

APPENDIX A

Judgment, September 15, 2017

United States v. Eddie Torie Barr

No. 15-2216

United States Court of Appeals for the First Circuit

United States Court of Appeals For the First Circuit

No. 15-2216

UNITED STATES OF AMERICA,

Appellee,

v.

EDDIE TORIE BARR,

Defendant, Appellant.

Before

Torruella, Thompson, and Kayatta,
Circuit Judges.

JUDGMENT

Entered: September 15, 2017

In 2012, Eddie Torie Barr pleaded guilty to three counts of distributing a controlled substance: to wit, cocaine base. Barr was a career offender under the Guidelines. But, the sentencing judge thought Barr's career-offender range too harsh and instead imposed a sentence of ninety-two months, the bottom of Barr's hypothetical non-career-offender Guidelines range. A few years later, Amendment 782 retroactively reduced the Guidelines sentencing ranges applicable to certain drug-related offenses. See U.S. Sentencing Guidelines Manual § 1B1.10(e)(1), App. C Supp., Amends. 782, 788 (U.S. Sentencing Comm'n 2015) (hereinafter U.S.S.G.); United States v. Vaughn, 806 F.3d 640, 643 (1st Cir. 2015). Barr sought a sentence reduction, contending that he was sentenced under the since-reduced drug Guidelines. Skipping over some procedural history unnecessary to our disposition of this appeal, the sentencing judge eventually rejected the motion. United States v. Barr, 132 F. Supp. 3d 290, 290 (D.R.I. 2015). A sentencing court may not reduce a defendant's term of imprisonment unless (1) the defendant's applicable "sentencing range

... has subsequently been lowered by the Sentencing Commission," and (2) the "reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); see U.S.S.G. § 1B1.10. According to the Guidelines policy statement, the applicable sentencing range is the defendant's original Guidelines range, calculated before any variance or departure. See United States v. Hogan, 722 F.3d 55, 58-60 (1st Cir. 2013) (citing U.S.S.G. § 1B1.10, cmt. n.1(A)). Barr's original range is his career-offender range--a range that was unaffected by Amendment 782. See U.S.S.G. § 4B1.1(a), (b). Accordingly, the sentencing court found that Barr is ineligible for a sentence reduction. See Barr, 132 F. Supp. 3d at 293-94.

Barr seems to levy a single challenge to this determination on appeal: 28 U.S.C. § 994(u) and § 994(a)(2)--statutory provisions authorizing the Sentencing Commission to reduce "the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," "specify in what circumstances" a reduction applies, and promulgate "general policy statements regarding application of the guidelines or any other aspect of sentencing"--are unconstitutional.¹ Specifically, he claims that these provisions are a "forbidden delegation of legislative power" because they do not provide the Commission with an "intelligible principle" to cabin the exercise of that power. See Mistretta v. United States, 488 U.S. 361, 372 (1989). According to Barr, that means the Guidelines policy statement requiring the sentencing judge to consider his original, pre-departure or variance Guidelines range (as opposed to the hypothetical non-career-offender range lowered by Amendment 782) is invalid, and he is eligible for a sentence reduction.

Barr did not raise this issue below, so our review is for plain error--meaning that to prevail, Barr must show "error, plainness, prejudice and a miscarriage of justice." United States v. Perez-Cruz, 558 F.3d 50, 52 (1st Cir. 2009). Barr has not shown "plainness." Id. As the government points out, the circuits that have considered this issue have rejected Barr's argument. E.g., United States v. Taylor, 743 F.3d 876, 879 (D.C. Cir. 2014) (finding that "§ 1B1.10 is . . . an exercise of validly delegated authority"); United States v. Erskine, 717 F.3d 131, 139 (2d Cir. 2013) (finding that "Congress has . . . sufficiently instructed the Commission as to both the contours of its authority to reduce a term of imprisonment recommended in the Guidelines and the means by which it may do so" and thus has provided an "intelligible principle" to guide the Commission). That means Barr has not met his burden under our plain error standard of review. See United States v. Ponzo, 853 F.3d 558, 570 (1st Cir. 2017).

Affirmed.

¹ If Barr meant to argue anything else, we agree with the government that the argument is waived for lack of developed argumentation. United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990).

By the Court:

/s/ Margaret Carter, Clerk

cc:

Raymond Elwood Gillespie

Eddie Torie Barr

Stephen G. Dambruch

Donald Campbell Lockhart

APPENDIX B

U.S.S.G. § 1B1.10

Cmt. N. 1 (A)

November 1, 2014

GUIDELINES MANUAL

§1B1.10

- (d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).
- (e) Special Instruction.—
- (1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

- (A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., 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). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) 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).
- (B) Factors for Consideration.—
- (i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).