

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

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	CRIMINAL ACTION
	:	
v.	:	
RICHARD ROE, ¹	:	
	:	
Defendant.	:	No. [REDACTED]
	:	

**MEMORANDUM ON DEFENDANT’S MOTION TO REDUCE SENTENCE PURSUANT
TO 18 U.S.C. § 3582(c)(2)**

Baylson, J.

December 22, 2011

Defendant Richard Roe (“Roe”) moves for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2). Roe seeks to reduce his sentence in light of the Fair Sentencing Act of 2010 (“FSA”), Pub. L. No. 111-220, 124 Stat. 2372 (2010), and Amendment 750 to the United States Sentencing Guidelines. After careful consideration of all the relevant facts and circumstances, and for the reasons explained below, the Motion is DENIED.

I. Background and Procedural History

A. Roe’s Conviction and Sentencing

In 2007, Roe was charged by indictment with two counts of distribution of five grams or more of cocaine base (“crack”), and two counts of distribution of 50 grams or more of crack, in violation of 21 U.S.C. § 841(a)(1). In 2008, Roe pleaded guilty to all four counts of the

¹ To protect the identity of Defendant, his name has been redacted and the placeholder “Richard Roe” has been substituted in its place. “Richard Roe” is used instead of the more common “John Doe” to avoid any possible confusion with the John Doe that appears in this Memorandum’s discussion of United States v. Doe, 564 F.3d 305 (3d Cir. 2009).

indictment pursuant to a cooperation plea agreement with the government. In his plea agreement, Roe stipulated that his offense involved 189.6 grams of crack. PSR ¶ 5(b).

In 2009, Roe was sentenced to 96 months' imprisonment, 10 years of supervised release, and \$2,400 in fines and special assessment fees. At the sentencing hearing, the Court adopted the Guideline calculation set forth in the PSR. That calculation set Roe's offense level at 32 under the crack-cocaine Guideline, U.S.S.G. § 2D1.1, which was reduced by three levels for acceptance of responsibility, yielding a final offense level of 29. Roe's criminal history category was V. Accordingly, he was subject to a guideline range of 140-175 months' imprisonment. PSR ¶¶ 24, 30-32.

Prior to sentencing, however, the government filed a Section 851 notice of a prior conviction. Roe was thus subject to a statutory mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B) of 240 months' imprisonment, and his guideline range became 240 months' imprisonment. PSR ¶ 73. Finally, the government filed a motion for a downward departure from the guideline range under U.S.S.G. § 5K1.1, and for a departure from the mandatory minimum under 18 U.S.C. § 3553(e), based on Roe's substantial assistance to the government. At the hearing, the Court granted the government's motion and sentenced Roe to 96 months' imprisonment.

B. Passage of the FSA and Amendment 750

On August 3, 2010, Congress enacted the FSA, which modified the penalties for offenses involving cocaine base. Among other things, the FSA adjusted the mandatory minimum sentences applicable to offenses involving crack such that the ratio between the quantities of powder cocaine and crack cocaine required to trigger a mandatory minimum was reduced from

100:1 to 18:1. See FSA § 2(a), 124 Stat. 2372.

The FSA also directed the Sentencing Commission to act promptly in issuing the Guideline amendments “provided for in this Act,” along with “such conforming amendments . . . as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.” Id. § 8, 124 Stat. 2374. The amendments were to be promulgated “not later than 90 days after the enactment of [the FSA].” Id. § 8(1), 124 Stat. 2374.

The Commission complied with this directive by issuing temporary emergency guideline amendments that became permanent effective November 1, 2011. One of these amendments, Amendment 750, retroactively adjusted the base offense levels in U.S.S.G. § 2D1.1 to reflect the same 18:1 ratio adopted by the FSA for mandatory minimums.

C. The Instant Motion

In December 2011, Roe filed the instant Motion. Roe argues that, pursuant to Amendment 750, his amended guideline range has been retroactively lowered to 100-125 months from 140-175 months; accordingly, he seeks a reduction in sentence under § 3582(c)(2). The government timely responded, countering that Roe is not eligible for a reduction in sentence because Amendment 750 has not lowered his guideline range, which remains the statutory mandatory minimum sentence of 240 months. Roe timely replied.

II. Discussion

Roe moves the Court to reduce his sentence pursuant to Section 3582(c)(2), which provides in relevant part as follows:

[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, . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

Roe concedes that prior to the November 2011 amendments, the Third Circuit’s decision in United States v. Doe, 564 F.3d 305 (3d Cir. 2009) rendered defendants like him—that is, those whose mandatory minimum sentences exceeded their otherwise applicable guideline range, but who received a downward departure for substantial assistance—ineligible for a sentence reduction under § 3582(c)(2).

In Doe, the Third Circuit confronted the question of whether defendants similarly situated to Roe were eligible for a sentencing reduction based on the 2007 amendments to the crack-cocaine Guidelines. Defendants John and Jane Doe had been sentenced to 84 and 41 months’ imprisonment, respectively; both sentences reflected a downward departure from statutory mandatory minimum sentences that, in turn, exceeded both defendants’ initial guideline ranges. Doe, 564 F.3d at 307-08. On November 1, 2007, months after the defendants had been sentenced, the United States Sentencing Commission promulgated Amendment 706, which revised U.S.S.G. § 2D1.1 by lowering the base offense levels for most quantities of crack cocaine; the Amendment became retroactive on December 11, 2007. Subsequently, the Does filed motions for sentencing reductions under § 3582(c)(2), which the district court denied. Id. at 309.

On appeal, the Third Circuit affirmed the district court’s denial of the motions. The Court first noted that, pursuant to the Sentencing Commission’s policy statement regarding § 3582(c)(2), a reduction was not authorized where “[a]n amendment listed in subsection (c)

[e.g., Amendment 706] d[id] not have the effect of lowering the defendant’s applicable guideline range.” U.S.S.G. § 1B1.10(a)(2) (emphasis added). Accordingly, the central question presented on appeal was “whether the term ‘applicable guideline range’ in § 1B1.10(a)(2)(B) refers to [a defendant’s] initial sentencing range . . . calculated under § 5A or [a defendant’s] guideline sentence of [the mandatory minimum sentence] calculated under § 5G1.1(b).” Id. at 309. If the former, John and Jane Doe were eligible for reductions; if the latter, they were not.

The Court held that, although Amendment 706 lowered the defendants’ initial sentencing ranges, it did not lower their “applicable guideline ranges,” which remained set by their respective mandatory minimums. Id. at 311. The Court reasoned that U.S.S.G. § 1B1.1 directed courts to apply the Guideline provisions in a particular order to determine a defendant’s applicable guideline range; because the last step in that procedure was to apply any relevant mandatory minimum under § 5G1.1(b), a defendant’s applicable guideline range necessarily incorporated any relevant mandatory minimum. Id. In other words, the mandatory minimum “subsumed and displaced” a defendant’s initial range. Id. at 312.

The Court further observed that Application Note 1(A) to § 1B1.10 supported its conclusion. That Application Note, as it was then worded, provided that a sentencing reduction was not authorized where “an amendment listed in subsection (c) 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).” (emphasis added).

Here, Roe contends that Doe has been superseded by the FSA amendments effective November 1, 2011. Principally, Roe relies upon a revision to Application Note 1(A), which

describes the “applicable guideline range” as “the guideline range that corresponds to the offense level and criminal history category determined pursuant to 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.” According to Roe, the plain language of the revision means that his applicable guideline range is the range that reflects his offense level and criminal history category—that is, his crack-cocaine range, not the range produced by incorporation of his mandatory minimum sentence. Because Amendment 750 reduced Roe’s crack-cocaine range, he contends that he is eligible for a sentencing reduction.²

In further support of his claim, Roe points to a report by the Sentencing Commission’s Office of General Counsel; the report contemplates that defendants in Roe’s position would be eligible for relief after the November 1, 2011 amendments. It states, in relevant part:

Some offenders who received a reduced sentence under [Federal] Rule [of Criminal Procedure] 35(b) [for cooperating with the government] may currently have a sentence that is below the otherwise applicable statutory mandatory minimum penalty, because the court was authorized to impose a sentence below that mandatory minimum penalty. For these offenders, the Commission’s assumption that any modification of sentence pursuant to the FSA Guideline Amendment would be limited by the statutory mandatory minimum penalties would be inaccurate, and, therefore, underestimate the magnitude of sentence reduction for some offenders.

United States Sentencing Commission, Office of Research and Data, Office of General Counsel, Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively, at 27 n.48 (May 20, 2011), available at http://www.ussc.gov/Research/Retroactivity_Analyses/Fair_Sentencing_Act/20110520_Crack_R

² Roe does not dispute that his mandatory minimum sentence remains unchanged by the FSA. See United States v. Reevey, 631 F.3d 110 (3d Cir. 2010) (holding that the FSA does not apply retroactively to defendants who were sentenced before its enactment).

etroactivity_Analysis.pdf.

Roe's arguments are creative but ultimately inadequate to persuade this Court to depart from the basic analysis set forth in Doe, pending further guidance from the Court of Appeals. Admittedly, as a superficial matter and viewed in isolation, the parenthetical clause in the first sentence of the revised § 1B1.10 Application Note 1(A) appears to describe the applicable guideline range as "the guideline range that corresponds to the offense level and criminal history category" of the defendant. This clause becomes ambiguous, however, in light of the same sentence's subsequent reference to § 1B1.1(a), which explicitly includes application of any mandatory minimum.

That ambiguity, in turn, is resolved by the next sentence in the Note, which provides that a sentencing reduction is not authorized where an "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)." It is difficult to imagine what purpose or meaning this latter statement could have if, in fact, a mandatory minimum sentence was irrelevant to determination of the applicable guideline range.

Furthermore, as the government asserts in its brief, Amendment 741 to U.S.S.G. § 1B1.1, which was enacted in 2010, reinforces the Doe holding that the "applicable guideline range" includes application of a mandatory minimum sentence under § 5G1.1. See U.S.S.G. Amendment 741 (2010). Amendment 741 clarified that Chapter Five departures and the § 3553(a) factors should be considered only after a defendant's guideline range is calculated pursuant to an eight-step process, the last step of which includes application of any applicable mandatory minimum. See U.S.S.G. § 1B1.1(a)-(c).

Understood in context, then, the new parenthetical clause in Application Note 1(a) merely reemphasizes the Commission’s 2010 clarification that a defendant’s applicable guideline range is determined before, and therefore does not reflect, a subsequent departure or variance. See § 1B1.10 Application Note 1(A) (describing the “applicable guideline range” as “the guideline range that corresponds to the offense level and criminal history category determined pursuant to 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.”) (emphasis added).

The Court turns now to Roe’s reliance on the U.S.S.C. Office of General Counsel’s report. In the circumstances presented here, the report—which cites no supporting authorities for the opinion stated in the portion relied upon by Roe—proves little. Without more, the Court cannot accurately discern the report’s meaning; it may reflect any number of things, including (1) preliminary views of the Commission that subsequently evolved, (2) the views of one Commissioner who solicited a report consonant with his or her own understanding of the Guidelines, (3) a disagreement between the Sentencing Commission and its counsel, or (4) something else altogether. Accordingly, the Court declines to engage in a proverbial “reading of the tea leaves.” It suffices to say that the report is of uncertain impact, at best, and may be irrelevant.

Finally, the Court acknowledges sua sponte one additional ambiguity created by the revised Application Note 3 to § 1B1.10, which was not addressed by the parties but gives the Court further pause. Pursuant to the November 2011 amendments, Note 3 contains three new paragraphs as follows:

If the term of imprisonment imposed was outside the guideline range

applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) [i.e., that a court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range] also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

U.S.S.G. § 1B1.10 Application Note 3 (2011) (emphases added).

These new paragraphs arguably support Roe's interpretation of his eligibility under

§ 3582(c)(2). Certainly, without the third paragraph, there is no reason to believe the first two paragraphs refer to anything other than situations in which a defendant has received a downward departure from a guideline range that was above his applicable mandatory minimum sentence, or under circumstances in which no mandatory minimum applied; in light of the third paragraph, however, the Note seems to contemplate sentencing reductions involving downward departures from mandatory minimums under § 3553(e) and/or Federal Rule of Criminal Procedure 35(b). In other words, one seemingly reasonable interpretation of Application Note 3 creates an internal inconsistency with the previously-discussed provisions of Application Note 1(a).

In light of the Third Circuit's reasoning in Doe and the explicit language in the second sentence of Application Note 1(a), the Court remains persuaded that the government has the better argument and that Roe is not eligible for a reduction under § 3582(c)(2). Nevertheless, Roe's position is not without force, and the Court is inclined to think that further exposition by higher judicial authority would be helpful.

III. Conclusion

For the foregoing reasons, Roe's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(2) is DENIED.

An appropriate Order follows.

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD ROE,³

Defendant.

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CRIMINAL ACTION

No. [REDACTED]

ORDER

AND NOW, on this 22nd day of December, 2011, upon careful consideration of Defendant's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(2), and the parties' briefing, and for the reasons in the accompanying Memorandum, it is hereby ORDERED that Defendant's Motion is DENIED.

BY THE COURT:

/s/ Michael M. Baylson

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

³ To protect the identity of Defendant, his name has been redacted and the placeholder "Richard Roe" has been substituted in its place.