

12-4741

To Be Argued By:
BRIAN P. LEAMING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4741

—
UNITED STATES OF AMERICA,
Appellee,

-vs-

JOHNNY RODRIGUEZ, aka Quest,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on January 9, 2009. Joint Appendix 3 (“JA__”). The defendant did not appeal from the judgment of conviction.

On March 13, 2012, the defendant filed a post-judgment motion seeking a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2). JA5. On November 5, 2012, the district court determined that the defendant was eligible for a sentence reduction, but exercised its discretion in denying the defendant’s request for a reduced sentence. JA7, JA260-61. At the same time, the court granted the defendant’s request for a 30-day extension of time to file a notice of appeal. JA7.

On November 20, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1) and (4). JA7, JA265. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over an appeal of a final order denying a § 3582(c)(2) motion. *See United States v. McGee*, 553 F.3d 226 (2d Cir. 2009) (per curiam).

**Statement of Issue
Presented for Review**

Whether the district court abused its discretion by denying the defendant's post-judgment sentence reduction motion under 18 U.S.C. § 3582(c)(2) where the district court found that a reduction would not properly reflect due consideration of the sentencing factors set forth at 18 U.S.C. § 3553(a)?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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Appellee,

-vs-

JOHNNY RODRIGUEZ, aka “Quest,”
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 arises out of a motion filed by the defendant, Johnny Rodriguez, to reduce his sentence, under 18 U.S.C. § 3582(c)(2), based on the amendments to the Sentencing Guidelines reducing the applicable base offense levels for cocaine base (“crack”) offenses. The district court concluded that Rodriguez was eligible for a sen-

tence reduction, but exercised its discretion and declined to lower his sentence, finding that such a reduction was unwarranted after an evaluation of the sentencing factors in 18 U.S.C. § 3553(a).

Rodriguez claims on appeal that the district court erred in denying his § 3582(c)(2) motion. As set forth below, this claim lacks merit, and the judgment of the district court should be affirmed.

Statement of the Case

On May 23, 2008, the defendant waived his right to be charged by indictment and entered a guilty plea to a one-count information charging him with possession with intent to distribute 50 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A). JA2-3, JA11. The defendant's waiver and guilty plea were accompanied by a binding agreement with the government pursuant to Rule 11(c)(1)(C). JA12-20. The parties agreed to a binding range of 140 to 175 months of imprisonment, which was the recommended sentencing range based on the quantity of crack cocaine involved in the offense conduct, provided the district court determined the defendant not to be a "career offender," under U.S.S.G. § 4B1.1. JA15. On December 29, 2008, the district court accepted the binding plea agreement and sen-

tenced the defendant principally to 140 months of imprisonment. JA118.

On March 13, 2012, Rodriguez filed a motion to reduce his sentence, pursuant to 18 U.S.C. § 3582(c)(2). JA5, JA136. On May 2, 2012, the district court entered an order denying the motion. JA6, JA168-72. On that same date, Rodriguez filed a supplemental memorandum of law in support of his motion for sentence reduction. JA173-76. The district court construed Rodriguez's memorandum as a motion for consideration and directed the government to respond. JA6. On November 5, 2012, after a hearing, the district court determined that Rodriguez was eligible for a sentencing reduction, but determined after consideration of all the sentencing factors codified at 18 U.S.C. § 3553(a), including the lower sentencing guideline range, that a lower sentence was not warranted. JA257-61. On November 20, 2012, Rodriguez filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(b) and the district court's order granting him a 30-day extension of time to file his notice of appeal. JA7.

Rodriguez is currently serving his sentence of incarceration.

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

A. The offense conduct

In October of 2006, law enforcement began investigating unlawful narcotics distribution at the Sports Center Café, in Hartford. Pre-Sentence Report (PSR) ¶ 8. Rodriguez was employed as a bartender at the Sports Center Café and was identified as a distributor of crack cocaine. PSR ¶¶ 9-10.

Early in the investigation, a cooperating witness introduced an undercover federal agent (UC) to Rodriguez and identified the UC as his gun source from Maine. PSR ¶ 10. Rodriguez expressed an interest in acquiring firearms from the source and inquired about prices. PSR ¶ 11. On November 14, 2006, the cooperating witness met with Rodriguez inside the Sports Center Café to complete the purchase of one-half ounce of crack cocaine for \$400. PSR ¶¶ 14-15. During this meeting, Rodriguez inquired of the cooperating witness what types of firearms he could obtain from the Maine source. PSR ¶ 15. Rodriguez was particularly interested in acquiring .45 caliber pistols because of their ability to “break bones.” PSR ¶ 15. Meanwhile, the crack cocaine transaction could not be completed. PSR ¶ 15. On November 16, 2006, the cooperating witness again tried to purchase one-half ounce of crack cocaine from Rodriguez, but when they met, Rodriguez and another male, the suspected source

for Rodriguez, told the cooperating witness they would not sell quantities less than 63 grams (2¼ ounces). PSR ¶ 16. For this quantity, Rodriguez stated he would charge \$1,300. PSR ¶ 16.

Thereafter, the cooperating witness purchased 63-gram quantities of crack cocaine from Rodriguez on four occasions: (1) on November 21, 2006, 63 grams (61.3 grams net weight); (2) on December 19, 2006, 63 grams (58.8 grams net weight); (3) February 1, 2007, 63 grams (43.7 grams net weight); and (4) February 26, 2007, 63 grams (no net weight identified). PSR ¶¶ 17-20. On March 5, 2007, Rodriguez was arrested and found in the possession of 60.7 grams (net weight) of crack cocaine. PSR ¶ 21.

B. The change of plea proceeding

On May 23, 2008, Rodriguez entered a guilty plea to one-count Information charging him with possession with the intent to distribute 50 grams or more of crack cocaine. JA11, JA21-57. He entered his plea pursuant to a written plea agreement with the government, and in accordance with Rule 11(c)(1)(C). JA12-20. The parties agreed, in relevant part, as follows:

In consideration of the defendant's agreement to waive indictment and enter a guilty plea to the Information, the Government has agreed to forego the filing of a Notice of Prior Conviction pursuant to Title 21, United States Code, Section 851,

the effect of which would have been to increase the defendant's mandatory minimum sentence to 240 months imprisonment. The defendant and the Government agree that the defendant's guilty plea is entered pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure and that, assuming the Court accepts this plea agreement, a sentence within the range of **140 to 175** months imprisonment is a reasonable and appropriate disposition of this case. . . .

The Government and the defendant acknowledge that the defendant's criminal history when applied to the offense of conviction may qualify him as a Career Offender under § 4B1.1 of the Sentencing Guidelines. As the offense of conviction carries a statutory maximum penalty of life, the parties further acknowledge that if the defendant is a Career Offender his offense level would be 37. A three level reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility would result in a total offense level of 34. A total offense level 34 with a criminal history category VI, which U.S.S.G. § 4B1.1(b) would require, the recommended guideline range would be 262 to 327 months imprisonment

If the defendant did not qualify as a

“Career Offender,” then the parties stipulate and agree that the defendant’s offense level is 32. A three level reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility would result in a total offense level of 29. Based on the information available to the Government at this time, including representations by the defendant, the defendant’s criminal history category is V. At a total offense level 29 and criminal history category V, the defendant’s Sentencing Guideline range is 140 to 175 months

JA15. The district court thoroughly canvassed Rodriguez on this provision of the plea agreement, JA40-42, and he acknowledged that if the court did not impose a sentence within that range, “the agreement will be torn up.” JA42. The district court expounded that if it intended to impose a sentence below 140 months, the government “gets to say we’re ripping up this agreement. It is of no effect.” JA41. And, if the district court intended to impose a sentence higher than 175 months, “you [Rodriguez] get to say we’re ripping up this agreement. It is no longer in effect.” JA41. If either of those situations were to arise, the district court further explained, the government would present the matter to the grand jury and proceed to trial. JA41. When asked if he understood the effect of this binding plea agreement, Rodriguez responded affirmatively. JA41, JA42.

C. The Presentence Report

In addition to detailing the offense conduct, as set forth above, the PSR found that the relevant and reasonably foreseeable quantity of cocaine base was at least 150, but less than, 500 grams. PSR ¶ 22. The actual quantity of cocaine base, however, totaled 288.5 grams. PSR ¶¶ 17-21. Based on this quantity, the PSR determined the base offense level to be 32. PSR ¶ 29. The PSR also noted that Rodriguez might be a career offender under U.S.S.G. § 4B1.1, PSR ¶ 23, although the career offender guideline was not used to calculate his offense level, PSR ¶¶ 29-36. The PSR calculated a final offense level of 29, after a 3-level reduction for acceptance of responsibility. PSR ¶¶ 35-36.

The PSR also described Rodriguez's lengthy criminal history dating to 1990. PSR ¶¶ 40-54. Included among Rodriguez's criminal convictions, were convictions in 2005 for unlawful restraint in the first degree and threatening, where Rodriguez was alleged to have threatened to "cut" out the baby from his ex-girlfriend with a ninja type sword, while he violently swung the sword. PSR ¶ 54. Rodriguez's criminal history was also remarkable for his conviction in 1999 for assault in the first degree where Rodriguez was alleged to have struck another man with a bottle causing the victim to lose permanent vision in one eye. PSR ¶ 52. Rodriguez had also sustained multiple convictions for serious nar-

cotics offenses which were not scored due to their age. PSR ¶¶ 43, 44, 47. In total, the PSR scored 17 criminal history points placing Rodriguez squarely in criminal history category VI. PSR ¶ 55.

The PSR thereafter calculated the applicable sentencing guideline range of 151 to 188 months' imprisonment, based on total offense level of 29, which included a three level reduction for acceptance of responsibility, and a criminal history category VI. PSR ¶ 94.

D. The sentencing proceeding

On December 29, 2008, the parties appeared for sentencing. JA3, JA95. At the outset, the district court confirmed that it would consider all the sentencing factors under 18 U.S.C. § 3553(a) and that the plea was an "11(c)(1)(C) agreement." JA96. Thereafter, Rodriguez agreed that he reviewed the PSR, and did not have any objections or additions to it. JA97. The district court adopted the PSR "to the extent it sets forth facts." JA98.

The district court noted a discrepancy between the parties' agreement as to Rodriguez's criminal history category as set forth in the plea agreement (V) and the PSR (VI). JA98. As explained by the court, a criminal history category VI, assuming Rodriguez was not a career offender, increased his sentencing range to 151 to 188 months' imprisonment, as compared to the par-

ties stipulated range of 140 to 175 months' imprisonment. JA98. Moreover, the court noted that while the parties had not resolved whether Rodriguez was a career offender, it would find that he was, in fact, a career offender, and thus that his resulting guideline range was 262 to 327 months' imprisonment. JA104. The district court further noted that the plea agreement, if accepted by the court, obligated it to impose a sentence within the sentencing range of 140 to 175 months' imprisonment. JA104-105.

The district court then entertained remarks from the government, defense counsel and the defendant. In seeking a sentence within the parameters of the parties' agreement, Rodriguez relied on his sentencing memorandum which outlined his acceptance of responsibility, his agreement to plead to an information, his efforts to assist the government, his long standing substance abuse history, his difficult childhood, and his post-offense rehabilitation. JA105-108. In both his written and verbal comments, Rodriguez requested a sentence within the sentencing range set forth in the plea agreement. JA81, JA107-108.

The government presented its view of Rodriguez's offense conduct in its sentencing memorandum, highlighting the agreement between Rodriguez and the cooperating witness to exchange a gun for 63 grams of crack cocaine. JA88. The government also noted that the par-

ties erred in calculating Rodriguez's criminal history category and that the appropriate range was 151 to 188 months' imprisonment, if he was not deemed to be a career offender. JA88-89. The government nonetheless advocated a sentence "within the agreed upon range" to give effect to the parties' agreement. JA89. The government advocated for such a sentence even though Rodriguez, in the government's opinion, had previously been convicted of two separate "crimes of violence" which would qualify him as a career offender. JA90-92. The government agreed to the lower range in the Rule 11(c)(1)(C) agreement based on Rodriguez's attempt to provide substantial assistance and the credible information he provided about criminal activity involving others. JA92-93. At the hearing, the government again argued that the district court should impose a sentence within the agreed upon range, in part, because of the defendant's assistance to the government. JA112-113. The government also noted Rodriguez's "very serious" criminal history. JA112.

Rodriguez personally addressed the district court. He apologized to the court "for whatever he did" and asked the court to give him a chance so he could be a father to his children. JA111.

Following the parties' presentations, the district court discussed the applicable guideline range and the seriousness of his offense conduct:

I have identified the sentencing guideline range that Congress would deem a reasonable sentence knowing the offense conviction and the defendant's criminal history as 262 to 327 which is almost 22 years to 27 years. Obviously it is what the defendant did is a very serious offense. Congress certainly thinks so. Certainly for someone with his criminal history it is a serious offense.

JA114. Indeed, the district court noted that Rodriguez sold sizable quantities of crack cocaine multiple times over a period spanning more than three months, and that the drugs he sold would be distributed in his own community. JA114-15.

The district court also noted the need to deter Rodriguez from continuing to commit crimes. JA115. Rodriguez's lengthy criminal history and separate periods of incarceration totaling 7 to 8 years, the district court reasoned, had been insufficient to deter his continued criminal conduct, and "the sentence here today had to be longer than those sentences because those sentences didn't deter Mr. Rodriguez, certainly not the last one, didn't deter him. He was selling the last drugs while on probation after the last incarceration." JA115-16. The district court also recognized the need to protect the community from Rodriguez. In fact, the district court explained the public's protection "is a real concern." JA116.

Explaining its reasoning further, the district court also considered Rodriguez's history and characteristics, including his criminal history. In particular, the district court stated that two of Rodriguez's previous convictions—for first degree assault and unlawful restraint—did not “reflect well on him” and were “disturbing.” JA116. While observing that the defendant had had a very difficult life, including early drug use and a difficult family situation, the district court noted that this did not “entitle[] [the defendant] to go out and violate the law repeatedly.” JA117. The district court further observed as follows:

While everything I have just said argues or suggests that the harshest penalty I could impose might be appropriate, the court is impressed I guess with the fact of the government's comments and the defense counsel as well but particularly the government's comments about the defendant's meeting with the government and what that I think hopefully reflects of Mr. Rodriguez which is an understanding that something has to change and I think pleading guilty, his meeting with the government is frankness with the government, indicate to me that while a lengthy sentence is necessary here that the Plea Agreement provides an appropriate sentence so the court will expressly accept on

the record the parties 11(c)(1)(C) Plea Agreement

JA117-18. Thereafter, the district court imposed a sentence of 140 months' imprisonment, followed by 10 years of supervised release. JA118. The district court further stated that while the sentence was "a very long" one, it was in "some ways a very short sentence." JA121. The district court further explained "because of what I think reflects I think change in attitude by you if that's the best way to put it." JA121. Continuing, the district court stated that the sentence was "also a short sentence in light of what Congress would have me give you. Congress would have me give you twice as much and I didn't do that." JA122.

E. The motion for sentence reduction

On January 18, 2012, the United States Probation Office issued an Addendum to the PSR to address Rodriguez's eligibility for a reduced sentence in light of the Sentencing Commission's retroactive reduction in the crack cocaine sentencing guidelines. *See* PSR, Retro-Crack Addendum. According to the Probation Office, Rodriguez was ineligible for a sentence reduction under the amended crack cocaine guidelines because the quantity of cocaine base involved was 288.5 grams, and this quantity did not translate into a reduced guidelines range. Moreover, the Probation Office noted that Rodriguez was also ineligible because he had pleaded guilty under a

Rule 11(c)(1)(C) binding plea agreement. PSR, Retro-Crack Addendum.

On March 13, 2012, Rodriguez filed a motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). JA5, JA136. Rodriguez argued that he was eligible for a reduction notwithstanding his binding plea agreement, and asked the court to reduce his offense level by four levels based on its earlier finding that the offense conduct involved 170 grams of crack cocaine. JA137-44. Based on this quantity and a criminal history category VI, Rodriguez argued, the resulting guideline range would be reduced to 110 to 137 months' imprisonment.¹ JA144. In support of his motion, Rodriguez highlighted his post-sentencing conduct while incarcerated. JA144-46.

On March 23, 2012, the Probation Office responded to Rodriguez's motion with a Second Retro-Crack Addendum to the PSR. In the Second Retro-Crack Addendum, the Probation Office explained that the 288.5 gram quantity it had used in the original Addendum came from adding up the drug quantities in the specific factual statements from the PSR that were adopted by the court at sentencing. Using these quantities, the Probation Office explained, Rodriguez was ineligible for a sentence reduction.

¹ Rodriguez's motion did not address the 10 year mandatory minimum term of imprisonment.

The government provided notice that it agreed with the Probation Office that Rodriguez was ineligible for a sentence reduction. JA159. The government argued that Rodriguez was determined to be a career offender and therefore the reduction in the crack guidelines did not have the effect of reducing his sentencing guideline range. JA164. The government alternatively argued that the quantity of crack cocaine involved in the offense conduct as detailed in the PSR and adopted by the district court was 288.5 grams and therefore the new guidelines did not reduce Rodriguez's applicable guideline range. JA164-65.

On May 2, 2012, the district court entered an order denying Rodriguez's motion. JA168-72. Citing Justice Sotomayor's concurrence in *Freeman v. United States*, 131 S. Ct. 2685, 2698 (2011), the court agreed with Rodriguez that he was eligible for a sentence reduction notwithstanding his binding plea agreement under Rule 11(c)(1)(C) because the parties' stipulated range was based on drug quantity. JA170. Nevertheless, the court disagreed with Rodriguez regarding the drug quantity, concluding that the PSR, as adopted by the court at sentencing, established a drug quantity of 288.5 grams of cocaine base. JA170-72. Because this drug quantity did not reduce Rodriguez's range the court found him ineligible for a sentence reduction. JA171-72.

At or near the time of the district court's ruling, Rodriguez filed a supplemental memorandum in support of his motion. JA173. In his supplemental memorandum, Rodriguez challenged the quantity of cocaine base involved, particularly as it related to the controlled narcotics purchase which occurred on February 26, 2007. JA174-75. The PSR described the transaction on that date as involving a weight of 64 grams of crack cocaine but it contained no information on a net weight for the drugs, as it did with the other drug seizures. *See* PSR ¶ 20. Rodriguez argued that because the net weight was lower than the gross weight in all the other purchases, the total weight found by the Probation Office of 288.5 grams was inaccurate, and indeed, the weight might fall beneath the 280 gram threshold to make him eligible for a reduced sentence. JA175-76.

The district court construed Rodriguez's supplemental memorandum as a motion for reconsideration, and directed the government to respond. JA6. Although the government originally argued that Rodriguez was ineligible for a reduced sentence, the government ultimately argued that in lieu of holding an evidentiary hearing on drug quantity (as requested by Rodriguez), the court should use the net weight quantities from the PSR as an established drug quantity. JA223. This would result in a finding that the offense conduct involved at least 224.5 grams

of cocaine base, and would translate into a range of 120 to 150 months' imprisonment with criminal history category V, or 130 to 162 months' imprisonment with criminal history category VI. JA223.

At a hearing on November 5, 2012, the district court specifically found that under *Freeman Rodriguez* was eligible for a sentencing reduction. JA246-47. The district court then turned to the next question, that is, whether the “defendant should be resentenced.” JA247. Rodriguez argued that he should be resentenced, and that his sentence should be reduced to 120 months' imprisonment. JA248-52. The government opposed any reduction in the defendant's sentence. JA252. As the government explained, although the plea agreement used the drug quantity range, there were multiple factors that led the parties to agree to that range. In particular, the government pointed to its agreement to forego the filing a second offender information pursuant to 21 U.S.C. § 851 (and thus the possibility of a 20-year mandatory minimum term), the defendant's attempt to cooperate with the government, the defendant's intention to exchange the crack cocaine for a firearm, the defendant's association with the Latin Kings, the ease with which the defendant obtained large quantities of crack cocaine to sell to the cooperating witness, and his criminal history, including a particularly violent domestic violence conviction. JA252-56.

Considering all these factors, the government urged that a sentence of 140 months continued to be appropriate and reasonable. JA256.

After hearing argument, the district court concluded that the applicable guideline range was reduced to 120 to 150 months' imprisonment. JA258. The district court then analyzed the statutory sentencing factors under 18 U.S.C. § 3553(a) in deciding whether to reduce Rodriguez's sentence. JA258-61. First, the district court noted that Rodriguez had a good disciplinary record in prison and had taken advantage of prison programming. JA258. Next, however, the court pointed to Rodriguez's "fairly serious criminal history" where he received "substantial prison sentences" which did not "deter him." JA258. Moreover, the court noted that Rodriguez was "selling substantial quantities on each of the multiple occasions[. . .] was interested in acquiring firearms[.] . . .[and was] eager to obtain firearms from [gun supplier from Maine]." JA259. The district court summarized its conclusions as follows:

[The defendant's] willingness to consider [acquiring a firearm] coupled with his involvement in regular and significant drug dealing, causes the court to conclude that his criminal offense, his criminal conduct coupled with the history and characteristics are such that it is my conclusion that the original guideline range that I gave

the defendant the bottom end of that range is appropriate and that more importantly the sentence that I gave him is the appropriate sentence that while the parties decided to agree to an 11C1C, to forgo the government forgo the filing of 851 and to agree to a particular guideline range, the government's position today that really wasn't just quantity that was driving their concern and their view that a sentence within that range was the appropriate range. The Court, in effect, agrees there are other factors here about Mr. Rodriguez.

JA259-60. The district court continued its comments by focusing on the defendant's criminal history, the defendant's commission of the present offense while under court supervision, the defendant's previous sentences of "substantial terms of imprisonment," and the defendant's offense conduct in this case. JA260. The court concluded, therefore, that "[f]or all of those reasons, . . . [the court] will not exercise its discretion and will not resentence Mr. Rodriguez, and the sentence originally imposed 140 months along with all the other aspects of the judgment remain in effect." JA260-261.

Summary of Argument

The district court properly exercised its discretion to deny Rodriguez's motion to reduce his sentence under 18 U.S.C. § 3582(c)(2). The district court understood its authority to reduce Rodriguez's sentence, and recognized Rodriguez's eligibility for a reduction. Nevertheless, when the district court considered all the sentencing factors under 18 U.S.C. § 3553(a), the balance of the sentencing factors weighed strongly in favor of the sentence imposed. Therefore, the court properly concluded that the original sentence, which was also within the reduced sentencing range of 120 to 150 months, was appropriate. In sum, it was not an abuse of discretion for the district court to deny Rodriguez's motion.

Argument

I. The district court properly exercised its discretion to deny Rodriguez's motion for a reduced sentence under 18 U.S.C. § 3582(c)(2).

A. Governing law and standard of review

Title 18, United States Code, Section 3582(c)(2) provides:

[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subse-

quently 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.

Id.

In U.S.S.G. § 1B1.10, the Sentencing Commission has identified the amendments which may be applied retroactively pursuant to this authority, and articulated the proper procedure for implementing the amendment in a concluded case. In particular, § 1B1.10 provides, in relevant part:

(1) *In General.*—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant’s term of imprisonment shall be consistent with this policy statement.

(2) *Exclusions.*—A reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

- (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 lower-

ing 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.

Id.

In *Dillon v. United States*, 130 S. Ct. 2683 (2010), the Supreme Court addressed the process for application of a retroactive guideline amendment, emphasizing that § 1B1.10 is binding. The Court declared: “Any reduction must be consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* at 2688.

Furthermore, the Court affirmed that a two-step approach must be followed for considering motions for reductions under § 3582(c)(2):

At step one, § 3582(c)(2) requires the court to follow the Commission’s instructions in § 1B1.10 to determine the prisoner’s eligibility for a sentence modification and the extent of the reduction authorized. Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing] the amended guideline range that would have been applicable to the defendant” had the relevant amendment been in effect at the time of the initial sentencing. “In making such de-

termination, 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.” *Ibid.*

* * *

At step two of the inquiry, § 3582(c)(2) instructs a court to consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by reference to the policies relevant at step one is warranted in whole or in part under the particular circumstances of the case.

Id. at 2691-92. See also *United States v. Figueroa*, 714 F.3d 757, 759-60 (2d Cir. 2013) (per curiam) (describing two-step approach). As is implicit in this two-step process, “[a] retroactive amendment to the Guidelines ‘merely authorizes a reduction in sentence; it does not require one.’” *United States v. Wilson*, 716 F.3d 50, 52 (2d Cir. 2013) (per curiam) (quoting *United States v. Rivera*, 662 F.3d 166, 170 (2d Cir. 2011)).

Moreover, “[b]y its terms, § 3582(c)(2) does not authorize a sentencing or resentencing proceeding. Instead, it provides for the ‘modification of] a term of imprisonment’ by giving courts the power to ‘reduce’ an otherwise final sentence in circumstances specified by the

Commission. . . Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Id.* at 53 (quoting *Dillon*, 130 U.S. at 2690-91).

The amendment in question in this matter is part A of Amendment 750, which altered the offense levels in Section 2D1.1 applicable to crack cocaine offenses, and which the Sentencing Commission added to Section 1B1.10(c) as a retroactive amendment. The Sentencing Commission lowered these offense levels pursuant to the Fair Sentencing Act of 2010, which changed the threshold quantities of crack cocaine which trigger mandatory minimum sentences under 21 U.S.C. § 841(b), and directed the Commission to implement comparable changes in the pertinent guideline.

This Court reviews a district court's denial of a motion for a sentence reduction for abuse of discretion. *United States v. Borden*, 564 F.3d 100, 101 (2d Cir. 2009); *Figueroa*, 714 F.3d at 759. As the *Borden* Court explained, abuse of discretion review is implicit in the statute that grants the district court discretion to grant or deny the requested relief:

[b]ecause the statute states that a district court *may* reduce the term of imprisonment, it clearly allows for a district court to exercise its discretion when considering

a motion to reduce a sentence brought pursuant to § 3582(c)(2). Accordingly, we join our sister circuits in holding that we review a district court’s decision to deny a motion under 18 U.S.C. § 3582(c)(2) for abuse of discretion.

564 F.3d at 104. A district court abuses its discretion only when a “challenged ruling rests on an error of law, a clearly erroneous finding of fact, or otherwise cannot be located within the range of permissible decisions.” *United States v. Boccagna*, 450 F.3d 107, 113 (2d Cir. 2006) (internal quotation marks omitted); *see also Borden*, 564 F.3d at 104.

B. Discussion

The district court properly exercised its discretion when it denied Rodriguez’s motion for a sentence reduction. The district court recognized that Rodriguez was eligible for a reduction under the amended guidelines, and then proceeded to consider the merits of his request as a matter of discretion. *See Dillon*, 130 S. Ct. at 2691-92 (setting out two-step procedure for evaluation of motions under § 3582(c)(2)).

When exercising its discretion, the court properly considered the sentencing factors in § 3553(a). The court considered, for example, Rodriguez’s extensive and troubling criminal history, the defendant’s previous terms of incarceration, and the offense conduct in this case—

which included the defendant's willingness to buy a gun and his regular involvement in drug dealing. All of these factors were proper factors for consideration as the court decided whether to reduce Rodriguez's sentence. *See* 18 U.S.C. § 3553(a).

On the record before it, the court was fully justified in exercising its discretion to deny Rodriguez's request for a sentence reduction, and Rodriguez fails to demonstrate otherwise. *First*, Rodriguez can point to no error of law by the district court. While Rodriguez frequently cites to "errors" by the district court, he fails to identify any error of law. The district court was authorized, but not required, to impose a lesser sentence based on the amendment to the crack cocaine guidelines. *Wilson*, 716 F.3d at 52. The mere fact that it exercised its discretion not to do so, was not an error of law. Rather, the district court's decision was a sound use of its wide-ranging discretion.

Rodriguez claims that the district court violated the "law of the case" doctrine by not reducing his sentence. Appellant Br. at 36-39. That argument has no merit. The law of the case doctrine provides that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (in-

ternal quotation marks omitted). “The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000). The district court did not violate this doctrine here. The court merely considered the § 3553(a) factors here—as directed by § 3582(c)(2) and § 1B1.10—weighed those factors, along with Rodriguez’s post-sentencing conduct, and concluded that the balance of factors did not weigh in favor of a reduced sentence.

According to Rodriguez, however, the court violated the law of the case doctrine because the only “new developments” that occurred after his sentencing were the lowering of the crack:powder ratio and his good post-sentencing behavior. Thus, according to Rodriguez, because the court gave him a sentence at the bottom of the guidelines range at his sentencing, and because the only “new” factors suggested the need for a lower sentence, the court was required by the law of the case doctrine to reduce his sentence. Appellant Br. at 36-38.

Rodriguez’s argument is untenable, principally because it is inconsistent with the statute. The logical implication of Rodriguez’s argument is that whenever a defendant’s sentencing range is lowered retroactively by the Sentencing Commission the district court *must* reduce the de-

fendant's sentence to accommodate that "new" information. After all, in Rodriguez's view, all of the § 3553(a) factors were considered at the original sentencing, and so because the only new information (*i.e.*, the reduced sentencing range) suggests the need for a lower sentence, the court must reduce the sentence or violate the law of the case doctrine. But that is not the law. Indeed, this Court has held directly to the contrary. As this Court explained, the mere fact of a retroactive guideline amendment does not require a sentence reduction; it merely authorizes one. *See Wilson*, 716 F.3d at 52; *Rivera*, 662 F.3d at 170.

Moreover, the statute and the Sentencing Commission's policy statement direct the court to consider the § 3553(a) factors when deciding whether to grant a reduction, and when deciding the extent of any such reduction. 18 U.S.C. § 3582(c)(2); U.S.S.G. 1B1.10, Application Note 1(B). By requiring the court to consider the § 3553(a) factors, these provisions clearly contemplate that the court will *re-weigh* the § 3553(a) factors along with the new, reduced sentencing range, and further, that that reweighing may result in a decision to *deny* any sentence reduction. In other words, the mere fact that a guidelines range is lowered does not mandate a corresponding reduction in a defendant's sentence, any more than any particular factor

mandates a particular sentence at the original sentencing.

Further, with respect to this case in particular, Rodriguez's argument subjugates all of the other sentencing factors the district court relied on in its original sentencing. The district court, at the original sentencing, and in the ruling denying Rodriguez's motion, was painstakingly clear that a sentence of 140 months was not only well below the applicable guideline range, but also based on many factors other than the quantity of crack cocaine. At sentencing the court focused, for example, on Rodriguez's attempted cooperation, the need to deter Rodriguez (particularly since his previous sentences had not deterred him), the serious offense conduct, Rodriguez's significant and "disturbing" criminal history, and the need to protect the public. JA114-18. The quantity of crack cocaine distributed by Rodriguez, while a factor, was obviously not a significant one relied on by the district court. Indeed, at the original sentencing the district court mistakenly understated the quantity of crack cocaine distributed by Rodriguez. *See* JA114 ("[O]n three different occasions the defendant sold cocaine base in quantities that totaled about 170 grams I think over a little more than a three-month period."). In fact, Rodriguez distributed, or possessed with intent to distribute, closer to 280 grams of crack cocaine, on five occasions, and over a four-month period. *See* PSR ¶¶ 17-21.

Even the quantity (224.5 grams) eventually agreed upon by the parties following the filing of the § 3582 motion was higher than that stated by the district court when it imposed the 140-month prison sentence. Thus, it is hardly surprising that the district court did not find a two-level reduction in the guideline range required a reduced sentence. In short, to suggest now that the lowering of the crack cocaine sentencing range required the court to reduce Rodríguez's sentence would effectively strip the district court of its discretion and elevate one sentencing factor over all others.

Because the district court properly exercised its discretion, Rodríguez's reliance on *United States v. Grant*, 703 F.3d 427 (8th Cir. 2013) and *United States v. Burrell*, 622 F.2d 961 (8th Cir. 2010) afford him no relief either. In both cases, the appellate court vacated the sentences because the district court provided little or no explanation for its decision thereby denying any meaningful appellate review. Here, the district court provided ample, detailed and persuasive reasons for its decision to deny the defendant a sentence reduction. In particular, the district court again noted that the government did not file a second offender notice under 21 U.S.C. § 851 which would have mandated a prison sentence of 20 years, the defendant's attempt to cooperate, the defendant's intention to acquire a firearm, the defendant's association with the

Latin Kings, the ease with which the defendant obtained significant quantities of crack cocaine, and his criminal history, to include particularly violent convictions. JA256. All of these facts amply supported the court’s discretionary decision to deny the sentence reduction.

Second, Rodriguez can point to no “clearly erroneous finding of fact” by the district court. Instead of pointing to clearly erroneous facts, Rodriguez argues that the district court improperly emphasized or discounted certain factors over others. For example, Rodriguez faults the district judge when at the original sentencing she “underscored her belief that Rodriguez had not spent long periods in prison and thus did not need a particularly long prison sentence to deter him, while in denying him a sentence reduction, she underscored her belief that he previously spent long periods in prison and this did need a particularly long sentence to deter him.” Appellant Br. at 38-39. This argument rests on a misreading of the record. At both proceedings, the court considered Rodriguez’s prior terms of incarceration and the need to impose a sentence that deterred him from future criminal conduct. At his sentencing, the court noted, for example, that Rodriguez’s prior time in prison—which it understood to be a five-year term and then another shorter term—had not deterred him from criminal conduct. JA115-16. Similarly, at the 2012 hearing on his motion for a sentence reduc-

tion, the court made clear that while it did not have precise notes on how long Rodriguez had served, an important concern was in imposing a sentence that would deter him from further misconduct when his prior terms of incarceration had failed to do so. JA257. Certainly, the record does not support that such findings were “clearly erroneous.”

Further, the court did not err by relying on facts to deny the sentence reduction that it had not articulated at sentencing. In particular, Rodriguez faults the court for denying his motion in part by relying on his interest and efforts to acquire a firearm when the court had not mentioned those facts at sentencing. Appellant Br. at 38. While it may not have been articulated at the original sentencing, those facts were detailed in the PSR upon which the district court relied in calculating a reasonable sentence. PSR ¶¶ 10, 15. At the November 5, 2012, hearing the district court simply referred to the PSR, “which [it] did adopt” in recalling all the facts and circumstances which impacted her sentencing decision. JA259. That the district court did not specifically articulate a fact at the original sentencing does not render its reference to an undisputed fact in the PSR clearly erroneous.

Similarly, Rodriguez can identify no error by the district court in its reliance on the government’s reasons for entering into the plea agreement. Appellant Br. at 39-45. Again, this argu-

ment rests on a misreading of the record. Rodriguez's attempt to cooperate and the government's explanation of his efforts was one of the principal reasons why the district court accepted the binding plea and imposed a sentence of 140 months' imprisonment, which was nearly half of the Guideline sentence. JA117. Rodriguez's efforts to assist the government were instrumental in convincing the district court to depart *downward* to *accept* the binding plea agreement and impose a non-Guideline sentence, yet he now argues that the district court improperly "focus[ed]" on this fact in rejecting his motion for a sentence reduction. If it were not for Rodriguez's attempts to cooperate, it is highly likely that the binding plea agreement would have been rejected, and he would be facing a Guideline sentence of 262 to 327 months.

Rodriguez's exhaustive explanations on the nuances of plea negotiations and what he believes the government would actually have done in the absence of an agreement, the government's assessment of the value of Rodriguez's cooperation, and the likelihood of the government filing a § 851 second offender notice if there was no agreement, may make for an interesting read, but they are hardly relevant. Nor is his supposition of what the district court did, or should have done, with this information in denying Rodriguez's § 3582 motion, relevant. Atom-splitting of facts and mind-reading of the parties'

motivations in hypothetical situations that never presented themselves is beyond the lawful purview of a § 3582 motion, and adds nothing to deciding whether the district court abused its discretion in imposing a below-guideline sentence.

What is perhaps more perplexing and misleading is Rodriguez's suggestion that not only did the district court improperly rely on the government's reasons for offering a below-guideline plea agreement, but also that the government's memory is "particularly unreliable" as the "prosecutor's memory of actual events" was "color[ed]" by its legal opposition to Rodriguez's § 3582 motion. Appellant's Br. at 45. Apparently, according to Rodriguez, when the "prosecutor" does not prevail on its legal arguments, it will "color" the facts to support its position. Putting aside the implication of these arguments, the record belies Rodriguez's claim. Rodriguez's cooperation, or attempt to do so, was important to the district court in its sentencing assessment at the original sentencing *and* its decision to deny his motion for a reduction of his sentence. Its importance, however, did not require the district court to reduce a sentence it had already reduced well below the Guideline range. Moreover, that the government did not "pile on" at the sentencing hearing with a recitation of the offense conduct (as described in the PSR) and Rodriguez's "disturbing" criminal history (as described in the PSR) should not now be used to suggest

that these were not important factors in determining a reasonable sentence.

Rodriguez’s argument to the contrary demonstrates his failure to appreciate that the sentencing range was formed by agreement. Indeed, Rodriguez received the best outcome for what he bargained—a sentence at the low end of the agreed upon range. A sentence *within* that range is what both parties bargained and advocated for and what they received. That the government tempered its remarks at sentencing about Rodriguez’s offense conduct and criminal history to promote its agreement and to best ensure that the district court accept the parties’ agreement, should not foreclose the government—or the court—from considering the complete facts of the case when, years later, Rodriguez sought a sentence below the agreed-upon range.

Moreover, Rodriguez’s theory that Judge Hall operated on the basis of “irrational cognitive biases” is completely without foundation. He cites no authority that would allow this Court to scrutinize the district court’s alleged “cognitive” biases, much less any authority to *guide* the Court on such a journey. This Court must review the district court’s decision as that decision is revealed in the written and transcribed words of the court. Here, Judge Hall thoroughly explained her decisions, and Rodriguez provides no basis for this Court to second-guess her stated explanations or question whether she properly

considered various § 3553(a) factors, or whether she only considered them through some sort of “cognitive bias.” Indeed, it is hard to imagine how this Court would even conduct such an analysis.

Similarly, there is no basis for applying “special scrutiny” to this case to avoid an appearance of bias. Counsel is careful to avoid the suggestion that Judge Hall was biased in this case, but asks for a remand to avoid the appearance that “the federal criminal justice system simply do[es] not care that an irrational and racially-discriminatory sentencing ratio has been employed and is not being rectified.” Appellant Br. at 53. But on this record there is no need to remand to avoid a suggestion that the “federal justice system does not care” or that Rodriguez’s claims were not given a full hearing under the law. As set forth in detail above, Judge Hall considered numerous arguments, both in writing and in hearings, over the course of several months on the merits of Rodriguez’s motion. Although she originally ruled that he was ineligible for a reduction, after further consideration, she changed her mind and proceeded to an extended consideration of *whether* to reduce his sentence. At no point has there been any suggestion that Judge Hall was anything less than fair, impartial, and dedicated to getting to a just result in this case. The mere fact that she denied

Rodriguez's motion is not, by itself, sufficient to establish bias worthy of a remand.

Third, Rodriguez also fails to articulate how the district court's decision to deny a sentence reduction to a defendant who was sentenced to a term that was approximately one-half of the Guideline sentence "cannot be located within the range of permissible decisions." *Boccagna*, 450 F.3d at 113. While Rodriguez spends considerable time dismissing the disparity between the ultimate sentence and his original guidelines range, he never addresses the pivotal issue of whether the court's decision to deny a reduction below 140 months, in consideration of all the sentencing factors, *cannot* be in the range of permissible sentences. This is especially true in this context where this Court has made clear that denial of a § 3582(c)(2) motion, on the basis of § 3553(a) factors, is one of the permissible outcomes of the analysis. *Wilson*, 716 F.3d at 52.

Rodriguez's *pro se* brief similarly fails to raise any cognizable basis to reverse the district court's ruling. In his *pro se* brief, Rodriguez advances three claims of error. First, he argues that under the Fair Sentencing Act (FSA) he is eligible for a sentencing reduction to a five-year mandatory prison term. Appellant Pro Se Br. at 7. This argument fails, however, because this Court has explicitly held that the FSA does not apply to defendants, such as Rodriguez, who were convicted and sentenced before its enact-

ment. *See United States v. Diaz*, 627 F.3d 930, 931 (2d Cir. 2010) (per curiam).

Second, Rodriguez claims that the government breached the plea agreement thereby justifying a remand for resentencing. Appellant Pro Se Br. at 8. Specifically, Rodriguez argues that the government breached the agreement “by consistently mentioning other drug amounts and incidents to justify denying the § 3582(c)(2) motion.” *Id.* This argument is frivolous given that the parties entered into a binding plea agreement that included a stipulation that the relevant drug quantity was at least 150 grams and less than 500 grams of cocaine base. *See* JA20. The quantities discussed by the government fell squarely within this range.

Third, Rodriguez argues that his post-sentencing rehabilitation could be used to support a sentencing reduction. Appellant Pro Se Br. at 10. The government has no quarrel with this argument; there is no doubt that a defendant’s post-sentencing rehabilitation can be used to support a sentencing reduction under § 3582(c)(2). Indeed, this argument is consistent with the argument his counsel made in support of his § 3582 motion. *See* JA144-146. Nevertheless, the mere fact that Rodriguez had post-sentencing rehabilitation did not require the court to reduce his sentence to account for that fact. The court considered Rodriguez’s post-sentencing conduct and rehabilitation as positive

factors in its analysis of his motion, *see* JA258, but at the end of the day, found that those factors did not warrant a reduced sentence when they were balanced against all of the other factors in Rodriguez's case. JA258-61. That Rodriguez would have liked the court to give his post-sentencing rehabilitation more weight does not mean that the court abused its discretion when it failed to do so.

Conclusion

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

Dated: November 15, 2013

Respectfully submitted,

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**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,565 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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**BRIAN P. LEAMING
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--

* * *

(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) Limitation and Prohibition on Extent of Reduction.--

(A) Limitation.--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 for Substantial Assistance.--If the 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 pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may 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, 715, and 750 (parts A and C only).