

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals**For the Seventh Circuit****Chicago, Illinois 60604**

Argued July 10, 2024

Decided August 5, 2024

BeforeMICHAEL Y. SCUDDER, *Circuit Judge*DORIS L. PRYOR, *Circuit Judge*JOSHUA P. KOLAR, *Circuit Judge*

No. 23-2426

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,**v.*BRIAN MCKENZIE,
*Defendant-Appellant.*Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division.

No. 1:19-CR-00019(1)

John Robert Blakey,
*Judge.***ORDER**

After Brian McKenzie was sentenced for two counts of carjacking and brandishing a firearm, the U.S. Sentencing Commission enacted a retroactive amendment to the Guidelines that would have reduced his criminal history category and guidelines range. McKenzie now seeks relief under 28 U.S.C. § 2106, which authorizes limited or general remands for resentencing. *See United States v. Claybron*, 88 F.4th 1226, 1229 (7th Cir. 2023) (collecting cases). Because McKenzie's sentence was below his amended guidelines range and he is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2), we affirm.

I

McKenzie committed two armed carjackings in Chicago's southwestern suburbs in October 2018. He stole the first car from a victim at gunpoint, and, while attempting to evade law enforcement, crashed it. He also struck and injured a construction worker who was working at the scene of the crash. McKenzie fled on foot, only then to approach a second car, which he stole at gunpoint. A police officer tried to apprehend McKenzie while he was stealing the second car, but McKenzie backed into the officer with the car and knocked him over. McKenzie then ran over the officer's leg and escaped. He was later located and arrested.

A federal indictment then followed, charging McKenzie with two counts of carjacking, 18 U.S.C. § 2119(1); one count of brandishing a firearm during and in relation to a crime of violence, 18 U.S.C. § 924(c)(1)(A); and one count of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). Pursuant to a plea agreement, he pleaded guilty to both carjacking counts and to brandishing a firearm. In the Presentence Investigation Report (PSR), a probation officer calculated an advisory guidelines range of 262 to 327 months' imprisonment on the carjacking counts based on a combined adjusted offense level of 35 and a criminal history category of V. The criminal history determination reflected a finding that McKenzie had eight criminal history points and adding two more points under the then-effective version of U.S.S.G. § 4A1.1(d), because he had committed the offenses while under a criminal justice sentence in a prior state case. As for the brandishing-of-a-firearm count, the guidelines range was the seven-year minimum prison term that Congress required be imposed consecutively to his sentence on the carjacking counts. *See* 18 U.S.C. § 924(c)(1)(A)(ii), (D)(ii); U.S.S.G. § 2K2.4.

At McKenzie's sentencing hearing in March 2023, the district court overruled McKenzie's objections to two adjustments to the offense level for the second carjacking and adopted the guidelines calculations in the PSR. The court continued the sentencing hearing to July 2023 to give the parties time to determine restitution.

In the meantime, in April 2023, the Sentencing Commission proposed an amendment to § 4A1.1 of the Guidelines ("Amendment 821") that would require district courts to add only one point—instead of two—to the criminal history score of a defendant like McKenzie who committed an offense while under a criminal justice sentence (and had seven or more criminal history points). U.S.S.G. AMEND. 821 (U.S. SENT'G COMM'N 2023). The Commission decided that "status points" should be accounted for on a more limited basis, given research studies showing that "status points" were not strongly predictive of future recidivism. *See id.* Of significance here,

the Commission also proposed an accompanying amendment to make Amendment 821 retroactive. *Id.* at AMEND. 825.

The proposed amendments remained pending when McKenzie's sentencing hearing resumed in July 2023. At the hearing, McKenzie did not mention them. The district court weighed the 18 U.S.C. § 3553(a) factors and then imposed a below-guidelines sentence of 180 months' imprisonment to be served concurrently on each carjacking count, and ten years' imprisonment on the brandishing count to be served consecutively to the carjacking sentence. The result was a total prison term of 300 months. In November 2023, the amendments became retroactively effective. *See* U.S.S.G. § 4A1.1(e).

II

On appeal, McKenzie argues that we should remand for resentencing under § 2106. He points to *United States v. Claybron*, 88 F.4th 1226 (7th Cir. 2023), where we seemed to rely in part on § 2106 to remand for resentencing based on later retroactive amendments to the Guidelines (Amendments 821 and 825) that lowered the defendant's criminal history category. McKenzie argues that the retroactive application of § 4A1.1(e) would decrease his criminal history category from V to IV and lower his guidelines range. With a criminal history category of IV and an offense level of 35, McKenzie's amended guidelines range for the carjacking counts would be 235 to 293 months' imprisonment (rather than his guidelines range of 262 to 327 months' imprisonment at sentencing). In light of his lower amended guidelines range, McKenzie argues that we should remand because, like in *Claybron*, further proceedings would be just under the circumstances.

The government counters that remand under § 2106 would be unjust. According to the government, McKenzie's situation differs from Claybron's in that he is ineligible for relief under 18 U.S.C. § 3582(c)(2)—the statute that expressly authorizes district courts to reduce a sentence after the enactment of a retroactive amendment to the Guidelines. The government points out that § 3582(c)(2) prohibits district courts from reducing the sentences of defendants, like McKenzie, whose sentences fall below a guidelines range that has been recalculated to account for the retroactive amendment. *See* § 1B1.10(b)(2)(A) (no relief for defendants with below-the-amended-guidelines sentences); *Dillon v. United States*, 560 U.S. 817, 819 (2010) (policy statement in § 1B1.10(b) is binding on district courts). By contrast, Claybron's sentence fell within the amended guidelines range. *See Claybron*, 88 F.4th at 1230–31. Highlighting the interplay between the statutes, the government maintains that McKenzie's ineligibility for relief under § 3582(c)(2) precludes relief under § 2106.

We begin § 3582(c)(2), where Congress provided that “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 ... the court may reduce the term of imprisonment ... if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2). When the Sentencing Commission makes retroactive a guidelines amendment (like Amendment 821), § 3582(c)(2) “authorizes a district court to reduce an otherwise final sentence that is based on the amended provision.” *Dillon*, 560 U.S. at 821.

In no way is relief under § 3582(c)(2) constitutionally compelled; to the contrary, the provision “represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines.” *Id.* at 828. Further, the availability of a sentence reduction under § 3582(c)(2) is limited—relief is generally unavailable for a defendant like McKenzie whose original sentence fell below the amended guidelines range. That is because any reduction must be “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2). Under the relevant policy statement, district courts “shall not reduce the defendant’s term of imprisonment ... to a term that is less than the minimum of the amended guideline range.” *See* U.S.S.G. § 1B1.10(b)(2)(A); *Dillon*, 560 U.S. at 822. The Supreme Court held in *Dillon* that § 1B1.10(b) is binding on proceedings under § 3582(c)(2). 560 U.S. at 819.

Remand would give McKenzie an end-run around the specific avenue for sentence reduction in response to a retroactive amendment to the Guidelines that Congress established in § 3582(c)(2). McKenzie’s below-the-amended-guidelines sentence disqualifies him from relief under § 3582(c)(2) and distinguishes this case from *Claybron*, where relief under § 3582(c)(2) relief was available to the defendant whose original sentence was not below the amended guidelines range. *Claybron*, 88 F.4th at 1229, 1231. Indeed, remand here would open the door for McKenzie to receive a sentence *even lower* than his below-the-amended-guidelines sentence, an outcome that § 3582(c)(2) prohibits. *See* U.S.S.G. § 1B1.10(b)(2)(A); *Dillon*, 560 U.S. at 819.

McKenzie concedes that he is ineligible for relief under § 3582(c)(2) but argues that the provision does not bear on our ability to grant relief under § 2106. He further contends that the opportunity to receive a shorter sentence than would be allowed under § 3582(c)(2) favors remand. McKenzie asserts that in *Claybron* we “rejected the

government's insistence that the defendant pursue § 3582(c) after the appeal rather than gaining § 2106 relief on appeal."

But *Claybron* did not license such a broad use of § 2106. And given the factual distinctions between this case and *Claybron*, McKenzie reads too much into *Claybron*. He ignores that case's key insight that there was "no difference" whether Claybron pursued relief under § 3582(c)(2) or § 2106 because "the same relief would be available to Claybron on *either* statutory path." *Id.* at 1231 (emphasis added). Either path led to the same result, and we decided that § 2106 presented an alternative avenue of no independent legal significance. *Id.* (remand under § 2106 "promotes judicial economy.") Notably, *Claybron* did not require us to decide whether remand under § 2106 would have been warranted if relief under § 3582(c)(2) had been unavailable.

Indeed, unlike *Claybron*, McKenzie seeks a result under § 2106 that is expressly prohibited under § 3582(c)(2). Congress and the Sentencing Commission ruled out a sentence reduction under § 3582(c)(2) for individuals like McKenzie whose sentences were below the amended guidelines, *see* 18 U.S.C. § 3582(c)(2); U.S.S.G. § 1B1.10(b)(2)(A), and that limitation binds district courts when considering sentence reductions, *see Dillon*, 560 U.S. at 819. McKenzie now asks us to circumvent that limitation. In a different context involving another provision of 18 U.S.C. § 3582(c), we rejected an attempt to create an "end-run" around Congress's "clear and precise limitation" regarding sentencing. *See United States v. Thacker*, 4 F.4th 569, 573–74 (7th Cir. 2021) (no sentencing reduction under 18 U.S.C. § 3582(c)(1)(A) based on change to sentencing scheme in criminal statute that applies only prospectively). Remand here would be unjust and imprudent because it would contravene the limitation on post-amendment sentence reduction Congress expressly included in § 3582(c)(2).

AFFIRMED