10-1199

To Be Argued By:
HAROLD H. CHEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-1199

UNITED STATES OF AMERICA,

Appellee,

-vs-

NELSON LUIS MILLETT, MANUEL E. ROMAN, aka Manny, aka Pito, RICHARD MORALES, aka Richie,

(For continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

GILBERTO RIVERA, aka Junco,

Defendant-Appellant.

TABLE OF CONTENTS

Table of Authorities. iii

Statement of Jurisdiction. vi

Statement of Issue Presented for Review. vii

Preliminary Statement. 1

Statement of the Case.. 3

Statement of Facts and Proceedings
Relevant to this Appeal. 4

A. Trial.. 4

B. Presentence Report.. 4

C. Sentencing 5

D. Section 3582(c)(2) motion 6

Summary of Argument.. 7

Argument. 9

I. The district court properly denied Rivera's request for a reduced sentence under 18 U.S.C. § 3582 because he was not sentenced based on a sentencing range that was subsequently lowered by the Sentencing Commission. 9

A. Governing law and standard of review. 9

1. Section 3582(c)(2) and the new crack guidelines. 9

2. Standard of review. 13

B. Discussion. 13

1. Relief under Amendment 706 pursuant to Section 3582(c)(2) is not available to Rivera because he was sentenced as a career offender. 13

2. The limited *McGee* exception does not apply 19

Conclusion. 27

Addendum

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Cortorreal v. United States,
486 F.3d 742 (2d Cir. 2007) (per curiam). 9

Dillon v. United States,
130 S. Ct. 2683 (2010). 9, 10

United States v. Caraballo,
552 F.3d 6 (1st Cir. 2008), *cert. denied*,
129 S. Ct. 1929 (2009). 23, 26

United States v. Collier,
581 F.3d 755 (8th Cir. 2009). 23

United States v. Darton,
595 F.3d 1191 (10th Cir.), *cert. denied*,
130 S. Ct. 3444 (2010). 25

United States v. Martinez,
572 F.3d 82 (2d Cir. 2009) (per curiam). . . . . *passim*

United States v. Mateo,
560 F.3d 152 (3d Cir. 2009). 18

United States v. McGee,
553 F.3d 225 (2d Cir. 2009) (per curiam). . . . *passim*

United States v. Mock,
612 F.3d 133 (2d Cir. 2010) (per curiam). 13

United States v. Monaco,
194 F.3d 381 (2d Cir. 1999). 25

United States v. Perez,
129 F.3d 255 (2d Cir. 1997). 10

United States v. Tolliver,
570 F.3d 1062 (8th Cir. 2009). 25

United States v. Williams,
551 F.3d 182 (2d Cir. 2009). 13, 22

STATUTES

18 U.S.C. § 3231. vi

18 U.S.C. § 3553. 9

18 U.S.C. § 3582. . . . . *passim*

21 U.S.C. § 841. . . . . 3, 4, 14

21 U.S.C. § 846. . . . . 3, 4

28 U.S.C. § 994. . . . . 9, 10

28 U.S.C. § 1291. viii

RULES

Fed. R. App. P. 4. vi

GUIDELINES

U.S.S.G. § 1B1.10. . . . . *passim*

U.S.S.G. § 2D1.1. . . . . *passim*

U.S.S.G. § 4A1.3. . . . . 19, 20

U.S.S.G. § 4B1.1. . . . . *passim*

U.S.S.G. § 5H1.3. 21

U.S.S.G. § 5K2.0. . . . . 5, 21, 24

U.S.S.G. § 5K2.13. 5

Statement of Jurisdiction

The district court (Hon. Alan H. Nevas; Hon. Ellen Bree Burns) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment on September 11, 1996. Joint Appendix ("JA") 24 (docket sheet).

On January 14, 2008, Rivera filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). JA29 (docket sheet). On July 17, 2009, the district court denied the motion. JA31 (docket sheet). On July 27, 2009, Rivera filed a motion to reconsider. *Id.* On March 25, 2010, the district court granted Rivera's motion to reconsider, but denied the motion to reduce his sentence. *Id.* On March 31, 2010, Rivera filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA31 (docket sheet). On April 27, 2010, Rivera filed an amended notice of appeal. *Id*.

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

Statement of Issue Presented for Review

Did the district court properly deny Rivera's motion for relief under 18 U.S.C. § 3582(c)(2) when he was sentenced as a career offender and therefore his sentence was not based on the crack cocaine guidelines?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-1199

UNITED STATES OF AMERICA,

Appellee,

-vs-

GILBERTO RIVERA, aka Junco,

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 denial of Rivera's motion for sentence reduction under 18 U.S.C. § 3582(c)(2). In 1996, a jury found Rivera guilty of one count of conspiracy to possess with intent to distribute, and to distribute, controlled substances, including crack cocaine. Rivera was sentenced based on his status as a career offender under U.S.S.G. § 4B1.1, which required

the district court to adopt the higher offense level based on the attributable quantity of crack cocaine. After determining the applicable Guideline range, the district court granted a three-level downward departure in light of the defendant's apparent mental illness. The departure was neither based on, nor tied to, the drug-quantity guidelines.

Thereafter, Rivera sought a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2) on the basis of amendments to the Guidelines (principally Amendment 706), which reduced the offense levels for crack cocaine offenses by two levels. The district court denied Rivera's motion because his modified sentence was based on the career offender guideline, and application of Amendment 706 to Rivera's case would not have had the effect of lowering his applicable guideline range. Rivera then moved for the district court to reconsider its decision. Again, and for the same reasons, the district court declined to revise Rivera's sentence.

The district court's denial of Rivera's motion should be affirmed. For the defendant to be eligible for a reduction under § 3582(c)(2), he must have been sentenced based on an applicable Guideline range that was subsequently lowered by the Sentencing Commission. The record makes clear that although the district court referred to the crack cocaine guideline when determining this range, as required by § 4B1.1, he was ultimately sentenced pursuant to the career offender guideline. Moreover, the defendant's applicable Guideline range remains the same both before and after applying Amendment 706. Consequently, to revisit Rivera's sentence pursuant to § 3582(c)(2) would

be inconsistent with the policy statement of the Sentencing Commission in § 1B1.10.

Statement of the Case

On April 30, 1996, a federal grand jury returned a one-count superseding indictment against Rivera, charging him with conspiracy to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. §§ 846 and 841(a)(1). JA1-2 (indictment); JA22 (docket sheet). On June 18, 1996, trial commenced. JA23. On June 24, 1996, the jury found Rivera guilty. JA23 (docket sheet). On September 10, 1996, the district court (Alan H. Nevas, J.) sentenced Rivera to 292 months of imprisonment. JA24 (docket sheet); JA75-78 (judgment). This Court affirmed. JA26 (docket sheet).

On January 14, 2008, Rivera filed a motion seeking a reduction in sentence through the retroactive application of Sentencing Guidelines for crack cocaine offenses under 18 U.S.C. § 3582(c)(2). JA29 (docket sheet). On July 13, 2009, the case was transferred to the Honorable Ellen Bree Burns, JA30, and on July 17, 2009, the district court denied the motion. JA31 (docket sheet); JA79-85 (ruling). Rivera filed a motion to reconsider on July 27, 2009, JA31, and on March 25, 2010, the district court granted Rivera's motion for reconsideration, but again denied the motion for reduction of sentence. JA31 (docket sheet); JA86-90 (ruling). On March 31, 2010, Rivera filed a notice of appeal. JA31 (docket sheet). On April 27, 2010, Rivera filed an amended notice of appeal. JA31 (docket sheet); JA91 (notice).

The defendant remains in custody and is serving the sentence imposed by the district court on September 10, 1996.

Statement of Facts and Proceedings Relevant to this Appeal

A. Trial

On April 30, 1996, a federal grand jury returned a one-count superseding indictment against Rivera, charging him with conspiracy to distribute heroin, cocaine, and cocaine base in violation of 21 U.S.C. §§ 846 and 841(a)(1). JA1-2. A jury trial began on June 18, 1996, and continued through June 24, 1996, when the jury returned a verdict of guilty on the sole count of the indictment. JA23.

B. Presentence Report

Using the Guidelines as amended in November 1, 1995, the Presentence Report ("PSR") found that Rivera's base offense level was 38 because more than 1.5 kilograms of crack cocaine were attributable to him. PSR ¶¶ 15, 31. The PSR computed his criminal history category ("CHC") to be IV based on his criminal history points. PSR ¶ 43. However, because the PSR determined that Rivera was a career offender under § 4B1.1, his CHC was increased to VI. PSR ¶¶ 39, 43. The PSR further found that "the total offense level remain[ed] 38" because "the offense level from U.S.S.G. [§] 2D1.1 is greater than that provided in U.S.S.G. [§] 4B1.1." PSR ¶ 39. *See also* U.S.S.G. § 4B1.1 (defining "career offender" and providing that "[i]f the

offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply"). The PSR recommended no reduction for acceptance of responsibility because Rivera denied "any and all guilt in this case." PSR ¶ 37. In light of these findings, the PSR determined that with a total offense level of 38 and a CHC VI, Rivera faced a Guideline range of 360 months to life imprisonment. PSR ¶ 70.

C. Sentencing

On September 10, 1996, the district court held Rivera's sentencing hearing. The court found that Rivera was a career offender under U.S.S.G. § 4B1.1, that he was responsible for more than 1.5 kilograms of crack cocaine, and that he did not suffer from diminished capacity under U.S.S.G. § 5K2.13. JA45-46; JA47-49; JA64; JA71 (statement of reasons). The district court also accepted the Guideline calculation set forth in the PSR, and determined that his Guideline range was 360 months to life imprisonment based on a total offense level of 38 and criminal history category VI. JA48-49 (sentencing transcript); JA72 (statement of reasons). The court, however, granted a three-level downward departure pursuant to U.S.S.G. §§ 5H1.3 and 5K2.0, finding that "there is some form of mental illness here that may have played a role in the commission of this offense." JA64 (sentencing transcript); JA72 (statement of reasons). After factoring in this downward departure, the district court found that an adjusted offense level of 35, with a criminal history category VI, yielded a post-departure range of 292

months to 365 months of imprisonment. JA65 (sentencing transcript); JA72 (statement of reasons). The district court then sentenced Rivera to 292 months of imprisonment. JA65 (sentencing transcript); JA73 (statement of reasons).

D. Section 3582(c)(2) motion

On January 14, 2008, Rivera filed a motion to reduce his sentence pursuant to the retroactive application of the amended Guidelines for crack cocaine offenses under 18 U.S.C. § 3582(c)(2). JA29 (docket sheet). On July 17, 2009, the district court denied Rivera's motion. JA31 (docket sheet); JA79-85 (ruling). On July 27, 2009, Rivera filed a motion for reconsideration. JA31 (docket sheet). On March 25, 2010, the district court granted the motion for reconsideration, but adhered to its prior ruling denying the motion to reduce his sentence. JA31. In its second ruling, the district court found as follows:

> It is true that application of the amended guidelines would result in a two level reduction of Rivera's § 2D1.1 base offense level for the quantity of crack cocaine involved – from 38 to 36. But his offense level as a career offender under § 4B1.1, which was not effected by the Amendment [706], would still be 37. And because his offense level as a career offender under § 4B1.1 would now be greater than his offense level under § 2D1.1, the court would be required to use that level. Based on an offense level 37 and criminal history category VI, his resulting guidelines sentencing range would be 360 months to life, which is the same as it was

> when he was sentenced in 1996. Thus, the crack cocaine amendment would not have the effect of lowering Rivera's applicable guideline range within the meaning of § 1B1.10, and resentencing is not authorized.

JA83.

On March 31, 2010, Rivera filed a notice of appeal. JA31 (docket sheet). On April 27, 2010, Rivera filed an amended notice of appeal. JA31 (docket sheet); JA91 (notice).

Summary of Argument

Rivera is ineligible for a sentence modification under § 3582(c)(2). Under that section, a sentence may be reduced only if (1) it was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," and (2) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Here, Rivera's sentence was based on a sentencing range determined under the career offender guideline, which has not been directly altered by the Sentencing Commission. Although the district court consulted the crack cocaine guidelines as an intermediate step in applying the career offender guideline, the court did so in order to comport with the dictates of the career offender guideline. Thus, because Rivera's sentence was ultimately based on § 4B1.1 and not § 2D1.1, he is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

Even though the district court ultimately sentenced the defendant below the career offender range pursuant to a downward departure, Rivera's efforts to analogize his case to the limited exception enunciated in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam), are unavailing. The district court's basis for departing from the career offender range when sentencing Rivera had nothing to do with the crack guidelines. Instead, the district court departed based on its assessment of Rivera's mental illness. Unlike the scenario in *McGee*, 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 departure here did not bring into play the crack guidelines. At bottom, there is nothing in the record to suggest that the sentence was explicitly based on the crack cocaine guidelines, and thus there is no basis for a sentence reduction here.

Argument

I. The district court properly denied Rivera's request for a reduced sentence under 18 U.S.C. § 3582 because he was not sentenced based on a sentencing range that was subsequently lowered by the Sentencing Commission.

A. Governing law and standard of review

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

"'A district court may not generally modify a term of imprisonment once it has been imposed.'" *United States v. Martinez*, 572 F.3d 82, 84 (2d Cir. 2009) (per curiam) (quoting *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam)); *see also Dillon v. United States*, 130 S. Ct. 2683, 2690 (2010). 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 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.[1] 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

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[1] 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); *Dillon*, 130 S. Ct. at 2691 ("A court's power under § 3582(c)(2) thus depends in the first instance on the Commission's decision not just to amend the Guidelines but to make the amendment retroactive.").

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.

The amendment in question in this case is Amendment 706, effective November 1, 2007, which reduced the base

offense level for most crack offenses.[2] On December 11, 2007, the Commission added Amendment 706 to the list of amendments identified in § 1B1.10(c) that may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713.

In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine offenses.[3] 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.

This Court has recently held that a reduction 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

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

[3] The Guidelines Manual at issue in this appeal is the version promulgated on November 1, 2009. The Supplement to the 2010 Guidelines Manual § 2D1.1 (Nov. 1, 2010) that was promulgated pursuant to the Fair Sentencing Act of 2010, Pub. L. 111-120, 124 Stat. 2372 (Aug. 3, 2010), is not germane to this appeal.

Commission.'" *Martinez*, 572 F.3d at 84 (quoting § 3582(c)(2)).

2. Standard of review

The denial of a motion pursuant to 18 U.S.C. § 3582(c)(2) is reviewed for abuse of discretion. *See United States v. Mock*, 612 F.3d 133, 135 (2d Cir. 2010) (per curiam). Within that inquiry, "[t]he determination of whether an original sentence was 'based on a sentencing range that was subsequently lowered by the Sentencing Commission,' 18 U.S.C. § 3582(c)(2), is a matter of statutory interpretation and is thus reviewed *de novo*." *Martinez*, 572 F.3d at 84 (citing *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009)). *See also United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam).

B. Discussion

1. Relief under Amendment 706 pursuant to Section 3582(c)(2) is not available to Rivera because he was sentenced as a career offender.

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant who was sentenced "based on" a Guideline range that was subsequently lowered may qualify for a reduced sentence. Rivera contends that his sentence should be reduced under § 3582(c)(2) because his sentence was "based on a sentencing range that has been subsequently lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Rivera further contends that a sentence reduction would be

"consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

Rivera's argument cannot prevail because, as a threshold matter, the record makes clear that the district court sentenced him as a career offender under § 4B1.1. Although the court referenced the attributable quantity of crack cocaine as an intermediate step to determine the Guideline range, it did so only because § 4B1.1 required such consideration. Here, it is undisputed that the district court found Rivera to be a career offender. *See* JA71 (court's finding in statement of reasons that "[t]he Court found that the defendant was a career offender"); JA48-49 (sentencing transcript). The table in § 4B1.1 set his base offense level as 37 because the statutory maximum for Rivera's offense under 21 U.S.C. § 841(b)(1)(A) was life imprisonment. *See* U.S.S.G. § 4B1.1 (Nov. 1995). Section 4B1.1 further required the district court to use the higher base offense level of 38 in light of the attributable quantity of more than 1.5 kilograms of crack cocaine.[4] *Id*. *See also* PSR ¶ 39 ("[T]he offense level from U.S.S.G. [§] 2D1.1 is greater than that provided in U.S.S.G. [§] 4B1.1.[;] therefore, the total offense level remains 38.").

In fact, the government specifically requested at sentencing that the district court find a base offense level

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[4] The career offender guideline then in effect stated: "If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply." *See* U.S.S.G. § 4B1.1 (Nov. 1995).

of 38, as referenced in § 2D1.1, to comply with the dictates of § 4B1.1 that the higher offense level be used when sentencing a career offender:

> [AUSA] MARTINI: I don't think it matters now regarding Your Honor's finding regarding drug quantity, but the finding was important in terms of *the career offender provision* because the offense maximums under *the career offender provision* are given by the offense statute maximums. And as Your Honor knows and as [defense counsel] knows, and obviously if you have a different statutory maximum, *the offense level under the career offender provision is going to be different, and what dictates that in our case is, of course, the drug quantity*.
>
> So, the point I'm making is the drug quantity finding was important here. Even though the defendant is classified as a career offender, but since Your Honor made a finding that the drug quantities as found by the presentence report are in fact the quantities, that means that the statutory maximum is life which means the offense level is 37 and --
>
> THE COURT: Thirty-seven or 38?
>
> [AUSA] MARTINI: Well, under the *career offender [Guideline]*, it's 37 but it's trumped by Your Honor's finding that the drug quantity calls for a level 38, so --

> THE COURT: All right. The court will make a finding that the offense level [is] 38, the criminal history category is six, and the guideline range from the sentencing table is 360 months to life.

JA48-49 (emphasis added). In short, when the district court referenced the crack cocaine guideline when rendering sentence, the court did so in furtherance of its ultimate finding that Rivera was being sentenced as a career offender under § 4B1.1. Stated differently, the district court's finding on the crack cocaine guideline was driven by the court's overarching adherence to the career offender guideline when determining the applicable Guideline range.

Because the record demonstrates that Rivera was sentenced as a career offender, this Court's decision in *Martinez* controls this case. In *Martinez*, this Court affirmed the denial of a sentencing reduction where, as here, the defendant was convicted of a crack cocaine offense and sentenced as a career offender pursuant to U.S.S.G. § 4B1.1. 572 F.3d 82. In *Martinez*, the defendant had been convicted of crack cocaine offenses and faced a Guideline range of 151-188 months of imprisonment due to his status as a career offender. *Id*. at 83. At his sentencing in 2001, the district court sentenced him to 151 months of imprisonment. *Id*. Just as Rivera presently asserts,[5] the *Martinez* defendant contended that "although

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[5] Rivera's brief makes a single reference to *Martinez* in (continued...)

he was sentenced under the career offender guideline range, the base offense level for his sentence was calculated under the crack cocaine guideline." *Id*. (internal quotation marks omitted). The *Martinez* defendant further alleged that he was eligible to be resentenced because "this base-level calculation meant his sentence was based on the now-amended § 2D1.1." *Id*. (internal quotation marks omitted).

In wholly rejecting this argument, the *Martinez* Court held that "[t]he fact that, but for his career offender designation, Martinez's sentence would have been based on the now-amended crack cocaine guidelines is of no relevance for purposes of a sentence reduction. *The simple fact is that Martinez was indeed sentenced under § 4B1.1, which remains unamended*." *Id*. at 85 (emphasis added). Thus, the Court held that "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." *Id*.

Here, as in *Martinez*, Rivera was ultimately sentenced based on § 4B1.1 rather than § 2D1.1. There is no dispute that the district court found Rivera to be a career offender. *See* JA71 (court's finding in statement of reasons that "[t]he Court found that the defendant was a career offender"); JA48-49 (sentencing transcript). Moreover,

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[5] (...continued)
which it summarizes the holding in *McGee*. Rivera Br. 14. Other than that reference, Rivera's brief contains no further discussion of *Martinez*.

when the district court referenced § 2D1.1 in determining Rivera's Guideline range, the district court was adhering to § 4B1.1's directive that it select the higher base offense level from either the 4B1.1 table for the offense's statutory maximum (*i.e.*, 37) or as derived from the underlying offense conduct (*i.e.*, 38). In other words, the Guideline calculation based on § 2D1.1 was subsumed in the sentencing range based on § 4B1.1.

In addition, *Martinez* undermines Rivera's contention that his sentence is somehow "based on" U.S.S.G. § 2D1.1 simply "because the District Court consulted that section in calculating his offense level." *Martinez*, 572 F.3d at 85 (quoting *United States v. Mateo*, 560 F.3d 152, 155 (3rd Cir. 2009)). *Martinez* adopted the Third Circuit's rule that "the term 'sentencing range' clearly contemplates the end result of the overall guideline calculus, not the series of tentative results reached at various interim steps in the performance of that calculus." *Id.* at 84 n.3 (citing and quoting *Mateo*, 560 F.3d at 155). Accordingly, when determining "which Guideline a defendant's sentence is 'based on,'" this Court "look[s] only to the end result of the overall calculus – the career offender sentence – and not to the 'interim' steps taken by the District Court." *Id*. Here, because the district court's reference to § 2D1.1 was an "interim step" in calculating the "end result" of calculating his sentencing range pursuant to § 4B1.1, Rivera cannot legitimately claim that his sentence was ultimately "based on" the crack cocaine guideline.

In sum, as Rivera was explicitly sentenced under the career offender guideline, his case falls within the rule of

Martinez, and he is not eligible for a sentence reduction under § 3582(c)(2).

2. The limited *McGee* exception does not apply.

Contrary to Rivera's assertion, this Court's limited exception articulated in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam), does not apply to him. In *McGee*, which predated *Martinez*, this Court considered the "narrow question" of whether "a defendant . . . who at sentencing was designated a career offender but granted a departure so that he was ultimately sentenced based on the crack cocaine . . . guidelines, is eligible for a reduced sentence pursuant to the so-called crack amendments." *Id*. at 225-26. In *McGee*, the district court had granted the defendant a downward departure because the "career offender classification overrepresented his criminal history," pursuant to U.S.S.G. § 4A1.3(b). *Id*. at 226. The district court then sentenced him to 115 months of imprisonment, which was at the top of the post-departure Guideline range of 92-115 months, a range expressly calculated using the crack cocaine guidelines. *Id*.

McGee held that the defendant was entitled to a sentence reduction because "in granting the departure, the district court [had] *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." *Id*. at 227 (emphasis added) (internal quotation marks omitted). Put another way, McGee had been "ultimately *explicitly sentenced* based on a Guidelines range calculated by

Section 2D1.1." *Id*. at 230 (emphasis added). By granting this downward departure for over-representation of criminal history, the district court had effectively negated the higher offense level otherwise mandated by the table in U.S.S.G. § 4B1.1. Consequently, because the § 4A1.3 departure had essentially displaced the higher range otherwise required by the career offender guideline in favor of the lower range based on the crack cocaine quantity – thereby neutering the career offender designation – McGee became eligible for a sentence reduction. *Id*. at 227.

In the subsequently decided *Martinez*, this Court emphasized the limited reach of *McGee*. In particular, the Court found that *McGee*'s holding relied on the district court's explicit statement "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,*'" thereby "effectively sentencing him under the crack cocaine guideline." *Martinez*, 572 F.3d at 84 (quoting *McGee*, 553 F.3d at 227) (emphasis in original). In other words, although "McGee *could have* been sentenced under § 4B1.1," *id.,* a review of that factual record made it "apparent that McGee was sentenced 'based on' [§ 2D1.1]," *McGee*, 553 F.3d at 227.

Here, a review of the record provides no such "apparent" evidence that Rivera's sentence was based on the crack cocaine guidelines. First, the district court neither granted nor considered a downward-departure motion from Rivera for over-representation of criminal history. Second, there is no evidence that the district court,

when sentencing Rivera, harbored any reservations that he qualified as a career offender who fell within the ambit of U.S.S.G. § 4B1.1. Much to the contrary, the record demonstrates that the district court here sentenced Rivera as a career offender, and concomitantly applied the higher level of 38 derived from the crack cocaine guideline, because the court was adhering to § 4B1.1. *See* JA71 (court's finding in statement of reasons that "[t]he Court found that the defendant was a career offender"). In other words, although the district court referred to § 2D1.1 in determining Rivera's sentencing range, the court based its ultimate sentencing range on § 4B1.1.

Third, while the court granted the defendant a downward departure from the career offender guidelines, there is no indication that the departure was granted because the district court believed (as in *McGee*) that the crack guidelines provided the appropriate sentencing range. Nor was there any explicit evidence (as in *McGee*) that the departure was based on the crack cocaine guidelines. Specifically, the district court granted a downward departure pursuant to §§ 5H1.3 and 5K2.0 because, in its judgment, Rivera suffered from "some form of mental illness here that may have played a role in the commission of this offense." JA64. This explanation provides no evidence 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.

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 the crack cocaine guidelines played some role in calculating his ultimate range, his sentence was "based on" the crack cocaine guidelines. This is incorrect. As this Court held in *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009), 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. *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, the case does not fall 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)), *cert. denied*, 130 S. Ct. 2066 (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.

Rivera attempts to avoid this conclusion by arguing that his *post-departure* range would likely be different under the new crack guidelines. Specifically, he notes that using the amended crack guidelines, the court would find a base offense level of 37, rather than 38, because Amendment 706 reduced the base offense level for more than 1.5 kilograms of crack cocaine to 36, but § 4B1.1 would dictate a level 37. From this level, Rivera argues that the court would then grant the same three-level downward departure pursuant to U.S.S.G. §§ 5H1.3 and 5K2.0, resulting in an offense level of 34. Stated differently, Rivera believes that his "applicable Guideline range" should include a three-level downward departure from 37 to 34, rather than from level 38 to level 35, that would yield a sentencing range of 262-327 months of imprisonment instead of 292-365 months. Rivera Br. at 22-23. In short, his argument rests on the unstated assumption that the term "applicable Guideline range" in U.S.S.G. § 1B1.10(a)(2)(B) should be defined as a defendant's post-departure sentencing range.

This argument – that "applicable Guideline range" in § 1B1.10(a)(2)(B) includes downward and upward departures – is undercut by the Guidelines themselves. The Guidelines define "departures" as sentences imposed either above or below the "applicable guideline range." *See* U.S.S.G. § 1B1.1, comment. (n. 1(E)) (defining "downward departure" as a "departure that effects a sentence less than a sentence that could be imposed under

the *applicable guideline range* or a sentence that is otherwise less than the guideline sentence," and an "upward departure" as a "a departure that effects a sentence greater than a sentence that could be imposed under the *applicable guideline range* or a sentence that is otherwise greater than the guideline sentence") (emphasis added). Moreover, in *United States v. Monaco*, 194 F.3d 381 (2d Cir. 1999), the Court confirmed that departures are separate and distinct from the "applicable Guideline range." There, this Court rejected the defendant's argument that a downward departure establishes a new Guideline range, holding that "[t]he district court *departed downward from the applicable guideline sentencing range*, not the offense level." *Id*. at 388 (emphasis added).

Furthermore, in the specific context of motions for sentence reductions under § 3582(c)(2) and Amendment 706 to the crack guidelines, several courts have expressly rejected the argument that the term "applicable Guideline range" is the post-departure guidelines range. Thus, the Tenth Circuit held that "for purposes of a sentencing modification under § 3582(c)(2), the 'applicable guideline range' and the range upon which a sentence is 'based' is, as a matter of law, the range produced under the guidelines' sentencing table after a correct determination of the defendant's total offense level and criminal history category but prior to any discretionary departures." *United States v. Darton*, 595 F.3d 1191, 1197 (10th Cir.), *cert. denied*, 130 S. Ct. 3444 (2010). *See also United States v. Tolliver*, 570 F.3d 1062, 1066 (8th Cir. 2009) (finding that "any post-departure guideline range that the district court might have relied upon in determining the extent of [the

defendant's] departure was not the "applicable guideline range"); *cf. Caraballo*, 552 F.3d at 11 ("Under an advisory guidelines system, a variance is granted in the sentencing court's discretion *after* the court has established an appropriately calculated guideline sentencing range. It is that sentencing range that must be lowered by an amendment in order to engage the gears of section 3582(c)(2)."") (internal citations omitted), *cert. denied*, 129 S. Ct. 1929 (2009).

To be sure, *McGee* approved the consideration of a defendant's post-departure range when finding a defendant eligible for a § 3582(c)(2) sentence reduction, but the exception approved in that case was a limited one. In *McGee*, this Court approved a § 3582(c)(2) reduction for a defendant whose "post-departure sentence was . . . *explicitly* based on the crack cocaine guidelines . . . ." 553 F.3d at 228 (emphasis added). As explained more completely above, this exception does not help Rivera because his post-departure sentence was not based – explicitly or otherwise – on the crack guidelines.

In sum, because Rivera's applicable Guideline range under Amendment 706 remains identical to his Guideline range when he was originally sentenced in 1996, he is not eligible 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: January 7, 2011

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.