11-66

To Be Argued By:
ANTHONY E. KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-66

UNITED STATES OF AMERICA,
Appellant,

-vs-

ANTHONY SWINT, aka KB,
Defendant-Appelle,

TYRICE WHITE, aka Ears,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Stefan R. Underill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On November 29, 2010, the district court issued an Order Regarding Modification of Sentence Pursuant to 18 U.S.C. § 3582(c). JA 38.[1] On December 26, 2010, the government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 54. This Court has jurisdiction over the government's appeal of the district court's order reducing the defendant's sentence under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b)(1).

On March 8, 2011, the Solicitor General of the United States personally authorized this appeal.

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[1] "JA" refers to the Joint Appendix, and "SA" refers to the Sealed Appendix. The Presentence Report will be referred to as "PSR" along with the appropriate paragraph number. The change of plea transcript is cited as "8/24/04 Tr. __."

Issue Presented for Review

1. Did the district court have the legal authority to reduce the defendant's sentence pursuant to 18 U.S.C. § 3582(c), where it had originally departed from the career offender guidelines solely based on the government's motion under U.S.S.G. § 5K1.1 and without any mention that the sentence was based on the crack cocaine guidelines in effect at the time?

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-vs-

ANTHONY SWINT, aka KB,
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Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In 2006, the defendant, Anthony Swint, having been convicted as a second offender of possession of five or more grams of cocaine base/crack cocaine, was sentenced to 132 months' incarceration. That sentence represented a 130 month downward departure from the bottom of the

262-327 month career offender guideline range. The sentencing transcript and statement of reasons issued by the district court both clearly indicate that the departure was based solely on the defendant's cooperation with the government and premised only on the government's motion for a downward departure pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1.

Over four years later, the district judge *sua sponte* reduced the defendant's incarceration term to 105 months under 18 U.S.C. § 3582(c). In denying the government's motion for reconsideration, the court acknowledged that the sentencing record was devoid of any reference to the crack cocaine guidelines then in effect. The court justified its sentence reduction, however, by stating that, even though there was no such reference in the record, it had indeed selected the defendant's original sentence by reference to the Chapter Two guideline range.

The district court's order should be vacated because it is contrary to the well established law in this Circuit. Whatever the court may have been thinking at the time of the sentencing, nothing in the contemporaneous sentencing record reflected that it was basing its sentencing decision on the crack cocaine guidelines then in effect. To the contrary, the sentencing proceedings reflect that defendant was sentenced as a career offender and the departure from the career offender guidelines was premised solely on the government's motion for a downward departure based on the defendant's cooperation. As such, the extent of the departure could only have been based on the nature and extent of the defendant's cooperation. Since there was no

legal authority for the district court to amend the judgment and reduce the defendant's sentence, the amended judgment should be vacated, and the original judgment should be reinstated.

Statement of the Case

On May 27, 2004, a federal grand jury charged the defendant with three counts of possessing with intent to distribute five grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). JA 1-2. On August 24, 2004, the government filed a second offender information pursuant to 21 U.S.C. § 851. JA 57 (docket entry 51). That information, *inter alia*, increased the mandatory minimum incarceration term to 10 years and the maximum possible incarceration term to life. JA 4. The defendant pleaded guilty to Count One of the Indictment on August 24, 2004. *See* 8/24/04 Tr. 47.

On August 25, 2006, the district court sentenced Swint to 132 months' imprisonment followed by 10 years' supervised release. JA 35. Judgment entered on August 29, 2006. JA 59 (docket entry 81). The defendant did not appeal that judgment.

On November 29, 2010, the district court, *sua sponte* and without notice to the parties, entered an order, pursuant to 18 U.S.C. § 3582(c), reducing the defendant's sentence from 132 months to 105 months. JA 37. On December 3, 2010, the government moved for reconsideration and a stay of the court's November 29, 2010 order. JA 38-47. On December 6, 2010, the court

denied the government's motion. JA 49-51. The government filed a timely notice of appeal on December 26, 2010. JA 52.

The defendant is presently incarcerated.

Statement of Facts and Proceedings Relevant to this Appeal

A. The indictment and plea

The following facts are undisputed and were set forth in the PSR.

On November 5, 2004, special agents and task force officers with the Federal Bureau of Investigation ("FBI") who were investigating gang activity in New Haven arranged for a cooperating witness ("CW") to purchase two "eight balls" (totaling 7 grams) of crack cocaine from Tyrice White. During the meeting between the CW and White, White called "KB" (later identified as the defendant) to obtain the crack and sell it to the CW. White drove the CW to a location, left the car and returned a short time later with one eight ball. The two then drove to another location where White obtained the second eight ball directly from the defendant, which he then sold to the CW. In total, the CW purchased 6.7 grams of crack cocaine. *See* PSR ¶ 6.

On November 12, 2004, the CW arranged to purchase crack cocaine directly from the defendant. The CW placed a recorded call to the defendant and asked to purchase four eight balls of crack for $130 each. The two then met in the defendant's car, and the defendant sold the CW approximately 12.9 grams of crack cocaine for a total of $520. *See* PSR ¶ 7.

On November 13 , 2004, the CW arranged with another person to purchase two ounces of crack cocaine from the defendant. The defendant called and advised the CW to meet him inside a CVS on Whalley Avenue. Surveillance officers then observed the same car driven by the defendant the previous day at that store. When the defendant and the CW left the store, they got into the defendant's vehicle. At that time, the CW provided the defendant with $1,800 in exchange for 48.1 grams of crack cocaine. Officers then stopped the defendant's vehicle and, although they did not arrest him at that time, they did locate over $2,000 on his person *See* PSR ¶ 8.

The defendant was indicted on May 27, 2004 in a three-count indictment charging him with each of the three sales discussed above. JA 1-2. On August 24, 2004, he pleaded guilty to Count One of the Indictment charging him in connection with the sale of 48.1 grams of crack to the CW on November 13, 2004. 8/24/04 Tr. 47.

In the written plea agreement executed at the time of the guilty plea, the defendant agreed that he was a career offender under U.S.S.G. § 4B1.1 and that his base offense level under § 4B1.1(C) was 37. JA 6. He further agreed

that, after a three-level reduction for acceptance of responsibility, his adjusted offense level was 34 and his resulting guideline range, based on a criminal history category of VI, was 262-327 months' incarceration. *Id*.

B. The sentencing

The PSR found that the defendant faced a statutory incarceration range of 10 years to life and determined the defendant's guidelines range using the same calculations set forth in the plea agreement. *See* PSR ¶¶ 57-58. Specifically, the PSR found that the defendant's base offense level, under U.S.S.G. § 2D1.1(c)(3), was 34 based on a finding that the defendant had been involved in distributing between 150 and 500 grams of crack cocaine. *See* PSR ¶ 14. The PSR then concluded that the defendant was a career offender based on his 1999 first degree assault convictions and his 1994 sale of narcotics convictions. *See* PSR ¶ 20. As a result, the defendant's base offense level rose to 37, and his adjusted offense level rose to 34. *See* PSR ¶¶ 21-22. At an adjusted offense level of 34 and a criminal history category VI, the resulting guideline incarceration range was 262-327 months. *See* PSR ¶ 58.

On March 20, 2006, the government filed a motion pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, asking the court to depart downward from the defendant's guidelines in light of the defendant's substantial assistance in the investigation or prosecution of other persons. SA 1. The motion also authorized the district court – to the extent it deemed appropriate and warranted – to impose a

sentence below the ten year mandatory minimum incarceration term. *Id*. The memorandum accompanying that motion detailed the nature and extent of the defendant's cooperation with the government, but did not advocate a particular sentence. *Id*. at 3-10.

The defendant filed a sentencing memorandum on August 23, 2006, in which he asked the district court to take into consideration the hardships of his pre-sentence confinement. JA 10-12. The defendant also asked that the court consider his long history of substance abuse. *Id*.

Sentencing took place on August 25, 2006. Neither the defendant nor the government registered any objections to the factual statements in the PSR. JA 15-16. As a result, the court adopted the factual statements contained in the PSR and accepted the plea agreement "being satisfied that the agreement adequately reflects the seriousness of the actual offense behavior and that accepting it will not undermine the purposes of sentencing." JA 16. Similarly, neither party objected to the PSR's conclusion that, as a career offender, the defendant faced a guideline incarceration range of 262-327 months. JA 17.

In imposing sentence, the court characterized the defendant's conduct as "very bad." JA 24. It stated, "[Y]ou've got a statute that says you have to be sentenced to at least ten years and you could be sentenced for the rest of your life for what you did. So that should be a strong indication just how serious this conduct is." JA 24. The court further noted, "In your situation it's also a continuation of past conduct. You have a bunch of sale

convictions." JA 24. The court was troubled by the fact that the defendant had "used a lot of violence in the past" and explained:

> That's something I keep struggling with in your case. The assaults, the use of weapons, that kind of thing gives me concern, and I think it's going to give a judge in the future concern. That's the bad side of things.

JA 25.

On "the good side," the court noted the defendant's "very helpful cooperation to the government" and stated, "but for that, you'd be going away for a very, very long time." JA 25. The court warned, "[T]here was a very good chance that but for your cooperation, you'd be going away to jail for more than 20 years. So I think you need to keep that perspective in mind and realize this is a very serious offense. . . ." JA 25.

The court expressed a desire to deter the defendant from engaging in future criminal conduct and advised him that, if he wanted to succeed he would have to conquer his drug addiction and gain the skills necessary to become employed. JA 25-27. The court then stated:

> You have a chance today because you did the right thing and cooperated. You're going to get a sentence that's going to be long, it's going to be longer than you want, I'm sure, but it's going to be

> a fraction of what I would have given you because you cooperated with the government.
>
> * * *
>
> I will tell you, in imposing this sentence I'm going as low as I can go with you. I'm really giving you a break, given your record and what you've done. I'm going lower than the probation officer thinks I should be going. I'm going to give you the biggest break I can give you but you've got to understand you've got to take advantage of it.

JA 27-28.

On this record, the court granted a downward departure, but did not impose a sentence below the 120-month statutory mandatory minimum. Instead, the court sentenced the defendant to a term of 132 months' imprisonment, followed by 10 years' supervised release. JA 28-29.

In the district court's written statement of reasons, the court (1) adopted the PSR without change; (2) confirmed that the adjusted offense level was 34, the criminal history category was VI, and the guideline incarceration range was 262-327 months; and (3) stated that sentence resulted from a departure based on the government's § 5K1.1 motion. SA 11-12.

No appeal was taken.

C. The order reducing the defendant's sentence

On March 13, 2008, after the Sentencing Commission had reduced the crack cocaine guidelines as part of amendments which took effect on November 1, 2007, and made those reductions retroactive, the United States Probation Office submitted a memorandum to the district court stating that the defendant was ineligible for a reduction under 18 U.S.C. § 3582(c) because he had been sentenced as a career offender under U.S.S.G. § 4B1.1. SA 15.

On November 29, 2010, the court, *sua sponte* and without notice to the parties, entered an order reducing the defendant's incarceration term from 132 months to 105 months, pursuant to 18 U.S.C. § 3582(c). JA 38. In that order, the court noted that the original guideline incarceration range was 262-327 months and reduced that range to 210-262 months based on a finding that the amended offense level was 32, instead of 34. JA 38. The court also found that "[t]he previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 reduction, and the reduced sentence is comparably less than the amended guideline range." JA 38. In addition, the court stated that "[t]he original and reduced terms of imprisonment are both about one half of the bottom of the crack cocaine guideline range." JA 38. Finally, the court explained, "The original sentence was a departure to a level actually based on the crack cocaine guidelines. Thus, Swint is eligible for the reduction even

though he was a career offender. *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) [(per curiam)]." JA 38.

D. The government's motion for reconsideration

On December 3, 2010, the government moved for reconsideration of the court's November 29, 2010 order. JA 38-47. It argued that *McGee* did not apply since there was no evidence in the sentencing record that the defendant was explicitly sentenced under the crack guidelines. JA 43-45. The government also noted that, contrary to the court's notation in its order that the defendant's original term of 132 months' imprisonment was approximately one-half of the crack cocaine guidelines, under the sentencing guideline in effect at the time of the defendant's sentencing, the crack guidelines would have yielded a range of 188 to 235 months' imprisonment. JA 45 n. 6.

On December 6, 2010, the district court denied the government's motion to reconsider. JA 48-51 (reported at *United States v. Swint*, 2010 WL 5067693 (D. Conn. Dec. 6. 2010). The court explained that "[a]lthough [it] did not say so on the record," it had selected the defendant's original sentence by determining the range that would have applied absent the career offender guidelines (*i.e.*, the defendant's crack cocaine guidelines range, 188-235 months), and then imposing a sentence that was approximately 56% of the top of that range. JA 49. Accordingly, when the court granted the § 3582(c)(2) sentence reduction, it ignored the career offender guideline, calculated the amended crack cocaine guideline

incarceration range to be 151-188 months, and then reduced the defendant's sentence to a term of 105 months, which was approximately 56% of the top of the adjusted crack cocaine guideline range. JA 49-50. The court agreed that its November 29, 2010 order was not accurate and amended the order to conform to the ruling on the motion for reconsideration. JA 49 n. 1.

Although the court acknowledged that a defendant sentenced under the career offender guidelines is ordinarily ineligible for a sentence reduction under § 3582(c)(2) and the crack cocaine amendments, it found that the defendant was eligible under *McGee* because he was granted a downward departure and, as a result, was ultimately sentenced based on the crack cocaine guidelines. JA 50. The court explained, "I have now explicitly stated in this ruling that I departed from the career offender sentencing range to the range that Swint would have been in absent his career offender status." JA 50-51. In relying on this Court's narrow decision in *McGee*, the court stated:

> I do not read *McGee* as holding that a career offender who receives a downward departure and who was actually sentenced based on the applicable crack cocaine offense level is ineligible for a sentence reduction unless the sentencing judge explicitly states *at sentencing* that the extent of the downward departure is based on the crack guidelines. Such a reading would lend itself to "excessive formalism." [*McGee*, 553 F.3d] at 228. Accordingly, I conclude that Swint, like McGee, is

eligible for a reduction in sentence because he was ultimately sentenced based on the crack cocaine guidelines.

JA 51 (emphasis in original).

Argument

I. The district court lacked legal authority to reduce the defendant's sentence pursuant to 18 U.S.C. § 3582

A. Relevant facts

The facts pertinent to consideration of this issue are set forth above in the "Statement of Facts" section.

B. Governing law and standard of review

1. Standard of review

This Court generally reviews *de novo* the district court's conclusions of law. *See United States v. Thorn*, 446 F.3d 378, 387 (2d Cir. 2006). Questions of law subject to this standard of review include, for example, the interpretation of a statute or a sentencing guideline. *See United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002); *United States v. Stroud*, 893 F.2d 504, 507 (2d Cir. 1980). Accordingly, the standard for reviewing a district court's holding regarding the scope of its authority in a § 3582(c)(2) ruling is *de novo*. *See United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009); *see also United States v. James,* 548

F.3d 983, 984 (11th Cir. 2008) (per curiam). The decision whether to reduce a sentence pursuant to § 3582(c) is reviewed for abuse of discretion. *See United States v. Boden,* 564 F.3d 100, 104 (2d Cir. 2009).

2. Applicable law governing 3582(c) motions

"A district court 'may not generally modify a term of imprisonment once it has been imposed." *United States v. Savoy*, 567 F.3d 71, 72 (2d Cir. 2009) (citing *United States v. McGee*, 553 F.3d at 226, quoting *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam)). Under 18 U.S.C. § 3582(c)(2), however, a district court may reduce a defendant's sentence under very limited circumstances:

> [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), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.

18 U.S.C. § 3582(c)(2).

Significantly, however, "Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon v. United States*, __ U.S. __, 130 S. Ct. 2683, 2691 (2010); *see also* U.S.S.G. § 1B1.10(a)(3) ("[P]roceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.").

In Section 1B1.10 of the Guidelines, the Sentencing Commission has identified the amendments that may be applied retroactively pursuant to this authority and articulated the proper procedure for implementing the amendment in a concluded case.[2]

On December 11, 2007, the Commission issued a revised version of § 1B1.10, which emphasized the limited nature of relief available under 18 U.S.C. § 3582(c). *See*

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[2] Section 1B1.10 is based on 18 U.S.C. § 3582(c)(2) and also implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." *Id.* A guideline amendment may be applied retroactively only when expressly listed in § 1B1.10(c). *See*, *e.g.*, *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997).

U.S.S.G. App. C, Amend. 712. That section became effective on March 3, 2008 and provided, in relevant part:

> (1) *In General.*—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
>
> (2) *Exclusions.*—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—
>
> (A) none of the amendments listed in subsection (c) is applicable to the defendant; or
>
> (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.
>
> (3) *Limitation.*—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

Amendment 706, effective November 1, 2007, reduced the base offense level for most crack offenses, and Amendment 715, effective May 1, 2008, changed the way combined offense levels are determined in cases involving crack and one or more other drugs.[2] On December 11, 2007, the Commission added Amendment 706 to the list of amendments identified in § 1B1.10(c) that may be applied retroactively, effective March 3, 2008. *See* U.S.S.G. App. C, Amend. 713. The Commission later amended § 1B1.10(c) to make Amendment 715 apply retroactively, effective May 1, 2008. *See* U.S.S.G. App. C, Amend. 716.

Notwithstanding the retroactive application of the new crack cocaine sentencing guideline, however, a defendant sentenced as a career offender is generally ineligible for a sentence reduction under § 3582(c)(2) and the 2007 amended crack guidelines. *See United States v. Mock*, 612 F.3d 133, 136 (2d Cir. 2010) (per curiam); *United States v. Martinez*, 572 F.3d 82, 84-86 (2d Cir. 2009) (per curiam).

This Court's holding in *Martinez*, however, is subject to a narrow exception, previously adopted in *United States v. McGee*, and expressly recognized in *Martinez* itself. In *McGee*, this Court addressed "the narrow question of whether a defendant . . . who at sentencing was designated a career offender but granted a departure so that he was

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[2] Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

ultimately sentenced based on the crack cocaine (cocaine base) guidelines, is eligible for a reduced sentence pursuant to the so-called crack amendments." *Id.*, 553 F.3d at 225-26. The Court concluded that a defendant who qualified as a career offender, but was granted a departure at sentencing, could still be eligible for a reduced sentence under § 3582 and the crack guideline amendments if he was "ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." *Id.* at 230.

As explained in *Martinez*, the reduction in *McGee* was appropriate because the district court had found that the career offender guidelines were excessive and "'explicitly stated that it was departing from the career offender sentencing range to the level that the defendant *would have been in absent the career offender status* calculation and consideration.'" *Martinez*, 572 F.3d at 84 (emphasis in original) (quoting *McGee*, 553 F.3d at 227). "In other words, McGee *could have* been sentenced under § 4B1.1 but was *in fact* sentenced under § 2D1.1" *Id.* (emphasis in original). A review of the record made it "apparent that McGee was sentenced 'based on' [§ 2D1.1]." *McGee*, 553 F.3d at 227.[3]

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[3] A circuit split exists on the question presented in *McGee*, namely whether a defendant is eligible for § 3582(c)(2) reduction when the district court sentenced the defendant based on a departure from the career offender guideline range. Compare *United States v. Cardosa*, 606 F.3d 16 (1st Cir. 2010) (defendant eligible for reduction), and *United States v. Munn*, 595 F.3d 183, 192-93 (4th Cir.

C. Discussion

A review of the record in this case, including the district court's own explanation at the time of sentencing of the reasons for its departure from the career offender guidelines, provides no evidence that the defendant's sentence was explicitly based on, or even related to, the crack cocaine guidelines.

First, the sentencing transcript and written statement of reasons reflect that the defendant was sentenced under the career offender guidelines and that the sole basis for the departure from the guidelines was the granting of the government's substantial assistance motion. *See, e.g.* JA 25 ("[B]ut for [your cooperation], you'd be going away for a very, very long time."); JA 27 ("You have a chance today because you did the right thing and cooperated."); JA 28 ("[Your sentence is] going to be a fraction of what I would have given you because you cooperated with the

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2010) (same); with *United States v. Guyton*, __ F.3d __, 2011 WL 590110 at *1 (7th Cir. Feb. 22, 2011) (holding that defendant ineligible for sentence reduction); *United States v. Payton*, 617 F.3d 911, 913-14 (6th Cir. 2010) (same); *United States v. Darton*, 595 F.3d 1191, 1197 (10th Cir.) (same), *cert. denied*, 130 S. Ct. 3444 (2010); *United States v. Blackmon*, 584 F.3d 1115, 1116-17 (8th Cir. 2009) (per curiam) (same), *cert. denied*, 130 S. Ct. 2417 (2010); and *United States v. Tolliver*, 570 F.3d 1062, 1066 (8th Cir. 2009) (same).

government."). Nowhere in the contemporaneous sentencing record is there an explicit reference – or even an implicit suggestion – that the district court's sentence was in any way based on the crack guidelines then in effect. In fact, the district court made clear that, based on the § 5K1.1 motion, its sentence was "going as low as I can go with you" and giving the defendant "the biggest break I can give you," which was even "lower than the probation officer thinks I should be going." JA 28. Notably, despite being authorized to do so by the government's motion, when it sentenced the defendant in 2006, the court did not impose a sentence below the 120-month mandatory minimum term.

Second, unlike in *McGee*, where the departure was based on the district court's conclusion that the career offender guideline range overrepresented the seriousness of the defendant's criminal record, the district court here departed downward under § 5K1.1 *despite* the defendant's serious and violent criminal history, which included four prior sale of narcotics convictions, the use of "a lot of violence in the past[,] . . . assaults, [and] the use of weapons . . . ." JA 25. As the district court noted, "[T]hat kind of thing give[s] me concern, and I think it's going to give a judge in the future concern." *Id*.

Finally, in sharp contrast with *McGee,* where the sentencing court expressly stated that it was applying the Chapter Two crack cocaine guidelines range, the district court here made no such statement. There was no explicit or implicit reference to the crack cocaine guidelines. To the contrary, the defendant was sentenced as a career

offender, and the sole justification provided by the court for reducing his sentence was the granting of the § 5K1.1 motion. As a result, the defendant was not "ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." *McGee* 553 F.3d at 230. This case, therefore, does not fall within the narrow exception articulated in *McGee* and is instead controlled by this Court's decision in *Martinez*, which precludes a sentence reduction under § 3582(c) for a defendant sentenced as a career offender.

The Seventh Circuit recently held that "for the purposes of section 3582(c), the relevant sentencing range is the one calculated before the defendant received the benefit of a downward departure under [U.S.S.G. § 5K1.1]." *Guyton*, 2011 WL 590110 at *1. Although the court acknowledged that its reasoning might, in certain respects, be in tension with *McGee*, it distinguished *McGee* based on the fact that the decision in *McGee* did not involve a departure based solely on Section 5K1.1, but instead involved a departure for overstatement of criminal history under U.S.S.G. § 4A1.3(b). *See Guyton*, 2011 WL 590110 at *4; *cf. United States v. Flemming*, 617 F.3d 252, 265 (3d Cir. 2010) (holding that the applicable guideline range is established before any departure under § 5K1.1, but after any departure under § 4A1.3 for over-representation of criminal history). Here, the sole basis for a downward departure was the granting of the government's § 5K1.1 motion, and the defendant's criminal record was an aggravating factor, not a mitigating factor.

In its ruling denying the motion for reconsideration, the district court relied upon the *McGee* exception by stating that *McGee* did not require the "explicit statement" at the time of sentencing that the original sentence was based on the crack cocaine guidelines. JA 51. Indeed, the court stated that such a reading of *McGee* would be an exercise in "'excessive formalism.'" *Id*. (quoting *McGee*, 553 F.3d at 228).

Far from being an exercise in "excessive formalism," however, the requirement that a district court state in open court its reasons for the sentence at the time the sentence is imposed, rather than over four years after the sentencing, is firmly rooted in the law and makes sound sense. Under 18 U.S.C. § 3553(c)(2), a district court, "at the time of sentencing, shall state in open court the reasons for the imposition of a particular sentence, and, if the sentence is not of the kind, or is outside the [guidelines] range . . . , the specific reason for the imposition of a sentence different from that described . . . ." *Id.*; *see United States v. Mock*, 612 F.3d at 136 n. 2 (2d Cir. 2010) (referring to § 3553(c)(2)'s requirement as the "open court" doctrine). Indeed, this Court has held that "a sentencing court's failure to comply with § 3553(c)(2) affects the fairness, integrity, and public reputation of judicial proceedings." *United States v. Lewis*, 424 F.3d 239, 247 (2d Cir. 2005).

The requirement that a court state with specificity the reasons for the imposition of a sentence does not bind it to specific "robotic incantations." *United States v. Sindima*, 488 F.3d 81, 85 (2d Cir. 2007). The court's statement

must, however, be detailed enough "to allow a reviewing court, the defendant, his or her counsel, and members of the public to understand why the considerations used as justifications for the sentence are 'sufficiently compelling . . . or present to the degree necessary to support the sentence imposed.'" *Id.* at 86 (internal citations omitted). Moreover, a district court's adoption of the factual or legal findings in the presentence report is insufficient. *See United States v. Richardson*, 521 F.3d 149, 158 (2d Cir. 2008) (finding that "[t]he PSR is no substitute" for explicit factual findings where "the factual findings in the report provide[] inadequate support for the sentence imposed").

The open court doctrine exists not only to inform the defendant and the public of the reasons for the sentence but also to assist prison and probation officials in developing programs for the defendant and facilitating appellate review of the sentence. *See United States v. Alcantara*, 396 F.3d 189, 206 (2d Cir. 2005) (citing *United States v. Molina*, 356 F.3d 269, 277 (2d Cir. 2004)); *United States v. Fernandez*, 443 F.3d 19, 31 n.8 (2d Cir. 2006);. To allow the justification for a sentence to be announced years after the sentencing would undermine these purposes.

In fact, this case exemplifies the need for contemporaneous announcement of the reasons for a sentence. At sentencing and in its written statement of reasons, the court explained that the sole basis for its departure from the guidelines was the granting of the government's § 5K1.1 motion, but in its ruling denying the government's motion for reconsideration, the court stated

that it had calculated the extent of the defendant's downward departure from the career offender guideline range by reference to the Chapter Two guideline range.

It bears note that the court's explanation of its sentence over four years later is not consistent with governing law that "makes clear that the only factor the sentencing court may consider in deciding the maximum extent of the downward departure pursuant to a § 3553(e) motion is the nature and extent of the defendant's substantial assistance." *United States v. Williams*, 551 F.3d at 186 (explaining holding in *Richardson*, 521 F.3d 149). In *Williams*, this Court explained:

> When, as here, the Guidelines sentence ends up as the statutory minimum, both the decision to depart and the maximum permissible extent of this departure below the statutory minimum may be based only on substantial assistance to the government and on no other mitigating considerations. . . . [I]n arriving at a final sentence, of course, the district court may consider other factors in determining whether to grant the full extent of the departure permitted by § 3553(e). . . . *Richardson* makes clear that the only factor the sentencing court may consider in deciding the maximum extent of the downward departure pursuant to a § 3553(e) motion is the nature and extent of the defendant's substantial assistance.

Williams, 551 F.3d at 86 (internal quotation marks omitted).

Here, the district court departed from a guideline incarceration range of 262-327 months to an incarceration term of 132 months and stated at the time that it did so based exclusively on the government's filing of the substantial assistance motion. Under *Williams* and *Richardson*, the district court was certainly authorized to consider the § 3553(a) factors in deciding whether to grant the full extent of the departure, and the sentencing record in this case reveals that the court intended to give the defendant the full substantial assistance departure. JA 28. Had the court announced at the time of sentencing that the extent of its departure was based, in part or whole, on the crack cocaine guidelines, however, it is unclear whether that decision would have survived appellate court review, especially considering the fact that its subsequent Section 3582 order had the effect of reducing the defendant's incarceration term below the otherwise applicable mandatory minimum term of 120 months. Under *Williams* and *Richardson*, the only viable basis to support a sentence below the 120 month mandatory minimum term of incarceration was the defendant's substantial assistance.

Conclusion

For the foregoing reasons, the district court's § 3582(c) order and amended judgment should be vacated, and the original August 29, 2006 judgment should be reinstated.

Dated: April 21, 2011

Respectfully submitted,

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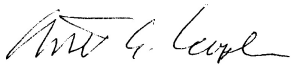
DISTRICT OF CONNECTICUT



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