

correction of sentence and the motion for appointment of counsel will be denied.

I. BACKGROUND AND PROCEDURAL HISTORY

Petitioner, and twenty-five other individuals, were charged by an indictment with: (1) conspiracy, in violation of 21 U.S.C. § 846 (Count One); (2) continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Counts Two, Three, and Four); (3) possession with intent to distribute and distribution of a controlled substance, in violation of 21 U.S.C. § 841(a)(1) (Counts Five through Thirteen and Fifteen through Twenty-One); (4) felon in possession of a firearm, in violation of 18 U.S.C. § 922 (Count Twenty-Three); (5) use of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924 (Counts Fourteen and Twenty-Two); (6) aiding and abetting, in violation of 18 U.S.C. § 2 (Counts Five through Thirteen and Fifteen through Twenty-One); and (7) forfeiture, in violation of 21 U.S.C. § 853 (Counts Twenty-Four through Thirty-Two).

On April 23, 1992, a jury convicted Petitioner on Counts One, Four, and Eleven. The sentencing court determined Petitioner's base offense level from Count Four, pursuant to U.S.S.G. § 2D1.5(a)(1), resulting in a base offense level of 44.¹

¹ Count Four - continuing criminal enterprise in violation of 21 U.S.C. § 848 - requires application of U.S.S.G. § 2D1.5(a). This guideline specified that the base offense level

After a two level enhancement for possessing a dangerous weapon, the sentencing court fixed Petitioner's final offense level at 46, corresponding to life imprisonment under the Guidelines.

On August 6, 1992, the Court sentenced Petitioner to life imprisonment. The Court of Appeals later affirmed his conviction and sentence. United States v. Thornton, 1 F.3d 149 (3d Cir. 1993). Petitioner has filed multiple motions under 28 U.S.C. § 2255 to vacate his sentence, all of which have been denied or dismissed - the last one dismissed with prejudice. Since this dismissal, Petitioner has filed two motions under § 3582(c)(2) for a reduction of sentenced based on Amendment 505, both of which were denied.² Petitioner then filed a motion to

to be applied was the greater of "(1) 4 plus the offense level from § 2D1.1 applicable to the underlying offense; or (2) 38." U.S.S.G. § 2D1.5(a). The conspiracy was found responsible for distributing in excess of 1,000 kilograms of cocaine. At the time of sentencing, under § 2D1.1, this amount of cocaine corresponded to a base offense level of 40. Applying § 2D1.5(a)(1), a four level addition to 40 resulted in a base offense level of 44.

² Amendment 505 became effective November 1, 1994 and deleted offense levels 38, 40, and 42 of the Drug Quantity Table, replacing them with a revised level 38 as the maximum offense level under U.S.S.G. § 2D1.1(c). U.S. Sentencing Guidelines Manual app. C Vol. 1 (2003). It was explicitly made retroactive by Section 1B1.10 of the Guidelines. U.S.S.G. § 1B1.10(c).

Amendment 505 did operate to reduce Petitioner's base offense level two levels, from 44 to 42. However, Petitioner was still subject to a two level enhancement for possession of a dangerous weapon, increasing his final offense level to 44. This level corresponds to life imprisonment, the exact same guideline range as Petitioner's previous final offense level 46. Therefore, Petitioner's sentence remained unchanged.

correct his sentence under Federal Rule of Criminal Procedure 52(b), which was also denied. Petitioner has also filed two motions to appoint counsel, both of which were denied as well. Petitioner has filed this instant motion under § 3742(a)(2) to correct an incorrect application of the Guidelines, which is currently before the Court.

II. MOTION FOR RESENTENCING

Petitioner contends he is entitled to a reduction in sentence pursuant to 18 U.S.C. § 3742(a)(2) because the district court incorrectly applied the Guidelines. In particular, Petitioner argues there was a failure to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 505.

Petitioner urges that under § 3742(a)(2),³ the district court may review a previously imposed sentence on the basis that it incorrectly applied the Guidelines. This argument has no merit. Section 3742(a)(2) does not vest jurisdiction in the district court for this purpose. 18 U.S.C. § 3742(a); see, e.g., United States v. Auman, 8 F.3d 1268, 1271 (8th Cir. 1993); United States v. Turner, No. Crim. 95-296-09, 2002 WL 31099797, at *1 (E.D. Pa. Sept. 19, 2002); United States v. Byrnes, 79 F. App'x

³ Specifically § 3742(a)(2) provides: "(a) Appeal by a defendant - A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence - . . . (2) was imposed as a result of an incorrect application of the sentencing guidelines . . ."

850, 851-52 (6th Cir. 2003). Review of a final sentence by the district court lies only with the court of appeals.^{4,5}

Accordingly, this Court has no authority to review Petitioner's sentence under § 3742(a)(2).

III. BOOKER DOES NOT PROVIDE A BASIS FOR RESENTENCING

Petitioner also argues that based on the Supreme Court decision in United States v. Booker, he is entitled to reconsideration of a sentence outside the applicable guideline range because the Guidelines are now advisory, not mandatory. See 543 U.S. 220 (2005) (holding Guidelines are advisory).

The Court recognizes that the Guidelines are now

⁴ The only reference to the district court in this section is to identify the district court as the place where the appeal is filed.

⁵ Even construing Petitioner's motion as one for leave to allow the filing of a late appeal, the motion fails. A defendant's notice of appeal in criminal cases must be filed within ten days of the entry of the judgment. Fed. R. App. P. 4(b)(1)(A)(I). In some cases, an extension can be granted for excusable neglect. Fed. R. App. P. 4(b); see also, United States v. Sheiner, 873 F. Supp. 927, 932 (E.D. Pa. 1995) (finding that "the Court's failure to advise him of his rights to appeal his sentence . . . coupled with post-sentencing depression that 'adversely influenced [his] mental condition . . . and prevented him from making any rational decision about pursuing an appeal' warrant an extension of time to file an appeal based on excusable neglect").

Here, Petitioner's motion to correct his sentence was filed sixteen years after his original sentence and over one year after denial of his last motion for reduction of sentence. Nor has Petitioner proffered an explanation for this delay.

advisory and that unwarranted sentencing disparities can be considered as part of the sentencing equation. However, Congress's directive that sentences are final unless a reduction is consistent with the Guidelines policy statements is controlling. Therefore, the Court may not, under the guise of applying § 3582, reduce Petitioner's sentence when the applicable guideline range has not been altered by application of an amendment. See, e.g., United States v. Mateo, – F.3d – , No. 08-3249, 2009 WL 750411, at *3 (3d Cir. Mar. 24, 2009) (finding the Court cannot reduce a defendant's sentence when Amendment 706 does not apply); United States v. Melvin, – F.3d – , No. 08-13497, 2009 WL 236053, at *1 (11th Cir. Feb. 3, 2009) (“[c]oncluding that Booker . . . do[es] not apply to § 3582(c)(2) proceedings, we hold that a district court is bound by the limitations on its discretion imposed by § 3582(c)(2) and the applicable policy statements by the Sentencing Commission”); Carrington v. United States, 503 F.3d 888, 890-91 (9th Cir. 2007) (finding Booker is not pari passu with an amendment to the Guidelines sufficient to provide a basis for reducing a defendant's sentence under § 3582(c)(2)); United States v. Carter, 500 F.3d 486, 490-91 (6th Cir. 2007) (same); McMillan v. United States, 257 F. App'x 477, 479 (3d Cir. 2007) (same) (not precedential); Cortorreal v. United States, 486 F.3d 742, 744 (2d Cir. 2007) (holding Booker cannot be the basis for a reduction of

sentence under § 3582(c)(2)).

Here, since all of Petitioner's motions for sentence reductions have been previously denied, and his current petition to correct an incorrect application of the Guidelines is not within this Court's jurisdiction, Booker has no effect on Petitioner's sentence.

IV. CONCLUSION

For the reasons set forth above, the petition for a correction of sentence and motion for appointment of counsel will be denied. An appropriate order follows.

