

12-961

To Be Argued By:
CHRISTOPHER M. MATTEI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-961

—
UNITED STATES OF AMERICA,
Appellee,

-vs-

MICAL BETHEA, aka Kareem,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
*Acting United States Attorney
District of Connecticut*

CHRISTOPHER M. MATTEI
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

Table of Contents

Table of Authorities	ii
Statement of Jurisdiction	iv
Statement of Issue Presented for Review.....	v
Preliminary Statement	1
Statement of the Case	2
Statement of Facts and Proceedings Relevant to this Appeal	3
A. The offense conduct.....	3
B. The change of plea proceeding.....	4
C. The sentencing proceeding	6
D. The motion for sentence reduction.....	15
Summary of Argument	17
Argument.....	17
A. Governing law and standard of review	17
B. Discussion	22
Conclusion	28

Table of Authorities

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.

Cases

<i>Dillon v. United States</i> , 130 S. Ct. 2683 (2010).....	19, 25
<i>United States v. Boccagna</i> , 450 F.3d 107 (2d Cir. 2006)	22, 25
<i>United States v. Borden</i> , 564 F.3d 100 (2d Cir. 2009)	21, 22
<i>United States v. Figueroa</i> , 714 F.3d 757 (2d Cir. 2013) (per curiam).....	20, 21, 27
<i>United States v. McGee</i> , 553 F.3d 226 (2d Cir. 2009) (per curiam)	iv
<i>United States v. Mock</i> , 612 F.3d 133 (2d Cir. 2010) (per curiam)	25
<i>United States v. Rivera</i> , 662 F.3d 166 (2d Cir. 2011)	21
<i>United States v. Wilson</i> , __ F.3d __, 2013 WL 2096607 (2d Cir. May 16, 2013) (per curiam).....	20, 27

Statutes

18 U.S.C. § 3231.....	iv
18 U.S.C. § 3553.....	<i>passim</i>
18 U.S.C. § 3582.....	<i>passim</i>
21 U.S.C. § 841.....	2, 4, 5, 12, 21
21 U.S.C. § 851.....	5, 6, 12
28 U.S.C. § 994.....	17
28 U.S.C. § 1291.....	iv

Rules

Fed. R. App. P. 4	iv
-------------------------	----

Guidelines

U.S.S.G. § 1B1.10.....	18, 19, 20, 21
U.S.S.G. § 3E1.1.....	4
U.S.S.G. § 2D1.1.....	4, 21, 25

Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 24, 2010. Government's Appendix 5 ("GA_"). The defendant did not appeal from the judgment of conviction.

On September 22, 2011, the defendant filed a post-judgment motion, seeking a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2), which was denied on March 5, 2012. GA6-7. On March 9, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA7. 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

Docket No. 12-961

UNITED STATES OF AMERICA,
Appellee,

-vs-

MICAL BETHEA, aka Kareem,
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, Mical Bethea, 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 denied Bethea’s motion, finding that a sentence within the reduced guideline range would be in-

sufficient in light of the § 3553(a) sentencing factors.

Bethea now 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 January 5, 2010, a federal grand jury returned an indictment charging Bethea with two counts of possession with intent to distribute and distribution of five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). GA2. On June 29, 2010, Bethea pleaded guilty to Count One of the Indictment. GA4. On September 20, 2010, the district court (Bryant, J.) sentenced Bethea to 80 months of imprisonment. GA5. Judgment entered September 24, 2010. GA5.

On September 22, 2011, Bethea filed a motion to reduce his sentence, pursuant to 18 U.S.C. § 3582(c)(2). GA6. On March 5, 2012, the district court denied the motion. GA6-7. On March 9, 2012, Bethea filed a timely notice of appeal. GA7.

Bethea is currently serving his sentence of incarceration.

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

A. The offense conduct

Between February and April of 2009, Bethea engaged in a series of unlawful transactions involving firearms and crack cocaine. Government Sealed Appendix (“GSA”) 3-4. First, on February 24, 2009, Bethea, who had previously been convicted of multiple felonies, sold a .22 caliber handgun for \$400 to an individual who was cooperating with law enforcement. GSA4. Then, on March 3, 2009, Bethea sold 5.3 grams of cocaine base to an undercover law enforcement officer in exchange for \$260. GSA4. Next, on April 8, 2009, Bethea sold another firearm—a 12-gauge shotgun with ammunition for \$400. GSA4. Finally, on April 22, 2009, Bethea sold 5.13 grams of crack cocaine to an undercover law enforcement officer. GSA4.

At the time of the foregoing conduct, Bethea was serving a term of conditional discharge following a conviction for interfering with police. GSA8. Further, Bethea had previously sustained two convictions for Sale of Narcotics, one conviction for Risk of Injury to a Minor, one conviction for Assault in the 2nd Degree and one conviction for Failure to Appear in the 1st Degree. GSA6-7.

B. The change of plea proceeding

On June 29, 2010, Bethea entered a guilty plea to Count One of the Indictment. GA4. He entered his plea pursuant to a written plea agreement, which included a stipulation concerning the guideline calculation. The parties agreed, in relevant part, as follows:

The parties agree that, under U.S.S.G. § 2D1.1, the base offense level is 24 based on the parties' stipulation that between 5 and 20 grams of cocaine base was involved in the defendant's offense conduct. The Government recognizes that the Court has the discretion to depart from the Guidelines range or impose a non-Guidelines sentence if it concludes that the 100 to 1 ratio for crack cocaine and powder cocaine cases does not reflect the factors set forth in 18 U.S.C. § 3553(a). On this specific issue, the Government will defer to the Court's discretion, which is necessarily limited by the existence of any statutory mandatory minimum term of prison set forth under 21 U.S.C. § 841(b)(1).

The defendant's base offense level under U.S.S.G. § 2D1.1(c)(8) is 24. Three levels are subtracted under U.S.S.G. § 3E1.1 for acceptance of responsibility, as noted above, resulting in a total offense level of 21.

The parties agree that the defendant falls within Criminal History Category V.

A total offense level 21, assuming a Criminal History Category V, would result in a range of 70 to 87 months of imprisonment (sentencing table) and a fine range of \$7,500 to \$75,000, U.S.S.G. § 5E1.2(c)(3). The defendant is also subject to a supervised release term of three years to five years. U.S.S.G. § 5D1.2.

The parties agree that neither a downward nor an upward departure from the sentencing range set forth above is warranted and that a sentence of imprisonment within the guideline range is reasonable and appropriate in light of the sentencing factors set forth at 18 U.S.C. § 3553(a). Accordingly, neither party will seek a sentence of imprisonment outside the guideline range of 70-87 months. Nor will either party suggest that the Probation Department consider a departure or adjustment not set forth herein, or suggest that the Court *sua sponte* consider a departure or adjustment not identified above.

The parties acknowledge that in light of the defendant's prior conviction for a felony drug offense, the defendant is eligible for a sentencing enhancement under 21 U.S.C. §§ 841(b)(1)(B) and 851, which

would expose him to a mandatory minimum sentence of 10 years' imprisonment. In light of this plea agreement, the Government agrees that it will not file the information required by § 851, and therefore the defendant will not be exposed to a mandatory term of 10 years' imprisonment.

GA14-15. The district court thoroughly canvassed Bethea on this provision of the plea agreement, GA41-43, and he acknowledged that a sentence within the agreed upon range of 70 to 87 months imprisonment was "reasonable, in light of the sentencing factors," GA43.

C. The sentencing proceeding

On September 20, 2010, the parties appeared for sentencing. GA5. At the outset, the district court confirmed that Bethea had read the Pre-Sentence Report ("PSR"), and did not have any objections or additions to it. GA116-117. In that regard, the district court specifically noted that the PSR had calculated that Bethea was in Criminal History Category IV. GA118-119. The district court confirmed that Bethea understood that this calculation resulted in a guideline range of 60 to 71 months imprisonment. GA118-119. The district court then reminded Bethea that the plea agreement calculated that he was in Criminal History Category V, which resulted in the agreed-upon range of 70 to 87 months.

GA120. Bethea then confirmed that he was aware of the discrepancy and intended to seek a sentence within the agreed-upon range of 70 to 87 months imprisonment. GA120.

The district court then entertained remarks from the government, defense counsel and the defendant. In seeking a sentence of 87 months' imprisonment, the government presented its view of Bethea's history and characteristics, focusing on his prior convictions for violent felonies and narcotics trafficking. GA122. The government also described the seriousness of the offense, which involved two gun sales, the substantial risk of recidivism presented by Bethea, and the need for specific and general deterrence. GA122-25. Finally, the government noted that a sentence within the agreed-upon range was particularly reasonable, given the fact that the government had abstained from filing a second offender information, which would have subjected Bethea to a mandatory term of imprisonment of 10 years. GA126.

Bethea sought a sentence of 70 months' imprisonment, arguing that, although his past convictions were serious, he had not been previously sentenced to a lengthy term of imprisonment. GA127-29. Defense counsel also questioned whether the district court's sentence could effectively promote general deterrence. GA127. Defense counsel next focused on Bethea's difficult upbringing, which, according to

defense counsel, was characterized by “neglect” and verbal abuse. GA129-31. Finally, defense counsel stated that if the court were to calculate Bethea’s guideline range using the 18 to 1 ratio of crack to powder cocaine, Bethea’s guideline range would be lower. GA145.

Bethea personally addressed the district court. He expressed his “sincere” apology, and described his criminal conduct as “disgusting.” GA134. Bethea stated that he missed his family, and described himself as a “hard worker” and a “dedicated father.” GA135. Bethea promised that his “previous actions” were “no longer a part of [his] character. GA135.

Following the parties’ presentations, the district court discussed the framework for its sentencing analysis as follows:

In determining the appropriate sentence to impose, the Court must consider the factors set forth in 18 United States Code, Section [3553]. Those factors are the nature and circumstances of the offense; the history and characteristics of the defendant; the purposes of sentencing, which are to punish the defendant, but even more importantly, to deter the defendant and others from engaging in criminal activity. . . . It is also to engender respect for the law. . . . Another purpose is to protect the public from the defendant and the defendant’s criminal conduct. . . . The Court

must also consider the policy statements and the other provisions of the United States Sentencing Guidelines. . . . The Court must also avoid unwarranted sentencing disparities. . . . The Court must also impose a sentence that provides the defendant with necessary educational or vocational opportunities, as well as physical and mental health services.

GA156-58.

The district court discussed several of those factors in detail. First, the district court described the nature and circumstances of the offense as “quite serious,” and expressed strong disapproval of Bethea’s willingness to put his “desire for money . . . ahead of society’s interest in controlling in whose hands guns are placed.” GA157-58. With respect to Bethea’s narcotics trafficking, the district court was troubled by the fact that, “[h]aving known firsthand the dangers and ruinous consequences of drug use, you cho[se] to sell drugs to others.” GA158. At a later point in the proceeding, the district court observed, “[s]elling drugs and selling guns are not minor crimes, no matter what role you play.” GA170.

Second, the district court reviewed the defendant’s history and characteristics. Focusing first on Bethea’s criminal history, the district court observed that he had “an extensive criminal history and . . . ha[d] spent a substantial

portion of [his] adult life in prison.” GA159. The district court recounted each of Bethea’s prior felony convictions, and relied on those convictions in assessing the need to promote specific deterrence. The district court noted that Bethea had been sentenced to an effective term of imprisonment of six months following his first narcotics trafficking conviction. GA159. According to the district court, “the punishment was not sufficient. Nor was the risk of further punishment from the suspended sentence.” GA159. The district court then noted that Bethea was convicted “[l]ess than two years later” for risk of injury, and then subsequently convicted of assault in the second degree and sale of narcotics for which he was sentenced to “four years in jail” and “nine years in jail, suspended after four years.” GA159-60. As to these sentences, the district court observed, “Once again, the Court showed leniency in sentencing you to concurrent sentences, as well.” GA160. The district court added that Bethea committed this offense “while he was under court supervision . . . , and yet he was still not deterred.” GA163.

Compounding the district court’s concern about the risk of recidivism was its conclusion that Bethea was “in utter denial that [his] conduct was wrong and devastating to the community—in which [he] traded in those drugs and in those guns.” GA171. Further, the court expressed concern that Bethea had failed to come

to terms with the seriousness of his conduct or the current proceedings. GA170-71.

Third, the district court remarked on the need for the sentence to promote general deterrence. Addressing defense counsel's comment that a sentence would not serve as a general deterrent, the district court stated, "I certainly think that if Mr. Bethea was not punished at all for what he did, that would certainly serve the opposite of deterrence to the public in general." GA156.

Fourth, the district court commented that Bethea's involvement in drug and firearms trafficking suggested that he posed a danger to the public that must be addressed by the court's sentence. GA159.

Fifth, and of particular significance to this appeal, the district court acknowledged the effect of the Fair Sentencing Act of 2010. The district court stated:

The Court has considered the Fair Sentencing Act of 2010, in which Congress reduced the disparity between crack and powder cocaine to 18 to 1, and the Court recognizes that sentences since the enactment of that law have reflected the lower ratio, even though the United States Sentencing Guidelines have not yet been amended.

GA169.

Taking into account all of these factors, the district court imposed a non-guideline sentence of 80 months' imprisonment, to be followed by four years of supervised release. GA172-73.

After sentencing, the district court issued its Statement of Reasons. GSA17. The district court stated that it imposed a non-guideline sentence above the 60 to 71 month range for the following reasons:

In this case, the Defendant has a prior conviction for a felony drug offense which would have subjected the Defendant to a sentencing enhancement under 21 U.S.C. §§ 841(b)(1)(B) and 851, which would have in turn exposed the Defendant to a mandatory minimum sentence of 10 years' imprisonment, as the statute's revisions do not apply retroactively to this Defendant. The Government negotiated a 70-87 month Guideline Range in consideration of not filing the information required by § 851 for imposition of the 10 year mandatory minimum. The Government and Defendant's plea agreement acknowledges that a sentence within the Guideline provision's range of 60-71 fails to properly meet the objectives of Title 18 U.S.C. § 3553, and that a sentence within the Guideline range of 70 to 87 months is reasonable and appropriate. The Court agrees and concludes that a sentence in the range of 70 to 87

months is necessary and appropriate to meet the objectives of sentencing. In particular, the circumstances of the offense and history characteristics of the Defendant reflect that the Defendant engaged not only in the offense conduct of possessing and distributing crack cocaine, but also distributed guns illegally which is a particularly troubling and grave threat to the public. Additionally, the Defendant's prior criminal conduct, commission of the instant offense while on a term of state probation, and rationalization of his most recent criminal conduct as his merely acting as a middleman, and therefore, "not as bad as if he was doing it for real," and failure to abide with requirements, such as the full and truthful completion of his financial statement affidavit, underscore a need for a sentence that will deter what has become an established pattern of recidivism. Therefore, the Court notes that a sentence of 80 months, which is within the Guideline range agreed upon by the parties in their plea agreement appropriately reflects consideration of the nature and circumstances of the offense and history and characteristics of the Defendant and further reflects: (a) the seriousness of his offense conduct and the need to promote respect for the law and provide a just punishment, as drugs and guns result in se-

vere harm to communities throughout this nation; (b) affords adequate deterrence to criminal conduct by others, especially those who are tempted to rationalize involvement in destructive and illegal conduct due to financial hardship; (c) protects the public from further crimes of the Defendant, as his criminal conduct reflects a pattern of recidivism; (d) avoids unwarranted sentencing disparities as the Defendant would have in fact been subject to a mandatory minimum sentence of 120 months had the Government filed notice of his prior drug-related offense. . . . [I]n light of the Defendant's unfortunate childhood experiences and his period of gainful employment following his most recent convictions, sentences the Defendant to seven months less than the maximum term of the parties' agreed-upon sentencing range and concludes that a sentence of 80 months, a term contemplated by the parties in their plea agreement, is not only reasonable, but necessary to meet the objectives of sentencing identified in Title 18 U.S.C. § 3553.

GSA19-20.

Judgment entered on September 24, 2010. GA5.
Bethea did not appeal from the judgment.

D. The motion for sentence reduction

On September 22, 2011, Bethea filed a motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). GA6. The motion sought a four-level reduction in the Guideline range based on the amendments to the Sentencing Guidelines reducing the offense level in the drug quantity tables for crack offenses. Appendix 3 (“A__”). At this reduced offense level of 17, the applicable Guideline range for this defendant would be 60 months.¹ GSA23.

On September 21, 2011, the United States Probation Office issued an Addendum to the Pre-Sentence Report, to which it attached the original Pre-Sentence Report and the district court’s Statement of Reasons. GA6; GSA21. The Addendum indicated that Bethea was eligible for a reduction under the amended guidelines, but did not recommend a reduction, noting that the court previously found that the defendant “also distributed guns illegally which is a particularly troubling and grave threat to the public.” GSA21. This first Addendum inaccurately calculated that under the amended guidelines, Bethea would face a guideline term of imprisonment of 37-46 months. GSA21.

¹ Bethea’s motion incorrectly stated that the reduced range would be 37 to 46 months. A3. Due to the operation of the 60-month mandatory minimum term of imprisonment, the reduced range would have been 60 months.

On September 29, 2011, the United States Probation Office issued a revised Addendum to correct the first Addendum's calculation of the reduced guideline range. GA6. The first Addendum failed to account for the fact that Bethea continued to be subject to a 60-month mandatory minimum prison term. GSA23. As a result, the revised Addendum calculated that if the court were to reduce Bethea's sentence, the reduced range under the amended guidelines was 60 months. GSA23

On March 5, 2012, the district court entered an order denying Bethea's motion as follows:

ORDER denying . . . Motion to Reduce Sentence re Crack Cocaine Offense - 18:3582 for Mical Bethea The court sentenced defendant to a non-guidelines sentence predicated on the agreement between the parties that the calculated guideline range was insufficient. Therefore, a further reduction within the applicable guidelines range would only exacerbate the insufficiency. Therefore, the motion to reduce defendant's sentence is denied.

GA6-7.

Summary of Argument

The district court did not abuse its discretion when it denied Bethea's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). The district court understood its authority to reduce Bethea's sentence, and recognized Bethea's eligibility for a reduction. However, at the original sentencing, the district court had determined that, notwithstanding the disparate penalties applicable to crack and cocaine offenses, the balance of the sentencing factors weighed strongly in favor of a sentence above the original guideline range. Therefore, the court properly concluded that a reduction even further below the sentence it had originally selected would be inappropriate, especially when Bethea presented the district court with no compelling reason to reconsider the original sentence. In sum, it was not an abuse of discretion for the district court to deny his motion.

Argument

A. Governing law and standard of review

18 U.S.C. § 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 subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Direc-

tor 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 con-

sistent 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.

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 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." . . . 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*, __ F.3d __, 2013 WL 2096607, *2 (2d Cir. May 16, 2013) (per

curiam) (quoting *United States v. Rivera*, 662 F.3d 166, 170 (2d Cir. 2011)).

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 has held that “abuse of discretion is the appropriate standard of review to apply to a district court’s ruling on a motion under 18 U.S.C. § 3582(c)(2).” *United States v. Borden*, 564 F.3d 100, 101 (2d Cir. 2009); *Figueroa*, 714 F.3d at 759. The Court in *Borden* wrote that

[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. This Court has held that to identify an abuse of discretion, “we must conclude that 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. Bocca-gna*, 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 did not abuse its discretion when it denied Bethea’s motion for a sentence reduction. The district court recognized that Bethea was eligible for a reduction under the amended guidelines, and proceeded to consider the merits of his request as a matter of discretion.

In considering whether to reduce Bethea’s sentence, the district court properly noted that it had originally imposed a non-guideline sentence *above* the advisory guideline range of 60 to 71 months to account for multiple factors under § 3553(a). GA6. In other words, the court had concluded that a sentence above the advisory guidelines range was necessary to meet the purposes of sentencing. In particular, the sentencing record makes clear that the district court considered whether to give effect to the 18 to 1 ratio that was later codified by Amendment 750. GA169. The district court expressly declined to

exercise that authority, in light of all the other sentencing factors. The district court also noted that its original sentence was based, in part, on the parties' agreement that a sentence below 70 months' imprisonment would be insufficient to accomplish the goals of a criminal sentence. GA6. In short, the sentencing record makes clear that the district court agreed with the parties' assessment as set forth in the plea agreement (*i.e.*, that a sentence within the range of 70 to 87 months was appropriate), and imposed a sentence of 80 months for all the reasons it stated at sentencing and in its Statement of Reasons. GSA20-21.

Accordingly, having concluded that a sentence of 80 months was necessary to account for the § 3553(a) factors in this case, the district court properly concluded that a sentence *reduction* under § 3582(c)(2) was inappropriate as a matter of discretion. In other words, if, as the court concluded, the original range of 60 to 71 months was insufficient to account for the various § 3553(a) factors, "a further reduction within the applicable guidelines range would only exacerbate the insufficiency." GA6. Given the district court's lengthy and clear reasons for imposing its original non-guideline sentence, it was well within the district court's discretion to deny a sentence reduction.

This is especially true here where Bethea effectively failed to identify any specific factors or

issues that the court should consider to exercise its discretion in his favor. *See* A3. To be sure, Bethea’s motion for a sentence reduction identified two facts that the court should consider—the “spirit of the Fair Sentencing Act,” and the parties’ miscalculation of the sentencing guidelines range in their plea agreement—but he failed to explain why these factors warranted a lower sentence in 2012 when the court had already considered them at his 2010 sentencing. In particular, the court considered the Fair Sentencing Act, GA169, and the fact that Bethea’s guideline range was lower than the parties had originally calculated, GSA19-20, but found that neither of these facts warranted a sentence lower than 80 months’ imprisonment; Bethea’s motion offered the court no reason to reconsider that decision. Moreover, beyond these two issues, Bethea identified no other facts, such as personal characteristics or post-conviction conduct, that the court should consider. Accordingly, in the absence of some argument for why the court should reconsider arguments it had considered at the original sentencing or consider new arguments for an exercise of discretion, the district court properly exercised its discretion to deny Bethea’s motion.

Like Bethea’s motion in the district court, his brief to this Court fails to identify any facts that the court failed to consider or weigh as it considered his motion. Similarly, his brief similarly

identifies no legal errors or clearly erroneous findings of fact. Although he contends that the district court should have granted a sentence reduction, he has made no real attempt to show that the district court's decision "cannot be located within the range of permissible decisions." *Boccagna*, 450 F.3d at 113. Accordingly, Bethea has failed to show that the district court abused its discretion in denying his motion for sentence reduction.

Bethea's brief to this Court appears to argue, instead, that the district court should have granted a sentence reduction because the original sentence was unreasonable. *See* Appellant's Br. at 8-11. To the extent Bethea is asking this Court to review his sentence, or to correct any alleged errors at sentencing, the request is misplaced. This is not a sentencing appeal, and as the Supreme Court has made clear, a proceeding under § 3582(c)(2) is not a resentencing. *See Dillon*, 130 S. Ct. at 2694 ("Because the aspects of his sentence that Dillon seeks to correct were not affected by the Commission's amendment to § 2D1.1, they are outside the scope of the proceeding authorized by § 3582(c)(2)."); *United States v. Mock*, 612 F.3d 133, 136-38 (2d Cir. 2010) (per curiam) (holding that district court could not correct any alleged sentencing errors in a proceeding under § 3582(c)(2)).

But even if this Court *could* correct any alleged sentencing errors, there would be no basis

for doing so on the record here. First, Bethea expressly agreed that a sentence within the range of 70 to 87 months was reasonable, GA43, and thus waived any argument that the court should have imposed a lower sentence. Second, to the extent his argument for a lower sentence is based on the court’s alleged failure to consider that the parties’ agreed upon guideline range was higher than the guideline range calculated by the PSR, A3, that argument is belied by the record. As explained above, the district court expressly stated that it had considered the correct range, and elected to impose a non-guideline sentence above that range in light of all the factors. GA174. Given this history, there is no basis for concluding that the court’s original sentence was unreasonable. In sum, the soundness of the district court’s § 3553(a) analysis, which was thorough and well-reasoned, *see* pages 8-14, *supra*, is simply outside the scope of this appeal.

Bethea’s alternative argument—that the Fair Sentencing Act somehow *required* the district court to grant a sentence reduction, Appellant’s Br. at 12-14—is an inaccurate statement of the law.² Although § 3582(c)(2) authorizes a district

² At places in his brief, Bethea suggests that the court was required to grant him a sentence reduction as part of a “remand.” It is unclear what Bethea means by this language. There was no “remand” in this case. Bethea did not appeal his sentence to this Court, and the only issue pending before the district

court to grant a sentence reduction, it does not *require* the court to grant a reduction. *Wilson*, 2013 WL 2096607, *2; *Figueroa*, 714 F.3d at 760 (“If the district court determines that the defendant is eligible for a sentence reduction, then it may reduce the sentence ‘after considering the factors set forth in section 3553(a) to the extent that they are applicable.’”) (quoting 18 U.S.C. § 3582(c)(2)). Furthermore, although Bethea suggests that the Act required the court to consider certain “factors,” he does not identify any specific factors that the court failed to consider. Bethea’s motion only asked the district court to consider facts that it had already incorporated into his original sentence, and thus Bethea cannot show that the court erred in failing to consider any specific factors when it denied his § 3582(c)(2) motion.

The district court concluded, at sentencing, that a sentence in the range of 60-71 months was insufficient to meet the purposes of § 3553(a). Accordingly, the district court did not abuse its discretion when it rejected Bethea’s request for a lower sentence based on its conclusion that such a reduction would be inconsistent with the § 3553(a) factors.

court was his motion for relief under 18 U.S.C. § 3582(c)(2).

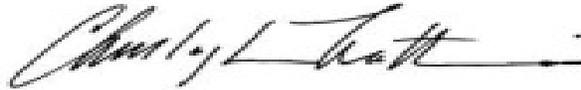
Conclusion

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

Dated: June 26, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script, appearing to read "Christopher M. Mattei", followed by a horizontal line.

CHRISTOPHER M. MATTEI
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

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).