

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEC 6 2000

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PETER BRENT IRELAN,

Defendant-Appellant.

No. 00-2104
(D.C. No. CIV-00-119-SC)
(D. N.M.)

ORDER AND JUDGMENT *

Before **TACHA** , **EBEL** , and **BRISCOE** , Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

This appeal is taken from an order of the district court denying defendant's motion for reduction of sentence pursuant to Amendment 505 of the Sentencing

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Guidelines, which changed the Drug Quantity Table under USSG § 2D1.1 and established a lower Offense Level than the one under which defendant alleges he was sentenced. Defendant contends that he is entitled to consideration for a reduction in his sentence under USSG § 1B1.10(c) (Amendment 505 covered by policy statement) and 18 U.S.C. § 3582(c)(2).

In dismissing this proceeding, the district court referred to the motion as having been filed under Amendment 509, which is not subject to retroactive application, and which was, as the court correctly noted, the subject of an earlier proceeding under 28 U.S.C. § 2255. This action is not based on § 2255, but rather on 18 U.S.C. § 3582(c)(2). See United States v. Jordan, 162 F.3d 1, 3 (1st Cir. 1998) (noting sentencing judge's discretion under § 3582(c)(2) to consider whether to apply Amendment 505 retroactively to defendant), cert. denied, 119 S. Ct. 1590 (1999).

Pursuant to our earlier show cause order, the government has responded and agrees that the matter should be remanded for proper consideration by the district court. Accordingly, the judgment of the district court is VACATED and the matter REMANDED for consideration of defendant's motion for reduction of sentence filed pursuant to 18 U.S.C. § 3582(c)(2) and USSG § 1B1.10(c)

(Amendment 505 covered by policy statement). The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe
Circuit Judge