

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICHARD RAMOS	:	CIVIL ACTION
v.	⋮	
	⋮	
UNITED STATES OF AMERICA	⋮	NO. 90-00431-01

ORDER & MEMORANDUM

ORDER

AND NOW, this 11th day of April, 2002, upon consideration of Defendant's *pro se* Motion for Reconsideration of Modification of Sentence Pursuant to Co-Defendant's Successful 18 U.S.C. § 3582(c)(2) Motion Filed Before the Honorable Court on October 31, 2001 (Document No. 78, filed March 25, 2002), and Government's Response to Motion for Reconsideration of Modification of Sentence (Document No. 80, filed April 4, 2002), **IT IS ORDERED**, for the reasons set forth in the following Memorandum, that Defendant's *pro se* Motion for Reconsideration of Modification of Sentence Pursuant to Co-Defendants' Successful 18 U.S.C. § 3582(c)(2) Motion Filed Before the Honorable Court on October 31, 2001, is **DENIED**.

MEMORANDUM

Defendant, Richard Ramos, in his *pro se* Motion for Reconsideration of Modification of Sentence, seeks a reduction in his sentence based on the same guideline amendments which benefitted his siblings and co-defendants, Elizabeth Ramos and Edwin Ramos. For the reasons set forth below, the Court concludes that Richard Ramos is not entitled to relief, and his Motion is denied.

I. BACKGROUND

Defendant was charged in a Superseding Indictment returned May 28, 1991, with numerous drug related crimes. On July 13, 1992, defendant pled guilty to Count Two of the Superseding Indictment which charged continuing criminal enterprise in violation of 21 U.S.C. § 848.

Sentencing was conducted on February 25, 1994. At that time, the Court determined that defendant's total offense level was 52. In Criminal History Category II, with a total offense level of 52, the United States Sentencing Guideline Imprisonment Range was life imprisonment. However, the Government filed a downward departure motion under § 5K1.1 of the Guidelines and 18 U.S.C. § 3553(e). Further, the parties entered a binding plea agreement under Federal Rule of Criminal Procedure 11(e)(1)(C), accepted by the Court, providing that the final sentence upon departure would be thirty (30) years imprisonment. On February 25, 1994, the Court imposed, *inter alia*, a sentence of thirty (30) years on Count Two of the Superseding Indictment.

The sentencing guideline calculations were determined by the Court at sentencing as follows:

Section 2D1.5 is the Guideline for the offense charged in Count Two of the Superseding Indictment, a violation of 21 U.S.C. § 848. That Guideline provides an offense level of 4 plus the offense level applicable to the underlying offense. The applicable offense level was derived from § 2D1.2(a)(1), for distribution of narcotics within 1,000 feet of a school, which sets a base offense level of 2 plus the offense level from § 2D1.1 applicable to the quantity of narcotics for which the defendant was criminally responsible. The Court found that, under § 2D1.1, the offense involved quantities of cocaine and cocaine base ("crack") which qualified for the highest offense level, 42. Thus, the offense level under § 2D1.5 was 48, representing 42 for drug quantity, 2 for distribution near a school, and 4 for the continuing criminal enterprise offense.

The Court imposed a further 2-level enhancement under § 2D1.1(b)(1), because defendant and his associates possessed firearms in connection with the offense. The Court also increased the offense level by 2 under § 3C1.1 for obstruction of justice, specifically, Ramos' flight at the time the first Indictment was returned. Those enhancements resulted in a total offense level of 52.

II. DISCUSSION

Ramos makes two arguments in his Motion. Specifically, he states that, in Amendment 505, adopted November 1, 1994, the Commission reduced the highest offense level available under § 2D1.1 for drug quantity from 42 to 38. Second, he argues that, in Amendment 591, adopted November 1, 2000, the Commission provided that a defendant may not receive the 2-level enhancement under § 2D1.2 for narcotics trafficking near a school in the absence of a conviction under 21 U.S.C. § 860. Parenthetically, the Court notes that Ramos was not convicted under that statute. Both of the Amendments are listed as retroactive under § 1B1.10.

The Court must now determine what the sentencing guideline calculations would have been at the time of Ramos' sentencing if the retroactive provisions had existed at that time. *United States v. McBride*, 2002 WL 389288 (3d Cir. March 13, 2002). In that case, the Third Circuit held that a resentencing based on a retroactive amendment is "limited," and requires that "the applicability of that retroactive amendment must be determined in light of the circumstances existent at the time the sentence was originally imposed. In other words, the retroactive amendment merely replaces the provision it amended and, thereafter, the Guidelines in effect at the time of the original sentence are applied."

Utilizing the analysis required by *McBride*, Ramos' total offense level of 52 would have been reduced by 6 levels - 4 levels under Amendment 505, and 2 levels under Amendment 591 - to a total offense level of 46. With a total offense level of 46, in Criminal History Category II, the Guidelines require the same mandatory life sentence as was required at the time of the

original sentencing. Thus, the retroactive amendments have absolutely no bearing on Ramos' sentence.

Ramos raises the question whether, pursuant to the Guidelines and the Constitution, a defendant may be denied the benefit of a retroactive amendment which reduces the Guideline sentencing range after defendant agreed to a particular sentence pursuant to Rule 11(e)(1)(C). This question need not be reached in this case because the retroactive amendments have no effect on either the final guideline calculations or defendant's agreement.

Richard Ramos also argues that he should have the benefit of the retroactive Guideline Amendments because the Court, in considering the cases of his brother, Edwin Ramos, and his sister, Elizabeth Ramos, applying the same retroactive Guideline Amendments, reduced their sentences. The short answer to that argument is that recalculation of the sentencing guideline range after applying retroactive Guideline Amendments to the sentences of Edwin Ramos and Elizabeth Ramos resulted in lower guideline sentencing ranges. In addition, those defendants sought by motion, and were granted, a downward departure for post-sentence rehabilitation under the theory of *United States v. Sally*, 166 F.3d 76 (3d Cir. 1997). Richard Ramos did not raise the latter issue, and it is doubtful that the Court could even consider such a motion at this time in view of the Third Circuit's recent decision in *McBride* which limits the issues that can be considered when a court determines the effect of a retroactive guideline amendment. The Court notes in connection with this argument that *McBride* was decided after the January 2002 resentencings of Edwin Ramos and Elizabeth Ramos.

The Court also notes that this is the second time Richard Ramos has sought a reduction in his sentence by reason of Amendment 505. That issue was first presented to the Court by his *pro se* Motion pursuant to 18 U.S.C. § 3582(c)(2) for Reduction of Sentence Due to Changes in Sentencing Guidelines (Document No. 72, filed December 28, 1995). By Order dated January 29, 1996, the Court denied that Motion. The denial was based on the fact, as set

forth above, that the retroactive amendment, Amendment 505, would have made no difference in the Court's guideline calculations and its sentence.

III. CONCLUSION

Defendant's *pro se* Motion for Reconsideration of Modification of Sentence Pursuant to Co-Defendants' Successful 18 U.S.C. § 3582(c)(2) Motion Filed Before the Honorable Court on October 31, 2001, is denied for all of the foregoing reasons.

BY THE COURT:

JAN E. DUBOIS, J.