

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

October 20, 2009

Charles R. Fulbruge III
Clerk

No. 09-10023

Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

OTHNIEL MCKINNEY, SR.,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:93-CR-29-16

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:*

Othniel McKinney, Sr., federal prisoner # 24693-077, was convicted by a jury of one count of conspiracy to distribute and to possess with intent to distribute cocaine base (crack), and he was sentenced to life in prison. That sentence was reduced in 1996 to 360 months following amendments to the Sentencing Guidelines imposing a maximum base offense level of 38 for drug offenses. Based on 2007 amendments to the Sentencing Guidelines that lowered

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

base offense levels for crack cocaine offenses, McKinney moved for another reduction pursuant to 18 U.S.C. § 3582(c)(2). The district court denied the motion on the basis that McKinney's base offense level remained 38 even with the amendments. McKinney now appeals, arguing that the district court had the authority in light of *United States v. Booker*, 543 U.S. 220 (2005), and its progeny to reduce his sentence notwithstanding the contrary policy statement set out in U.S.S.G. § 1B1.10.

We recently rejected materially indistinguishable arguments in *United States v. Dublin*, 572 F.3d 235, 236-39 (5th Cir. 2009), *petition for cert. filed* (Sept. 21, 2009) (No. 09-6657). Accordingly, the judgment of the district court is AFFIRMED.