

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

UNITED STATES OF AMERICAN	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 04-781
EARL ROBINSON.	:	

**MEMORANDUM RE: MOTION FOR REDUCTION OF SENTENCE**

**Baylson, J.**

**January 29, 2009**

**I. Factual Background**

In December 2004, Defendant was charged in a thirteen-count indictment with various narcotics possession offenses involving cocaine base (“crack”), cocaine, and marijuana, as well as with possession of a firearm in furtherance of a drug trafficking crime. (Doc. 1). On September 16, 2006, Defendant pled guilty to the first twelve Counts in the indictment; Count 13, the firearms charge, was dismissed by the government pursuant to the plea agreement. Also pursuant to the plea agreement, Defendant was sentenced to 120 months imprisonment, which represented the statutory mandatory minimum for Counts 1 and 2, the highest such minimum for all the offenses to which Defendant plead guilty.

The government’s sentencing memorandum (Doc. 58) identified the Guidelines sentencing range that would otherwise apply had Defendant not pled guilty and been sentenced pursuant to the plea agreement. The quantity of drugs attributed to Defendant resulted in a base offense level of 34 and Defendant received a 2 level increase for possession of a firearm. After a 3 level decrease for acceptance of responsibility and timely notification of intent to plea, Defendant’s base offense level was reduced to 33, which, combined with Defendant’s criminal

history category of I, indicated a sentencing range of 135-168 months imprisonment.

Since the time of Defendant's sentencing, the Sentencing Commission has amended the Sentencing Guidelines by reducing the base offense levels for cocaine base offenses in U.S.S.G. § 2D1.1 by two levels each. As a result of that amendment, Amendment 706, the recommended ranges for cocaine base offenses now encompass the statutory mandatory minimum sentence, which previously fell below the recommended range. In a subsequent amendment, Amendment 711, the Sentencing Commission also amended the Drug Equivalency Table in § 2D1.1, Application Note 10, which provides for the conversion of quantities of controlled substances into quantities of marijuana for cases where the defendant is convicted of offenses involving several different drugs. Amendment 711 changed the procedure for calculating the combined offense level under the Table when cocaine base and another controlled substance are involved, resulting in base level calculations for the combined narcotics offenses that are consistent with the reduced base offense levels for cocaine base offenses only in Amendment 706.

Defendant has now moved for a reduction of his sentence under 18 U.S.C. § 3582(c)(2). That statute allows for the modification of a term of imprisonment after it has been imposed if the sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3852(c)(2). Defendant, who pled guilty to cocaine base offenses as well as other narcotics offenses, asserts that he is entitled to resentencing under that statute because Amendments 706 and 711 to the Sentencing Guidelines reduced the suggested ranges for cocaine base offenses.

## **II. Discussion**

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 subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o) . . . , 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 identifies the Amendments that may be retroactively applied pursuant to the authority granted in § 3582(c)(2). The Sentencing Commission added Amendments 706 and 711 to that list on December 11, 2007, effective March 3, 2008. As a result, prisoners sentenced pursuant to § 2D1.1 are entitled to request a reduction in their sentences under § 3582(c)(2).

Defendant, pro se, contends that he is eligible for a reduction of his sentence under § 3582(c)(2) because his sentence was based on the base offense level 33, which would be reduced to level 31 under the amendments. The sentencing range for a base offense level 31 is 108 to 135 months imprisonment, and Defendant requests that he be resentenced at the lower end of that range. The government responds, correctly, that Defendant is not entitled to a reduction because (1) he was sentenced to the statutory mandatory minimum, which still applies despite the amendments reducing the recommended sentencing ranges; and (2) his sentence was not “based on” the amended § 2D1.1 but rather on the mandatory minimum, pursuant to a plea agreement.

In U.S.S.G. § 1B1.10, the Sentencing Commission provided that a reduction under § 3582(c)(2) is not authorized where it is not consistent with the policy statement set forth in § 1B1.10. Such inconsistency may occur when the amendment “does not have the effect of lowering the defendant’s applicable guideline range,” possibly “because of the operation of . . .

another statutory provision (e.g., a statutory mandatory minimum term of imprisonment.” § 1B1.10, Application Note 1(A). Essentially, where a statutory mandate determines a sentence, it cannot be altered by an amendment to the non-mandatory Sentencing Guidelines, and thus a sentence based on a statutory mandatory minimum, rather than the Guidelines range, cannot be lowered by a subsequent amendment to the Guidelines.

The Third Circuit has not decided a case requesting a reduction of sentence in which the Defendant’s sentence was based on the statutory mandatory minimum. However, it has held that where an amendment to the Guidelines procedure for calculating the weight of LSD did not affect the procedure for the same calculation under the mandatory minimum statute, that amendment did not provide a basis for a reduction for a defendant sentenced to the mandatory minimum. United States v. Hanlin, 48 F.3d 121, 125 (3d Cir. 1995). Similarly, the amendment to the Guidelines sentencing ranges did not affect the statutory mandatory minimum sentence, and therefore that amendment does not provide grounds for a reduction. Several other district courts within the Third Circuit have addressed this specific issue and concluded, as this Court does, that a court is not authorized to reduce the sentence of a defendant where that sentence was based on a statutory mandatory minimum and thus was not affected by the amendments lowering the cocaine base offense levels. See United States v. Eirng, 2008 WL 4710767, at \*2-3 (E.D. Pa. Oct. 23, 2008); United States v. Griggs, 2008 WL 750564, at \*1 (M.D. Pa. Mar. 19, 2008); United States v. Moses, 2008 WL 655993, at \*1 (W.D. Pa. Mar. 5, 2008).

Furthermore, § 3582(c)(2) requires a defendant’s sentence be “based on” a sentencing range that was subsequently lowered by an amendment of the Sentencing Commission. Where a defendant’s sentence is given pursuant to a plea agreement and the requested sentence is derived

from the statutory mandatory minimum, the sentence cannot reasonably be considered “based on” § 2D1.1. In the instant case, the government informed the Court as to what the applicable range under § 2D1.1 would have been had Defendant not accepted the plea agreement, but ultimately stipulated to the sentence of 120 months, the statutory mandatory minimum sentence for Defendant, which was below the otherwise applicable Guidelines range at that time. (See Doc. 58). The § 2D1.1 sentencing range did not guide or otherwise determine the government’s request for the sentence, and thus the sentence given was not “based on” that amended section.

Several courts in other circuits and districts have reach the same conclusion when the defendant is sentenced pursuant to a plea agreement. See, e.g., United States v. Trujeque, 100 F.3d 869, 871 (10th Cir. 1996); United States v. Hemminger, 114 F.3d 1192, 1997 WL 235838 (7th Cir. 1997) (unpublished); United States v. Oliver, --- F. Supp. 2d ---, 2008 WL 5209983, at \*1-2 (D.D.C. Dec. 15, 2008); United States v. Grigsby, 560 F. Supp. 2d 1066, 1067-68 (D. Colo.2008); United States v. Paul, 2008 WL 2510147, at \*1 (N.D.N.Y. June 19); United States v. Clayborn, 2008 WL 22292531, at \*1-2 (M.D. Pa. May 28, 2008). In Trujeque, the Tenth Circuit explained that even where the guidelines may have influenced the sentence in a plea agreement, the sentence “rests squarely on the parties' agreement and not on a calculation under a sentencing guideline range that was subsequently lowered,” as required by § 3582(c)(2). 100 F.3d at 1068.

Thus, because Defendant was sentenced to a statutory mandatory minimum, which is unaffected by the recent amendments to § 2D1.1, and was sentenced pursuant to a plea agreement that did not stipulate to a sentence based on the Guidelines sentencing range, Defendant is not eligible for a reduction under § 3582(c)(2).

An appropriate order follows.

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**ORDER**

AND NOW, this 29th day of January, 2009, after reviewing Defendant's motion for a reduction of sentence pursuant to § 3582(c)(2), (Doc. 66), it is hereby ORDERED that Defendant's motion is DENIED.

BY THE COURT:

s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.