

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

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 03-254-1
	:	
REGINALD MARSHALL	:	

MEMORANDUM AND ORDER

Kauffman, J.

October 24 , 2008

Defendant Reginald Marshall (“Defendant”) moves for a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706 to the United States Sentencing Guidelines, which reduces the guideline range for crack cocaine-related offenses. For the reasons that follow, the Court will deny the Motion.

I. BACKGROUND

On April 16, 2003, a grand jury charged Defendant and co-defendant Melvin Justice with one count of conspiracy to distribute and possess with intent to distribute more than 50 grams of cocaine base (“crack”), in violation of 21 U.S.C. § 846; three counts of distribution of and possession with intent to distribute more than 50 grams of cocaine base (“crack”), in violation of 21 U.S.C. § 841(a)(1); and one count of distribution of and possession with intent to distribute more than five grams of crack, in violation of 21 U.S.C. § 841(a)(1). Defendant’s crack cocaine offenses were subject to U.S.S.G. § 2D1.1, which listed his base offense level at 34 based on a drug amount of 439.7 grams of crack cocaine. He also had a criminal history category of VI. Thus, Defendant’s guideline range was 188-235 months. However, because of the statutory mandatory minimum sentence imposed by 21 U.S.C. § 841(b)(1)(A), he was subject to a

statutory mandatory minimum of 240 months, which exceeded the guideline range.¹

Prior to sentencing, the Government filed a motion for a downward departure from the guideline sentencing range pursuant to U.S.S.G. § 5K1.1, and for a departure from the mandatory minimum sentence pursuant to 18 U.S.C. § 3553(e). Judge Clarence Newcomer granted the Government's motion, and on December 5, 2003, Defendant was sentenced to 72 months in prison.²

On November 11, 2007, the Sentencing Commission approved Amendment 706, which generally reduced the offense levels for crack cocaine-related crimes. On March 3, 2008, Amendment 706 was made retroactive. U.S.S.G. App. C, Amend. 713. On March 23, 2008, Defendant filed the instant Motion pursuant to § 3582(c)(2) and Amendment 706.

II. LEGAL STANDARDS

Section 3582(c)(2) of United States Code authorizes district courts to reduce the sentence of criminal defendants in accordance with retroactive Guidelines amendments:

[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 . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) *to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.*

18 U.S.C. § 3582(c)(2) (emphasis added).

The Application Notes to § 1B1.10 state in part that “a reduction in the defendant's

¹ Section 5G1.1(b) of the Sentencing Guidelines states: “Where a statutorily required minimum sentence is greater than the maximum of the applicable Guideline range, the statutorily required minimum sentence shall be the Guideline sentence.” U.S.S.G. § 5G1.1(b).

² On January 11, 2008, the matter was transferred from Judge Newcomer's calendar to the calendar of this Court.

sentence is not authorized under § 3582(c)(2) and is not consistent with this policy statement if . . . an amendment [to the guideline range] is applicable to the defendant but the amendment does *not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).*” U.S.S.G. § 1B1.10 Application Note 1(A) (emphasis added).

III. DISCUSSION

Defendant argues that (1) the plain language of the Guidelines authorizes a reduction of his sentence, even when his offense includes a statutorily required minimum sentence; (2) not applying Amendment 706 would have unfair results and is contrary to congressional intent; (3) United States v. Booker frees the Court to deviate from the Guidelines; and (4) the rule of lenity is applicable.

A. Statutory Language

Defendant's first argument that his sentence should be reduced is premised on a theory that his final sentence was “based on a sentencing range that has . . . been lowered by the Sentencing Commission,” pursuant to § 3582(c)(2). According to Defendant, once the Court makes a decision to depart under § 5K1.1 and § 3553(e), “case law suggests a number of factors that might form the basis of the sentence, some of which are reflected in for [sic] the Guidelines range.” Def. Mot. 9. He asserts that the holding in Unites States v. Cordero, 313 F.3d 161, 165 (3d Cir. 2002), suggests that the mandatory minimum is only one basis for sentencing, and once a motion for departure from the mandatory minimum sentence is granted, the original guideline range may also be one of the bases for the final sentence. Def. Mot. 10. Defendant contends that one of the factors the Court should consider when calculating a departure is the “seriousness of

the offense,” which he argues is reflected by the Sentencing Commission in the guideline range.³

Defendant further claims that the Supreme Court and the Third Circuit hold that “courts are *required* to consider the Guideline range; and indeed the failure to consider the Guideline range is procedurally unreasonable and subjects the sentence to reversal on appeal.”⁴ Def. Mot. 11.

The Eastern District of Pennsylvania has consistently found that Defendant’s interpretation of the law is incorrect. See, e.g., United States v. Rivera-Crespo, 543 F. Supp. 2d 436 (E.D. Pa. 2008); United States v. Doe, 2008 U.S. Dist. LEXIS 70051 (E.D. Pa. Sept. 15, 2008); United States v. Weston, 2008 U.S. Dist. LEXIS 30027 (E.D. Pa. Apr. 14, 2008). Cordero specifically states that a § 3553(e) departure does not “waive” the mandatory minimum sentence; instead the mandatory minimum sentence “subsumes and displaces the otherwise applicable guideline range.” Cordero, 313 F.3d at 166. Thus, the mandatory minimum must remain the Courts starting point for any downward departure.

Additionally, the Application Notes to U.S.S.G. § 1B1.10 state in part that “a reduction in the defendant’s sentence is not authorized under § 3582(c)(2) . . . [if] . . . the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision (*e.g., a statutory mandatory minimum term of imprisonment*).” U.S.S.G. § 1B1.10 Application Note 1(A) (emphasis added). Consistent with the holding in Cordero, Note 1(A) suggests that § 3582(c)(2) would not apply here because a

³ To support this premise Defendant cites the Court of Appeals’ approval of a district court’s decision to limit departure due to the “extreme seriousness of the crime” in United States v. Casiano, 113 F.3d 420, 430-31 (3d Cir. 1997).

⁴ Defendant cites United States v. Gall, 128 S. Ct. 586, 596-97 (2007) and United States v. Wise, 515 F.3d 207, 216-17 (3d Cir. 2008).

statutory provision, such as the statutory mandatory minimum term of imprisonment of 21 U.S.C. § 841(b)(1)(A), would take Defendant’s “*otherwise applicable*” guideline range and “subsume[] and displace[]” it, whether or not there is a downward departure. Cordero, 313 F.3d at 166 (emphasis added).

B. Fundamental Fairness and Congressional Intent

Defendant’s fairness argument ignores the case law in Cordero. Because his sentencing was not based on the original guideline range, giving him a reduced sentence would put him in a *better* position than he would have been in had the Amendment been in place at the time of his sentencing. If the Amendment had been in place at the time of his sentencing in 2003, the 240 month statutory minimum still would have applied, and his cooperation would have been evaluated in the same manner as it was by Judge Newcomer whether the guideline sentence was 188-253 months under the Guidelines or 151-188 months under the Amended Guidelines. Furthermore, although the Sentencing Commission chose to reduce the sentencing range for crack-related offenses, Congress has made no such reduction for crack-related mandatory minimums. Thus, Defendant’s fairness arguments fails.

C. Booker

Defendant misinterprets the holding in Booker. The Supreme Court stated that it did “not believe that the entire statute must be invalidated” and that it “must retain those portions of the Act that are (1) constitutionally valid, (2) capable of ‘functioning independently,’ and (3) consistent with Congress’ basic objectives in enacting the statute.” Booker, 543 U.S. at 259 (citations omitted). Notably, the Court did not invalidate § 994(u), which authorized § 1B1.10, or § 3582(c)(2), which made it binding. See id. The Third Circuit supports this holding, stating

the following: “Some may argue that, because the Guidelines are no longer mandatory, defendants need not wait to apply for relief under § 3582(c)(2). That fundamentally misunderstands the limits of Booker. Nothing in that decision purported to obviate the congressional directive on whether a sentence could be reduced based on subsequent changes in the Guidelines.” United States v. Wise, 515 F.3d 207, 221 n.11 (3d Cir. 2008) (holding that defendants could not obtain immediate relief under § 3582(c)(2) because § 1B1.10(c) did not yet list Amendment 706).

D. The Rule of Lenity

Defendant’s final argument is that the applicable statutes are ambiguous and “the rule of lenity” requires courts to resolve any statutory ambiguity in his favor. See United States v. Introcaso, 506 F.3d 260, 261 (3d Cir. 2007). The rule of lenity applies only if there is such a “grievous ambiguity or uncertainty” in the statute that after “seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended.” Muscarello v. United States, 524 U.S. 125, 139 (1998) (internal quotations and citations omitted). Here, the plain language of the statute clearly directs the Court to reduce a sentence only “if such a reduction is consistent with applicable policy statements.”

IV. CONCLUSION

Because Defendant’s sentence was not based on a sentencing range that has been lowered by the Sentencing Commission, he is not eligible for a reduction of his sentence under 18 U.S.C. § 3582(c)(2), and his Motion will be denied. An appropriate Order follows.

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v.

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CRIMINAL NO. 03-254-1

ORDER

AND NOW, this 24TH day of October, 2008, upon consideration of Defendant's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(2) (docket no. 48) and all responses thereto, and for the reasons stated in the accompanying memorandum, it is **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

S/ BRUCE W. KAUFFMAN
BRUCE W. KAUFFMAN, J.