

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 : NO. 91-570-13  
 v. :  
 :  
 JOSEPH COBB, JR. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

APRIL 20, 2009

Petitioner Joseph Cobb, Jr. ("Petitioner") is serving a 360-month term of imprisonment for one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. He now seeks the reduction of his drug sentence to reflect Amendment 505 to the United States Sentencing Commission Guidelines (the "Guidelines"). Amendment 505 eliminated the base offense levels of 38, 40, and 42 and replaced these with a revised maximum base offense level of 38. This is Petitioner's second identical motion for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2).

For the reasons that follow, Petitioner's motion for a sentence reduction will be denied.

I. BACKGROUND

On October 2, 1991, Petitioner and twenty-five other individuals were charged by an indictment with, inter alia,

conspiracy, in violation of 21 U.S.C. § 846 ("Count One").<sup>1</sup>

On July 10, 1992, after a jury trial, Petitioner was convicted on Count One only. Petitioner's base offense level was 40, and he received a two level enhancement for possession of a firearm during the commission of the offense. At the sentencing hearing following Petitioner's conviction, the Court fixed Petitioner's total offense level at 42 and his Criminal History Category at I. Under these guidelines, the term of imprisonment was 360 months to life. On October 26, 1992, Petitioner was sentenced to 360 months in prison.

In March 1997, Petitioner filed a motion pursuant to 18 U.S.C. § 3582(c)(2) to reduce his sentence based on Amendment 505. The District Court denied that motion after considering the nature and circumstances of Petitioner's offense, analyzing the factors under § 3553(a), and weighing the Sentencing Commission policies regarding the need to avoid sentencing disparities. (Order Denying Mot. Sentence Reduction, May 20, 1997, Crim. No.

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<sup>1</sup> Petitioner was also charged with: (1) continuing criminal enterprise, in violation of 21 U.S.C. § 848 (Counts Two, Three, and Four); (2) 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); (3) felon in possession of a firearm, in violation of 18 U.S.C. § 922 (Count Twenty-Three); (4) use of a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924 (Counts Fourteen and Twenty-Two); (5) aiding and abetting, in violation of 18 U.S.C. § 2 (Counts Five through Thirteen and Fifteen through Twenty-One); and (6) forfeiture, in violation of 21 U.S.C. § 853 (Counts Twenty-Four through Thirty-Two).

91-570-13 (Katz, J.), doc. no. 73.)

On December 8, 1997, the Third Circuit Court of Appeals affirmed the District Court's denial of Petitioner's § 3582(c)(2) motion to reduce his sentence.

On September 25, 2008, Petitioner filed a second identical motion pursuant to § 3582(c)(2) to reduce his sentence based on Amendment 505, which is now before the Court.

## II. MOTION FOR RESENTENCING

Petitioner moves a second time for a reduction of his sentence under 18 U.S.C. § 3582(c)(2) because of changes to the Guidelines revising maximum base offense levels. Section 3582(c)(2) authorizes the district court to reduce a sentence if "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(ii). The applicable policy statement, § 1B1.10(a), provides that if "the guideline range applicable to th[e] defendant has . . . been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below," a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). U.S.S.G. § 1B1.10(a).

### A. The Law of the Case Doctrine Does Not Allow Petitioner's Second Motion for a Sentence Reduction on the Same Grounds

Petitioner argues he is entitled to a sentence

reduction pursuant to § 3582(c)(2) in this motion, his second identical motion under this provision. Petitioner, however, is procedurally barred from bringing this motion because of the law of the case doctrine.

The law of the case doctrine precludes revisiting issues that a court previously decided on appeal. In re City of Phila. Litig., 158 F.3d 711, 718 (3d Cir. 1998); United States v. Tykarsky, 295 F. App'x 498, 499 (3d Cir. 2008) (applying the law of the case doctrine in a criminal matter) (not precedential); see also Pendleton v. Nepa Cmty. Fed. Credit Union, 303 F. App'x 89, 90 (3d Cir. 2008) (citing In re City of Phila. Litig., 158 F.3d at 718) (not precedential); United States v. Schindler, Crim. No. 91-00063-15, 2000 WL 876902, at \*6 (E.D. Pa. June 13, 2000) (citing United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997)). Specifically, the law of the case doctrine precludes defendants from "re-litigating challenges to their sentences in successive § 3582(c)(2) motions." United States v. Lopez, 296 F. App'x 922, 923 (11th Cir. 2008).

The doctrine does not apply, however, when there are extraordinary circumstances. These include circumstances where: "(1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision is clearly erroneous and would create manifest injustice." In re City of Phila. Litig., 158 F.3d at 718 (citing Pub. Interest Research Group of

N.J., Inc. v. Magnesium Electron, Inc., 123 F.3d 111, 116-17 (3d Cir. 1997)). Here, Petitioner does not fit into any of the extraordinary circumstances providing an exception to the law of the case doctrine, and therefore his motion for a reduction in sentence is denied.

1. Petitioner presents no new evidence

Petitioner presents no new evidence that would affect his sentence. He does, however, raise a new legal theory in support of his argument. Petitioner contends that: (1) the two level enhancement for possession of a firearm was applied incorrectly because he did not possess a firearm during commission of the offense or during his arrest, and (2) that he has taken steps towards rehabilitation while in prison. (Pet'r Br. 3, 6.)

New evidence must differ substantially from the evidence originally on record. Hamilton v. Leavy, 322 F.3d 776, 787 (3d Cir. 2003). When evidence at both stages are "substantially similar," then the law of the case doctrine applies. Id. (citing In re City of Phila. Litig., 158 F.3d at 720).

Petitioner's claims here are without merit. Neither of his claims regarding the firearm enhancement or the rehabilitation in prison are substantially different from evidence originally on the record. With respect to Petitioner's

firearm argument, Comment 3 to U.S.S.G. § 2D1.1 specifies that the firearm "adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." For example, an unloaded hunting rifle found in the closet of the defendant's residence would not warrant an enhancement. See U.S.S.G. § 2D1.1 cmt. 3. The circumstances here are distinguishable from the example above in that Petitioner has several convictions for firearms violations (PSR ¶ 41), that all Junior Black Mafia ("JBM")<sup>2</sup> members carried firearms (PSR ¶ 12), and that Petitioner shot and attempted to kill another individual during the course of his participation in the conspiracy (PSR ¶ 18). Contrary to Petitioner's suggestion, the evidence here does not indicate that "it is clearly improbable that the weapon was connected with the offense," and Petitioner provides no new evidence to suggest otherwise.

Additionally, Petitioner's attempt to illustrate his rehabilitation does not provide any material evidence differing substantially from the original record. Cf. Bridge v. United States Parole Comm'n, 981 F.2d 97, 104 (3d Cir. 1992) (finding that a parole report containing information implicating the defendant in a bombing, and delivered to the court after its first order, constituted new, highly probative evidence that the court had not considered when making its initial determination).

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<sup>2</sup> The Junior Black Mafia was a violent drug trafficking group in the Philadelphia area. (PSR ¶ 5.)

Here, Cobb has not presented such highly probative evidence to fit within this exception to the law of the case doctrine.

2. No applicable supervening law has been announced that would affect Petitioner's sentence

A supervening new law has not been announced since Petitioner's first motion to reduce his sentence. Petitioner argues that based on the recent Supreme Court decisions in United States v. Booker, 125 S. Ct. 738 (2005), and Kimbrough v. United States, 128 S. Ct. 558 (2007), he is entitled to reconsideration of a sentence outside the applicable guideline range because the Guidelines are now advisory, not mandatory. See Booker, 125 S. Ct. 738 (holding Guidelines are advisory); Kimbrough, 128 S. Ct. 558 (permitting district courts to take unwarranted sentencing disparities into consideration).

The Court recognizes that the Guidelines are now 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 an 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 a

district 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, . . . [and] 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, Petitioner's previous motion for sentence reduction occurred and was denied before the decisions in Booker and Kimbrough. Despite the fact that these cases were decided after Petitioner's sentencing, Booker and Kimbrough do not affect Petitioner's case. The legal principles advanced by Booker and Kimbrough do not supervene the sentencing principles established at the time of Petitioner's sentencing. Booker and Kimbrough also do not create authority to reopen sentencing pursuant to §

3582(c)(2) when a sentence became final before Booker and Kimbrough were decided. United States v. Cunningham, 554 F.3d 703, 705 (7th Cir. 2009) (citing United States v. Hicks, 472 F.3d 1167, 1171 (9th Cir. 2007)). Nor do Booker and Kimbrough entitle Petitioner to a full resentencing. United States v. McBride, 283 F.3d 612, 615 (3d Cir. 2002).<sup>3</sup>

Therefore, Petitioner does not meet the supervening law exception to the law of the case doctrine.

3. Petitioner's earlier sentence was not clearly erroneous and does not create manifest injustice

Petitioner argues that his sentence was erroneous, and therefore manifestly unjust, because he improperly received a two level enhancement for possession of a firearm. As discussed supra, Petitioner's argument is without merit. The record does not indicate that the firearm enhancement was clearly erroneous.

Furthermore, Petitioner's original sentence of 360

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<sup>3</sup> In this case, Judge Katz previously denied Petitioner's identical motion for a sentence reduction according to the Guideline directives. These directives specify that before a reduction may be granted, the court must consider "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). Judge Katz based the decision on several factors, including those listed in § 3553(a), and took into account public policy considerations. (Order Denying Mot. Sentence Reduction, May 20, 1997, Crim. No. 91-570-13 (Katz, J.), doc. no. 73.) Judge Katz carefully reconsidered Petitioner's original sentence in light of the application of Amendment 505.

months imprisonment was within the recommended sentencing range in the Guidelines at the time of his original sentencing. This sentence is also within the recommended sentencing range in the Guidelines after applying Amendment 505 (292-365 months imprisonment). Petitioner's original motion for resentencing pursuant to § 3582(c)(2) was denied based on consideration of the appropriate § 3553(a) factors and policy intent behind the Guidelines. That decision was affirmed by the Court of Appeals. Petitioner provides no evidence to suggest any part of his original sentencing, resentencing procedure, or the result is clearly erroneous and created manifest injustice, and it is not the position of this Court to review what has already been affirmed by the Court of Appeals.

For these reasons, Petitioner does not meet any of the extraordinary circumstances that would provide an exception to the law of the case doctrine and his motion is precluded.

B. Petitioner Is Not Automatically Entitled to a Sentence Reduction Even After Application of Amendment 505

Even if Petitioner's motion were not barred by the law of the case doctrine, Petitioner's motion for a sentence reduction based on Amendment 505 would be denied. Petitioner argues that Amendment 505 applies to reduce his offense level and consequently it operates to lower his sentence. Petitioner is correct in that Amendment 505 does apply to his sentence, but

application of Amendment 505 is discretionary. This Court, using its discretion, denied Petitioner's previous, identical motion for a sentence reduction, and the Third Circuit affirmed that decision.

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). This change was made to reflect that "quantity itself is not required to ensure adequate punishment given that organizers, leaders, managers, and supervisors of such offenses will receive a 4-, 3-, or 2-level enhancement for their role in the offense, and any participant will receive an additional 2-level enhancement if a dangerous weapon is possessed in the offense." Id.

Amendment 505 was explicitly made retroactive by Section 1B1.10 of the Guidelines. U.S.S.G. § 1B1.10(c). When determining whether a reduction based on a retroactive amendment applies, a district court substitutes only the amended guideline where applicable, leaving all other guideline application decisions intact as originally determined. United States v. McBride, 283 F.3d 612, 615 (3d Cir. 2002).

In this case, Amendment 505 applies to Petitioner's sentence, reducing his base offense level from 40 to 38.

Petitioner was convicted of conspiracy to distribute over 500 kilograms of cocaine in violation of 21 U.S.C. § 846. This amount of cocaine originally resulted in a base offense level of 40. Possession of a firearm resulted in a two level enhancement, increasing the offense level to 42. A Criminal History Category of I placed Petitioner in a guideline range of 360 months to life imprisonment.

Under Amendment 505, Petitioner is entitled to a reduction of his base offense level from 40 to 38. Petitioner still receives a two level enhancement for possession of a firearm, increasing his final offense level to 40. Petitioner's Criminal History Category remains at I. An offense level of 40 and a Criminal History Category of I corresponds to a sentencing guideline range of 292-365 months imprisonment. Petitioner was originally sentenced to 360 months imprisonment - still within the recommended sentence in the Guidelines for a defendant with an offense level of 40 and a Criminal History Category of I.

Here, Petitioner was an active member of a long standing, violent drug trafficking organization, the JBM. (PSR ¶ 1.) He was implicated in the shooting death of at least one individual and was known for carrying a firearm during his involvement with the JBM. (PSR ¶s 18, 36.) He also has several juvenile and adult convictions. Despite Petitioner's course work in prison, the nature and circumstances of his history and

offenses; the necessity to impose a sentence that reflects the seriousness of the crime, to deter further criminal conduct, and to provide effective rehabilitation; Petitioner's potential danger to the community; and the consideration of the Sentencing Commission's policies, all militate against a sentence reduction when the current sentence is still within the appropriate guideline range even after application of Amendment 505. Furthermore, it is not likely that the Court would have applied a different sentence had Petitioner been sentenced today under the current Guidelines.

For these reasons, Petitioner, although receiving a base offense level reduction under Amendment 505, is not entitled to a sentence reduction under this amendment. Judge Katz exercised his discretion in determining that Petitioner should not be afforded any change in final sentence, the Third Circuit affirmed this decision, and this Court agrees.

### III. CONCLUSION

For the reasons stated above, Petitioner's motion for a sentence reduction pursuant to § 3582(c)(2) will be denied. An appropriate order follows.

