

**United States v. Robinson**

United States Court of Appeals for the Fifth Circuit

August 28, 2018, Filed

No. 17-20653 Summary Calendar

**Reporter**

735 Fed. Appx. 861 \*; 2018 U.S. App. LEXIS 24330 \*\*; 2018 WL 4103291

UNITED STATES OF AMERICA, Plaintiff-  
Appellee v. **SUNNY ROBINSON**, Defendant-  
Appellant

**Opinion**

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**Notice:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.*

**Prior History:** **[\*\*1]** Appeal from the United States District Court for the Southern District of Texas. USDC No. 4:09-CR-422-1.

*United States v. Robinson, 505 Fed. Appx. 385, 2013 U.S. App. LEXIS 345 (5th Cir. Tex., Jan. 4, 2013)*

**Core Terms**

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sentence, supervised release, healthcare, imprisonment, conspiracy, reduction, MOOT

**Counsel:** For UNITED STATES OF AMERICA, Plaintiff - Appellee: Lauretta Drake Bahry, Assistant U.S. Attorney, Carmen Castillo Mitchell, Assistant U.S. Attorney U.S. Attorney's Office, Southern District of Texas, Houston, TX.

**SUNNY ROBINSON**, Defendant - Appellant, Pro se; Big Spring, TX.

**Judges:** Before BENAVIDES, HIGGINSON, and ENGELHARDT, Circuit Judges.

**[\*861] PER CURIAM:\***

**Sunny Robinson**, federal prisoner # 43681-279, was convicted by a jury of conspiracy to commit health care fraud, aiding and abetting health care fraud, conspiracy to violate the Anti-Kickback Statute, and paying kickbacks in violation of the Anti-Kickback Statute. Robinson was sentenced to 97 months of imprisonment and to concurrent three-year terms of supervised release. He appeals the denial of his pro se motion for reduction of sentence under 18 U.S.C. § 3582(c)(2), based on Amendment 792 to the Sentencing Guidelines, which amended, *inter alia*, the definition of "intended loss" under U.S.S.G. § 2B1.1.

The district court correctly noted that Amendment 792 was not among the amendments listed in U.S.S.G. § 1B1.10(d), and therefore concluded that a sentence reduction was not authorized under § 3582(c)(2). See Dillon v. United States, 560 U.S. 817, 825-26, 130 S. Ct. 2683, 177 L. Ed. 2d 271 (2010). **[\*\*2]** However, according to the Bureau of Prisons website, Robinson was released from imprisonment on April 27, 2018. "Where a defendant has begun serving a **[\*862]** term of supervised release, the appeal of the denial of his § 3582(c)(2) motion is moot." United States v.

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\* Pursuant to **5TH CIR. R. 47.5**, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in **5TH CIR. R. 47.5.4**.

*Booker, 645 F.3d 328, 328 (5th Cir. 2011).*

Accordingly, the appeal is DISMISSED AS  
MOOT.

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**ENTERED**

September 28, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA

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v.

CR. NO. H-09-422-1

SUNNY ROBINSON

ORDER ON DEFENDANT'S MOTION FOR MODIFICATION OF SENTENCE

Defendant Sunny Robinson was convicted by a jury of conspiracy to commit health care fraud, aiding and abetting health care fraud, conspiracy to violate the Anti-Kickback Statute, and paying kickbacks in violation of the Anti-Kickback Statute. In August 2011, the Court sentenced Defendant to a term of ninety-seven months of imprisonment and three years of supervised release, and ordered him to pay restitution of \$1,578,492.72, the total amount paid by Medicare and Medicaid on Defendant's fraudulent claims. The Fifth Circuit affirmed the Court's judgment on direct appeal and, after the Court denied Defendant's motion under 28 U.S.C. § 2255, denied Defendant a certificate of appealability.<sup>1</sup>

Defendant, proceeding *pro se*, now moves for the Court to recalculate the Sentencing Guideline applicable to his case in light of a change in United States Sentencing Guidelines' definition of "intended loss" and to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2).<sup>2</sup> Defendant relies on the 2015 Amendment

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<sup>1</sup> Document Nos. 280, 310.

<sup>2</sup> Document No. 312.

792, which among other things revised Application Note 3(a)(ii) in the commentary at Guidelines § 2B1.1. The revised commentary provides that "intended loss" means "the pecuniary harm that the defendant purposely sought to inflict." Formerly, the 2010 Guidelines, under which Defendant's advisory Guideline range was determined, defined "intended loss" to mean "the pecuniary harm that was intended to result from the offense."

The law provides that, with rare exceptions, "[t]he court may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). Defendant cites the exception in § 3582(c)(2), but that does not apply to Defendant's sentence. Section 3582(c)(2) permits a court to reduce a term of imprisonment "in 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)," but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Id. § 3582(c)(2).

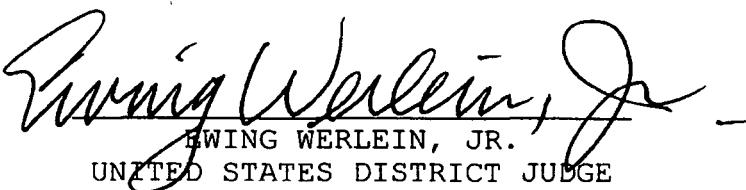
In the corresponding policy statement, the Sentencing Commission has listed the specific amendments to the Guidelines pursuant to which a defendant may be eligible for consideration of a sentence reduction under § 3582(c)(2). See U.S.S.G. § 1B1.10(d) (2015). Amendment 792, upon which Defendant relies, is not on the list. As explained in Application Note 1 of that Guideline, if the amendment is not on the list, "a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2)."

Id. § 1B1.10 App. Note 1(A). Thus, even if Amendment 792 in 2015 did change the Guidelines sentencing range for Defendant's crimes of conviction,<sup>3</sup> the Court would have no authority to modify Defendant's sentence under § 3582(c)(2). Accordingly, it is

ORDERED that Defendant's Motion Under 18 U.S.C. § 3582(c)(2) for Modification of Sentence by a Person in Federal Custody (Document No. 312) is DENIED.

The Clerk will enter this Order, providing a correct copy to all parties of record.

SIGNED at Houston, Texas, on this 28<sup>TH</sup> day of September, 2017.

  
EWINING WERLEIN, JR.

UNITED STATES DISTRICT JUDGE

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<sup>3</sup> In fact, it does not. Defendant's argument depends on factual assertions inconsistent with the evidence at trial, namely, that he was unaware of the fraudulent billing taking place in his company. The jury found beyond a reasonable doubt that Defendant knowingly and willfully defrauded Medicare, and his conviction was affirmed on appeal. The fraudulent claims he submitted to Medicare were therefore properly considered as the intended loss amount under the 2010 Guidelines, and the same would be true today under the 2015 Guidelines.