imprisonment once it has been imposed.” *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

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 (3rd 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

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

United States v. Williams, 551 F.3d 182, 185 (2d Cir. 2009)); *see also McGee*, 553 F.3d at 226.

B. Discussion

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant who was sentenced “based on” on a guideline range that was subsequently lowered may qualify for a reduced sentence. The defendant argues that his original sentence was “based on” the crack cocaine guidelines within the meaning of § 3582(c)(2), making him eligible for a sentence reduction under the crack amendments. He contends that the district court actually rejected the career offender guidelines when it departed downward and sentenced him to a term of imprisonment that was within the range set by the crack cocaine guidelines. App. Br. 6. He further contends that, under *McGee*, whenever a sentencing court departs from the career offender guidelines in a crack case, that departure means that the defendant’s sentence was not “based on” the career offender guidelines. App. Br. 7-8.

These arguments do not stand up to scrutiny. The defendant’s guideline range was in fact derived from the career offender provisions in U.S.S.G. § 4B1.1, just as the parties stipulated to in the plea agreement. PSR ¶¶ 28-30, 51, 89; A.A. 16, 33; Statement of Reasons at 1. While the district court departed from the career offender guideline at sentencing, there is nothing in the record to suggest that the sentence ultimately imposed was in any way derived from U.S.S.G. § 2D1.1. Indeed, the district court’s own recitation of its sentencing rationale in its orders denying a sentence reduction makes clear that the defendant was

not sentenced based on the drug quantity tables in U.S.S.G. § 2D1.1. A.A. 16, 29.

1. This Court’s recent *Martinez* decision controls the outcome of this case.

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) 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.”

Martinez, 572 F.3d 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).

2. *McGee* is inapplicable to this case because the defendant was not sentenced based on the crack guidelines.

In *Martinez*, this Court distinguished *McGee*, the principal case on which the defendant relies. App. Br. 4-9. In *McGee*, this Court held that a defendant who qualified

as a career offender but was granted a departure at sentencing could still be eligible for a reduced sentence under § 3582 and the crack guideline amendments if he was “ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines.” 553 F.3d at 230. As explained by the *Martinez* Court, a reduction in *McGee* was appropriate because there the district court had found that the career offender status overstated the defendant’s criminal history and “‘explicitly stated that it was departing from the career offender sentencing range to the level that the defendant *would have been in absent the career offender status* calculation and consideration.’” *Martinez*, 572 F.3d at 84 (quoting *McGee*, 553 F.3d at 227). “In other words, McGee *could have been* sentenced under § 4B1.1 but was *in fact* sentenced under § 2D1.1” *Id.* A review of the record made it “apparent that McGee was sentenced ‘based on’ [§ 2D1.1].” *McGee*, 553 F.3d at 227.

A review of the record here, including the Court’s own explanation of the reasons for the departure from the career offender guidelines, provides no such “apparent” evidence that the defendant’s sentence was based on the crack cocaine guidelines.

The parties stipulated that the defendant was a career offender with a total offense level of 31 and a criminal history category VI, resulting in a guideline range of 188 to 235 months in prison. A.A. 33. The district court agreed with that guideline calculation. A.A. 16; Statement of Reasons at 1. And while it granted the defendant a downward departure, there is no indication that that

departure was in any way done because the district court believed the crack guidelines provided the appropriate sentencing range. Although the ultimate sentence fell within what would have been the range if it had been calculated based on the drug quantity, it is clear that the departure was for other reasons unrelated to the drug quantity.

Specifically, the district court determined that the departure was appropriate to account for the defendant's purported extraordinary mental and emotional problems, under U.S.S.G. § 5H1.3, and because it concluded that the defendant never rose to more than a mid-level drug dealer. A.A. 29; Statement of Reasons at 2. Neither of these reasons indicates that the defendant was "ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." *McGee*, 553 F.3d at 230. Indeed, in denying the relief requested in the motion to reconsider, the district court clearly spelled out that its sentence "was not explicitly based on the crack cocaine guidelines." A.A. 29.

This case is in sharp contrast with the situation in *McGee*, where the sentencing court stated specifically that it was applying the defendant's crack cocaine guidelines range. Absent such a statement, and in light of the district court's express statement to the contrary when it ruled on the motion for reconsideration, it cannot be argued that the defendant was "ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." *McGee* 553 F.3d at 230; *see also United States v. Evans*, 2009 WL 2235882 at *3 (D. Conn., July

22, 2009) (defendant not eligible for sentence reduction because he was a career offender, and downward departure did not result in defendant being sentenced based on the crack guidelines); *United States v. Smith*, 614 F. Supp. 2d 433, 435 (S.D.N.Y. 2009) (defendant’s argument in sentencing submission that court should apply crack cocaine range rather than career offender range “is of no moment in the absence of any *express* indication that the Court accepted that analysis”) (emphasis added). Therefore, this case does not fall under the narrow holding of *McGee*.

With no evidence that the defendant was sentenced under the crack guidelines as in *McGee*, this case falls squarely within the rule of *Martinez*. Under *Martinez*, “a defendant convicted of crack cocaine offenses but sentenced as a career offender under U.S.S.G. § 4B1.1 is not eligible to be resentenced under the amendments to the crack cocaine guidelines.” *Martinez*, 572 F.3d at 85. Moreover, because the crack amendments did not lower the defendant’s guideline range, it “would . . . be inconsistent with U.S.S.G. § 1B1.10(a) to permit reduction of [his] sentence on the basis of the amendments to the crack cocaine guidelines.” *Id.* at 86. Accordingly, as a career offender sentenced under the career offender guidelines, the defendant is ineligible for a reduced sentence under § 3582(c)(2).

The defendant argues that because his ultimate sentence ended up in the crack cocaine range, his sentence was “based on” that range. App. Br. 6. This is incorrect. As this Court held in *Williams*, 551 F.3d at 185, as to

mandatory minimum sentences, and in *Martinez*, 572 F.3d at 85, with regard to §4B1.1, once the new range applied – whether determined by the statutory mandatory minimum or the career offender guideline – it “subsumed and displaced” § 2D1.1 as the applicable range. At that point, the defendant’s sentence was no longer “based on” the § 2D1.1 range, even if, as in *Williams*, the ultimate sentence ended up at a point within the crack quantity range that would have applied absent the controlling guideline. *Williams*, 551 F.3d at 185; *Martinez*, 572 F.3d at 85.

Moreover, this Court made clear in *McGee* that a career offender is only entitled to a sentence reduction when the district court “ultimately *explicitly* sentenced based on” the crack quantity guidelines. 553 F.3d at 230 (emphasis added). Here, where the district court departed based on factors that had no relation to the crack quantity guidelines, and where the district court expressly stated that it did not sentence based on the crack guidelines, the mere fact that the defendant’s sentence *coincidentally* arrived within the range that would have applied by applying the crack quantity guidelines is not enough to bring this case within the rule of *McGee*. In the absence of an express statement that the defendant was being sentenced under the crack cocaine guidelines, the defendant was sentenced under the career offender guidelines, and as such is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

As the First Circuit succinctly put it in a case where the defendant was a career offender but had received a

sentence below the career offender range, “[h]ad the new guideline provision for crack cocaine offenses (Amendment 706) been in effect when this defendant was sentenced, that provision would not have had any effect on the sentencing range actually used.” *United States v. Caraballo*, 552 F.3d 6, 11 (1st Cir. 2008) (holding that despite the fact that the district court imposed sentence below the career offender guideline range, the defendant was not eligible for a sentence reduction under § 3582(c)(2)), *cert. denied*, 129 S. Ct. 1929 (2009); *see United States v. Collier*, 581 F.3d 755, 759 (8th Cir. 2009) (holding that although the district court granted a significant departure from the guideline range at sentencing, the defendant “was sentenced as a career offender” and thus was not eligible for a sentence reduction under § 3582(c)(2)), *petition for cert. filed*, No. 09-8779 (Jan. 25, 2010). The same is true here: had the amended crack guidelines been in effect at the time of sentencing, they would have had no effect on the sentencing range used. As such, the defendant is not now eligible for a sentence reduction based on later amendments to the inapplicable crack guidelines.

II. The defendant is not entitled to a *Regalado* remand, as this matter concerns only whether the defendant is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

A. Governing law and standard of review

In *Regalado*, this Court considered a direct appeal from the defendant's 262-month sentence. 518 F.3d at 145. There, the defendant pled guilty to a crack distribution charge, was sentenced to 262 months in prison, which was the bottom of the applicable guideline range, and filed an appeal. *Id.* at 146. This Court remanded the case for further consideration of the sentence in light of *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On remand, the defendant "requested leniency, but made no argument bearing on the district court's discretion to deviate from the sentencing ranges for crack cocaine offenses." *Id.* The district court declined to resentence the defendant, and the defendant appealed again. On appeal from the *Crosby* remand, this Court found that the Supreme Court's recent opinion in *Kimbrough v. United States*, 552 U.S. 85 (2007), made clear that district courts had the discretion to consider the 100-to-1 crack-powder disparity in the Guidelines and conclude that the crack guidelines called for a sentence in a particular case that was greater than necessary. *Regalado*, 518 F.3d at 146-47. This Court found that a remand was appropriate in that case only because of the "unusual circumstance[]" that it had previously "tended to discourage district courts from deviating from the crack cocaine Guidelines." *Id.* at 147, 148 (citing this Court's pre-*Kimbrough* decision in *United*

States v. Castillo, 460 F.3d 337 (2d Cir. 2006)). The Court held that where a defendant, like Regalado, was sentenced before *Kimbrough*, there was “an unacceptable likelihood of error,” *id.* at 147, requiring a remand for the district court to consider whether it would have imposed a materially different sentence had it fully appreciated its discretion to deviate from the crack guidelines’ ratio.⁴ *See id.* at 148-51.

When a defendant raises an argument for the first time on appeal, 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* Fed. R. Crim. P. 52(b); *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. Carter*, 489 F.3d 528, 537 (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

⁴ At the end of its opinion in *Regalado*, the Court noted in dicta that the Sentencing Commission had amended the crack guidelines and made those amendments retroactive such that prisoners serving crack sentences could apply for sentence reductions under 18 U.S.C. § 3582(c)(2). 518 F.3d at 150-51. The *Regalado* Court’s discussion of § 3582(c)(2) was dicta because it was considering a direct appeal, not a motion under § 3582(c)(2). *See id.*

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 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 adds an argument on appeal for the first time: that he is entitled to a lower sentence because of this Court’s holding in *Regalado*. He appears to suggest that the Court should remand this case for a full resentencing where the district court can consider whether it would have sentenced the defendant differently had it known it was not bound by the 100-to-1 crack to powder ratio. App. Br. 10-11.

The Court need not tarry over this argument. *Regalado* has no application to this appeal. It dealt with a district court’s discretion at sentencing to deviate from the crack guidelines. This appeal addresses only whether the

defendant was eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

The defendant's argument that he is entitled to resentencing in light of *Kimbrough* and *Regalado* reflects a misunderstanding about the appropriate scope of proceedings under § 3582(c)(2), which permits 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."

This Court on several occasions since the amendment of the crack guidelines has held that 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 186-87 (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)).

Other courts 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 Guidelines application 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 only consider 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. Dublin*, 572 F.3d 235, 238-39 (5th Cir.) (per curiam) (noting differences between § 3582 proceeding and full sentencing; holding that § 3582 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 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); *United States v. Lafayette*, 585 F.3d 435, 438-39 (D.C. Cir. 2009) (holding that § 3582 permits courts only to consider consequences of Guidelines changes and does not reopen other elements of a sentence).

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 order that he nevertheless be resentenced. This Court has previously held that “[a] district court may not generally modify a term of imprisonment once it has been imposed.” *Martinez*, 572 F.3d at 84 (quoting *Cortorreal*, 486 F.3d at 744). The only exception to that rule which is potentially applicable here is § 3582(c)(2), and, for the reasons discussed, the defendant is ineligible for such relief.

Moreover, even in the context of a direct appeal, this Court has held that *Regalado* has no application where the

defendant's guideline range was not based on the crack guidelines containing the 100-to-1 crack-powder ratio, but, instead, was based on the career offender guidelines. *See United States v. Ogman*, 535 F.3d 108, 111 (2d Cir. 2008) (per curiam). Here, the defendant's status as a career offender confirms that *Regalado* is irrelevant to his case.⁵

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). Moreover, because the defendant's guideline range at sentencing was based on the career offender provisions of the Guidelines, *Regalado* has no application to his case, per this Court's own authority. As such, the district court committed no error – plain or otherwise – in denying the defendant's motion.

⁵ Even if the Court were to decide that the defendant is eligible for a sentence reduction § 3582(c)(2), the proper remedy would be to remand the case to the district court for it to decide whether it would exercise its discretion to grant such a reduction. The remedy would not be to send this back for full resentencing.

Conclusion

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

Dated: February 4, 2010

Respectfully submitted,

NORA R. DANNEHY
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A handwritten signature in black ink, appearing to read "Paul A. Murphy". The signature is written in a cursive style with a large initial "P" and "M".

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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 7,760 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

A handwritten signature in black ink, appearing to read "Paul A. Murphy". The signature is fluid and cursive, with a large initial "P" and "M".

PAUL A. MURPHY
ASSISTANT U.S. ATTORNEY

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.