

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA,

v.

REGGIE ISMEL,

Defendant.

CASE No. 3:94-cr-00008-1

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

This matter comes before the Court upon a *pro se* motion filed by Reggie Ismel (“Defendant”) in which he asks the Court to hold his notice of appeal in abeyance (docket no. 327). Before resolving the motion, I will briefly rehearse the relevant procedural history. In September 1994, a jury found Defendant guilty of one count of conspiring to distribute cocaine base (“crack”) in violation of 21 U.S.C. § 846 and one count of intentionally killing a human related to drug trafficking in violation of 21 U.S.C. § 848. On December 22, 1994, Defendant was sentenced to life in prison without parole as to both counts, to be served concurrently. In August 1998, the United States Court of Appeals for the Fourth Circuit affirmed Defendant’s conviction. *United States v. Ismel*, 153 F.3d 723, 1998 WL 486356, *1 (4th Cir. 1998) (unpublished table decision), *cert. denied*, 525 U.S. 1047 (1998).

On November 28, 2011, Defendant filed a letter with the Court. In his letter, Defendant requested, among other things, that the Court “assign counsel to argue applicability of the retroactive guideline amendments 505 and 750 to petitioner [sic] conspiracy charge” In light of Defendant’s crack conviction and his explicit reference to Amendment 750 of the United

States Sentencing Guidelines,¹ I construed Defendant's letter, in part, as a motion to reduce sentence pursuant to Amendment 750 and 18 U.S.C. § 3582(c)(2) and a motion to appoint counsel to argue for such a sentence reduction. In an order entered on January 13, 2012, I denied Defendant's motion for a sentence reduction and motion to appoint counsel.² It is this order which Defendant has appealed, and it is his notice of appeal in furtherance thereof that he seeks to have held in abeyance in the motion presently before the Court.

Although it is somewhat difficult to discern, the thrust of Defendant's argument in this motion appears to be that the Court should hold his notice of appeal in abeyance so that he may have time to make a formal motion to reduce sentence. According to Defendant, I mistakenly construed his letter inquiring about the retroactivity of Amendment 750 as a motion to reduce sentence. And in so doing, Defendant maintains, I denied him the right to fully develop and present "the issues at hand." In support of his position, Defendant cites *Castro v. United States*, 540 U.S. 375 (2003). According to Defendant, *Castro* requires district courts to provide *pro se* litigants with an opportunity to withdraw or amend their filings prior to re-characterizing them. Holding his notice of appeal in abeyance, Defendant asserts, would provide him with an opportunity to make a formal motion to reduce sentence (as opposed to the letter that I construed as a motion). However, for the reasons that follow, I decline to do so.

First, it is not uncommon for the federal courts to construe letters from *pro se* litigants as

¹ Amendment 750, which became effective on November 1, 2011, retroactively lowers the base offense levels applicable to crack offenses under § 2D1.1 of the Sentencing Guidelines.

² With respect to Defendant's construed motion to reduce sentence, I concluded that Amendment 750 could not have an effect on Defendant's term of imprisonment because his guideline range, which was based on the guidelines for first degree murder, was not lowered by Amendment 750. Consequently, I had no authority to reduce Defendant's sentence. 18 U.S.C. § 3582(c)(2) (stating that a court may modify a defendant's term of imprisonment if the term was "based on a sentencing guideline range that has subsequently been lowered by the Sentencing Commission"). Because I concluded that I was without authority under the law to reduce Defendant's sentence, I also found that appointing counsel to represent Defendant in his quest to achieve such a sentence reduction would achieve no purpose and would be inefficient.

motions; in fact, it is quite common in a variety of contexts. *See, e.g., United States v. Burdine*, 225 F.3d 655, 2000 WL 1062043, at *3 (4th Cir. 2000) (unpublished table decision) (construing a letter as a *pro se* motion to consider additional issues); *Bendall v. A.H. Robins, Co.*, 871 F.2d 465, 465 (4th Cir. 1989) (construing appellant’s *pro se* letter as a motion for reconsideration of the court’s order denying a petition for rehearing); *McKinzie v. United States*, No. 2:11-cv-00157, 2012 WL 170890, at *1 (S.D.W. Va. Jan. 20, 2012) (construing prisoner’s letter as a habeas corpus motion to vacate, set aside, or correct sentence); *Banner Life Ins. Co. v. Jones*, No. 2:11cv63, 2011 WL 4565352, at *6 (E.D. Va. Sept. 29, 2011) (construing *pro se* litigant’s letter as a motion to set aside entry of default); *Anderson v. Unknown*, No. 7:11-cv-00228, 2011 WL 1870030, at *1 (W.D. Va. May 16, 2011) (construing inmate’s letter as a motion for a temporary restraining order); *United States v. Lorello*, No. 5:00-CR-32, 2011 WL 1810581, at *1 n.2 (N.D.W. Va. May 11, 2011) (construing defendant’s letter of protest as a motion for return of property); *United States v. Greaves*, No. 7:95-CR-00038, 2011 WL 1655583, at *1 (E.D.N.C. Apr. 29, 2011) (construing prisoner’s letter as both a motion to reconsider an order denying his motion for sentence reduction and a motion to appoint counsel); *United States v. Johnson*, No. 7:10-CR-00093, 2011 WL 861109, at *1 (E.D.N.C. Mar. 9, 2011) (construing defendant’s letter as a *pro se* motion to withdraw her guilty plea). Thus, it was not unusual to have construed Defendant’s letter as a motion to reduce sentence and appoint counsel. Moreover, Defendant’s letter went beyond a mere inquiry for information regarding Amendment 750. As previously mentioned, Defendant asked the Court to “assign counsel to *argue* applicability of the retroactive guideline amendments 505 and 750 to petitioner [sic] conspiracy charge” (Emphasis added). Defendant’s inclusion of the word “argue” indicated his intention to seek any benefit in terms of sentence reduction that might have been derived from the retroactivity of Amendment

750. Therefore, it was reasonable to construe this portion of Defendant's letter as a motion to reduce sentence and appoint counsel.

Second, Defendant reads *Castro* far too broadly. In that case, the Supreme Court specifically addressed the practice employed by some courts whereby they treat as a request for habeas corpus relief under 28 U.S.C. § 2255 a motion that a *pro se* federal inmate has labelled differently. 540 U.S. at 377. The Court noted the serious consequences that sometimes result for these prisoners because the practice "subjects any subsequent motion under § 2255 to the restrictive conditions that federal law imposes upon a 'second or consecutive' (but not upon a first) federal habeas motion." *Id.* (quoting what is now 28 U.S.C. § 2255(h)). To guard against these potentially negative consequences, the Court narrowly ruled that courts

cannot so recharacterize a *pro se* litigant's motion as the litigant's first § 2255 motion *unless* the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing.

Id. While Defendant quotes portions of the foregoing language in his motion, he fails to mention that the Court's holding in *Castro* was confined to this unique context of federal habeas petitions. Indeed, it has no bearing on motions to reduce sentence pursuant to 18 U.S.C. § 3582(c)(2). Consequently, there is nothing in the Court's holding in *Castro* that prevented me from construing Defendant's letter as a motion.

Finally, there is no reason to hold in abeyance Defendant's notice of appeal. First, as the memorandum opinion accompanying the order denying his construed motion for sentence reduction (as well as this opinion) makes clear, Defendant is ineligible for a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) as far as this Court is concerned. No amount of time or assistance from counsel can change the fact that his sentence was based on the guideline range

for first degree murder and not on the guideline range for conspiring to distribute crack. As such, Amendment 750 does not and cannot lower his applicable guideline range. Second, and more importantly, Defendant has presented no sound reason for depriving the court of appeals of the ability to consider the appeal that he has noticed. Indeed, it is

generally understood that a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). In the instant case, when Defendant filed his notice of appeal, there were no pending motions before the Court.³ Therefore, the filing of the notice of appeal divested this Court of jurisdiction over Defendant's case and conferred jurisdiction on the court of appeals. *See United States v. Christy*, 3 F.3d 765, 767 (4th Cir. 1993). Although the purpose of Defendant's motion is difficult to decipher, it appears that he wishes to have this Court hold his notice of appeal in limbo in order to preserve the timeliness of his appeal while he files a formal motion for sentence reduction (which, again, could only be duplicative of the motion for sentence reduction that I previously construed on Defendant's behalf). I will not sanction this outcome for doing so would not only be counterproductive at this point, but would also represent an affront to the jurisdiction of the court of appeals. For the reasons stated herein, Defendant's motion to hold his notice of appeal in abeyance shall be denied.

The Clerk of the Court is hereby directed to send a certified copy of this memorandum opinion and the accompanying order to the Defendant and all counsel of record.

³ The Clerk of the Court received and docketed Defendant's notice of appeal as well as the motion presently before the Court on February 13, 2012. However, the former states that it was placed in the mail on February 8, 2012, whereas the latter is dated February 9, 2012.

Entered this 16th day of February, 2012.

/s/ Norman K. Moon
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE