

**December 23, 2008**

**Elisabeth A. Shumaker**  
**Clerk of Court**

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

No. 08-2088

DONALD RICHARD COSBY,

Defendant-Appellant.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW MEXICO**  
**(D.C. No. 05-CR-01016-JEC)**

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Michael A. Keefe, Assistant Federal Public Defender, Albuquerque, New Mexico,  
for Defendant-Appellant.

Terri J. Abernathy, Assistant United States Attorney, Las Cruces, New Mexico  
(Gregory J. Fouratt, United States Attorney, with her on the briefs) for Plaintiff-  
Appellee.

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Before **LUCERO, McWILLIAMS** and **McCONNELL**, Circuit Judges,

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**McCONNELL**, Circuit Judge.

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Donald Cosby pled guilty to possession with the intent to distribute a controlled substance. His offense involved cocaine base, commonly known as “crack” cocaine, which at that time entailed a significantly higher criminal offense level under the Sentencing Guidelines than was applicable to ordinary powder cocaine. In recognition of substantial assistance he provided to law enforcement, however, Mr. Cosby received a large downward departure. Subsequently, the Sentencing Guidelines were amended to reduce the penalty for offenses involving crack. Although the district court determined Mr. Cosby’s offense was covered by the amendment, it ultimately decided the additional two-level reduction in his sentence under the amended, retroactive guidelines was not warranted. We must now determine whether the district court improperly considered the prior departure in deciding not to further reduce Mr. Cosby’s sentence.

### **I. Background**

During a warranted search of Mr. Cosby’s home in Albuquerque, New Mexico, Drug Enforcement Administration agents found 170.9 grams of crack cocaine hidden in a toilet tank and 317.9 grams of crack cocaine under the bed in the master bedroom. They also found a semi-automatic handgun in another bedroom and 6.1 grams of cocaine base and \$2,000 on Mr. Cosby, who was present during the search. Mr. Cosby admitted the items were his and was arrested.

In 2006, Mr. Cosby pled guilty, pursuant to a plea agreement, to possession with the intent to distribute more than fifty grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), and also to being a felon in possession of a firearm in violation of 18 U.S.C. § 924(a)(2). His base offense level under the 2005 Sentencing Guidelines was 36. Two base offense levels were added, pursuant to U.S.S.G. § 2D1.1(b)(1), due to Mr. Cosby's possession of a firearm. In light of his cooperation with law enforcement, however, he received a three-level reduction in his offense level, giving him an offense level of 35. Mr. Cosby was found to be in criminal history category VI. The corresponding guideline range was 292 to 365 months. Prior to sentencing, the government filed a sealed motion for downward departure for substantial assistance in the investigation and prosecution of others, pursuant to U.S.S.G. § 5K1.1. Mr. Cosby also filed a sealed sentencing memorandum and two addendums seeking substantial leniency. At sentencing on May 4, 2006, the court granted Mr. Cosby's request and imposed two concurrent sentences of 120 months' imprisonment. Later that day, the government filed an amended motion for downward departure under 18 U.S.C. § 3553(e), which provided a legal basis for the court to impose a sentence below the statutory minimum.

After sentencing, the government made a motion for an additional reduction in Mr. Cosby's sentence pursuant to Federal Rule of Criminal Procedure 35(b), because of his continued assistance in the investigation and prosecution of other

drug traffickers. The district court granted the government's motion and reduced Mr. Cosby's sentence to 94 months.<sup>1</sup>

On November 1, 2007, the Sentencing Commission promulgated Amendment 706, amending the Drug Quantity Table in U.S.S.G. § 2D1.1(c) to lower the base offense levels for crack cocaine-related offenses by two levels. U.S.S.G. App. C, amend. 706 (2007). The Commission subsequently made this change retroactive. *See United States v. Herrera*, No. 08-6046, 2008 WL 4060168 at \*3 (10th Cir. Sept. 3, 2008). Mr. Cosby then filed a sealed motion for a sentence reduction in accordance with the lowered base offense level.

Under 18 U.S.C. § 3582(c)(2), where a defendant's sentence would be lower under retroactive amendments adopted during his imprisonment, "the court *may* reduce the term of imprisonment, after considering the factors set forth in section 3553(a) [18 U.S.C. § 3553(a)] to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Specifically, there is a two step procedure, set forth in U.S.S.G. § 1B1.10, comment. (n.1(B)). The procedure is described in detail in *United States v. Hasan*, 245 F.3d 682, 684–85 (8th Cir. 2001) (en banc), and in

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<sup>1</sup>The district court granted an eleven level departure pursuant to U.S.S.G. § 5K1.1. Though the district court did not announce it was lowering Mr. Cosby's offense level further in response to the government's Rule 35(b) motion, the court must have reduced his offense level by at least one more level in order to reach a 94 month sentence.

*United States v. Vautier*, 144 F.3d 756, 760 (11th Cir. 1998). First, “[i]n determining *whether*, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. 3582(c)(2) . . . is warranted, the court shall determine the amended guideline range that would have been applicable [if the amended guidelines] had been in effect at the time the defendant was sentenced.” U.S.S.G. § 1B1.10(b)(1) (emphasis added). In determining the range, “the court shall substitute only the amendments . . . for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.” *Id.* Second, to determine whether a reduction in accordance with the amended range is warranted, the district court is to weigh the factors in U.S.S.G. § 3553(a), as well as public safety considerations and post-sentencing conduct. Application Note 1(B)(i–iii), U.S.S.G. §1B1.10.

Both parties agreed that if the court were to apply the retroactive amendments with no change in the other adjustments, Mr. Cosby’s base offense level would be thirty-four rather than thirty-six. Adding two levels for possessing a firearm and subtracting three levels for cooperation would result in an offense level of thirty-three and a corresponding guideline range of 235 to 293 months, in lieu of the original range of 292 to 365 months. Their disagreement was over how to deal with the further reductions in sentence he received for substantial assistance to law enforcement.

Mr. Cosby argued that the credit he received for substantial assistance, calculated as the difference between the bottom of the original range, 292 months, and the actual sentence he received, 94 months, should be subtracted from the bottom of the amended guideline range, 235 months. The result would be 37 months. The government's primary argument was that no further reduction was warranted. In the alternative, the government argued that even if a further reduction was appropriate, a "comparable" departure should be determined in terms of percentages, not absolute numbers. Under this reasoning, a comparable amended sentence would be 68 percent below the amended minimum guideline, or 75 months. In support of this proportionate method of calculation, the government cited to Application Note 3, U.S.S.G. § 1B1.10, which sets forth an example of how to calculate a reduction "comparably less than the amended guideline range." U.S.S.G. § 1B1.10, comment. (n.3)(2008).

At a March 26, 2008 hearing on Mr. Cosby's motion, the court concluded that although Mr. Cosby was eligible for the reduction under the amended guidelines, such a reduction was not warranted in this case. The court stated that "[i]t is with particular concern for the safety of the community that the Court determines no further reduction in this defendant's term of imprisonment is appropriate." R. Vol. IV, at 22. Noting that Mr. Cosby had "already received a substantial reduction in his sentence," R. Vol. IV, at 21, the court entered an

order denying Mr. Cosby's motion for a sentence reduction. Mr. Cosby now appeals.

## II. Discussion

Though we generally review questions of statutory and guideline interpretation *de novo*, here Mr. Cosby admits he did not object to the district court's weighing of the prior U.S.S.G. § 5K1.1 departure in rejecting the sentencing reduction under the amended crack cocaine guidelines. Without such an objection, we review this issue for plain error. *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1199 (10th Cir. 2007). "We find plain error only when there is (1) error, (2) that is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cereceres-Zavala*, 499 F.3d 1211, 1217 (10th Cir. 2007). In any event, we find no error, let alone plain error.

Mr. Cosby argues that the district court erred when it took into consideration the fact that he had already received a large (198 month) reduction in his sentence. He relies primarily on the language in U.S.S.G. § 1B1.10, which states that when revisiting a sentence because of a retroactive amendment, the court "shall leave all other guideline application decisions unaffected." According to Mr. Cosby, this statement "make[s] clear that district courts may not factor prior guideline applications into decisions with respect to whether sentence reductions are warranted under amended guidelines." Aplt. Br. 14.

We do not agree. In our view, U.S.S.G. § 1B1.10 strongly suggests the opposite. In determining the amended guideline range, the sentencing court “shall substitute only the [retroactive] amendments” and “shall leave all other guideline application decisions unaffected.” U.S.S.G. § 1B1.10(b)(1). But having done so, the court has discretion to decide whether to reduce the length of the defendant’s *at all*. U.S.S.G. § 1B1.10(a)(1) provides that, following the adoption of a retroactive amendment, “the court *may* reduce the defendant’s term of imprisonment” (emphasis added). Moreover, where the original term of imprisonment was less than the original guideline range, whether to impose a sentence with a comparable reduction under the amended guidelines is also discretionary. U.S.S.G. § 1B1.10(b)(2)(B) provides that if the original term of imprisonment was less than the original guideline range, then “a reduction comparably less than the amended guideline range . . . *may* be appropriate” (emphasis added).

The commentary to U.S.S.G. § 1B1.10 indicates that in deciding whether to give the defendant the benefit of a retroactive amendment, the court must consider the sentencing factors set forth in § 3553, including “the need for the sentence imposed,” as well as public safety considerations and post-sentencing conduct. Application Note 1(B)(i–iii), U.S.S.G. § 1B1.10. It would be difficult to evaluate this need without considering the length of the sentence already imposed and the reductions already applied. U.S.S.G. § 1B1.10 thus presupposes



consideration of prior reductions. Accordingly, the court did not err when it noted the prior sentencing reductions Mr. Cosby had already received.

This analysis is consistent with our prior holding that “modification proceedings under § 3582(c)(2) are much more narrow in scope than original sentencing proceedings.” *United States v. Rhodes*, \_\_\_F.3d\_\_\_, 2008 WL 5102247, at \*5 (10th Cir. Dec. 5, 2008); *see also United States v. Pedraza*, \_\_\_F.3d\_\_\_, 2008 WL 5274446, at \*2 (10th Cir. Dec. 22, 2008); *United States v. Torres*, 99 F.3d 360, 362 (10th Cir. 1996) (noting that § 3582(c)(2) is a “different animal” than a complete resentencing). While we are mindful that a district court must not conduct a full resentencing in determining whether to modify a sentence, modification proceedings still involve an examination of § 3553 factors to determine whether to give effect to the retroactive changes. The district court examined these factors as well as policy considerations, particularly Mr. Cosby’s threat to the safety of others. It ultimately determined there was a need for the sentence previously imposed and that a further reduction was inappropriate. The district court had the discretion to decide whether to lower the sentence, and it properly determined not to do so.

### **III. Conclusion**

For the foregoing reasons, we **AFFIRM** the decision of the district court. Appellee’s motion to seal the briefs is **GRANTED**.