

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-4505

UNITED STATES OF AMERICA

v.

SIXTO LIZARDO,

Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 99-cr-00385)
District Judge: Honorable Ronald L. Buckwalter

Submitted For Possible Summary Action Under Third Circuit LAR 27.4 and I.O.P. 10.6
February 16, 2006

Before: BARRY, SMITH and NYGAARD, CIRCUIT JUDGES

(Filed: March 8, 2006)

OPINION

PER CURIAM

Sixto Lizardo, a federal prisoner, appeals the order of the United States District Court for the Eastern District of Pennsylvania denying his petition for a reduction of

sentence filed pursuant to 18 U.S.C. § 3582(c)(2).¹ For the reasons that follow, we will summarily affirm the judgment of the District Court.

In June 2000, after a jury trial, Lizardo was convicted of one count of conspiracy and three counts of distribution of cocaine. He was sentenced to 240 months of imprisonment. We affirmed Lizardo's conviction and sentence in 2002. In May 2005, Lizardo filed the underlying section 3582(c)(2) petition in the District Court, arguing that United States v. Booker, 543 U.S. 220 (2005), constitutes an amendment to the United States Sentencing Guidelines. Lizardo contends that his jury trial right was violated when his sentence was increased based on a drug quantity found by the District Court instead of by the jury. The government filed a response, and Lizardo filed a reply. By order entered September 26, 2005, the District Court denied relief. Lizardo appeals and has filed a memorandum in opposition to summary affirmance.

By its terms, section 3582(c)(2) provides for a reduction in sentence for a defendant who was sentenced based on a sentencing range that the Sentencing

¹ Lizardo submitted an eleven-page typewritten document titled in part "Petition for Reduction in Term of Imprisonment," specifically noting that he filed it pursuant to 18 U.S.C. § 3582(c)(2). Along with the petition, Lizardo submitted a form motion under 28 U.S.C. § 2255 to vacate his sentence, in which he raised no additional claims. From the record, it does not appear that the District Court treated Lizardo's document as a section 2255 motion. We note that Lizardo asserted in District Court that, in the alternative to section 3582(c)(2), he is entitled to pursue habeas corpus relief under 28 U.S.C. § 2241 because he did not file a timely section 2255 motion, and section 2255 is thus an inadequate or ineffective means for obtaining relief. However, section 2255 is not "inadequate or ineffective" merely because a petitioner cannot meet section 2255's stringent gate-keeping provisions. See In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

Commission later lowered by amendment to the Sentencing Guidelines. The Supreme Court's decision in Booker is not the equivalent of a Sentencing Guidelines amendment made by the Sentencing Commission. Cf. United States v. McBride, 283 F.3d 612 (3d Cir. 2002) (holding that a claim under Apprendi v. New Jersey, 530 U.S. 466 (2000), is outside the scope of a sentence modification under section 3582(c)(2)). Moreover, we note that we have held that Booker is not retroactively applicable to cases on collateral review. See Lloyd v. United States, 407 F.3d 608 (3d Cir. 2005). Lizardo's conviction became final years before Booker was decided. Thus, contrary to Lizardo's arguments on appeal, he would not be entitled to relief under Booker under section 2255.

Because this appeal presents "no substantial question," see 3d Cir. LAR 27.4 and I.O.P. 10.6, we will summarily affirm the District Court's order.