

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

MICHELLE BROUGH

v.

C.A. No. 01-372T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ernest C. Torres, Chief Judge.

Michelle Brough, has filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. For the reasons that follow, the motion is granted in part.

I. Facts and Background.

On May 9, 2000, Brough pled guilty to one count of conspiracy to distribute cocaine base and three counts of distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846, and 18 U.S.C. § 2.

In calculating Brough's guideline range, the Court determined that \$2590.00, in cash, found in the apartment shared by Brough and a co-conspirator, Andre Tucker, was the proceeds of drug sales and the Court converted that amount into the equivalent quantity of cocaine base using a price of approximately \$35.00 per gram. Accordingly, Brough's guideline range was established as 87-108 months and she received concurrent sentences of 87 months on each count of conviction.

When Tucker was sentenced approximately one month later, he successfully argued that the conversion rate should be \$65.77 per gram.

Brough did not appeal her sentence but now seeks to have her sentence reduced to reflect the same \$65.77 per gram conversion rate applied in Tucker's case thereby reducing her guideline sentencing range from 87-108 months to 70-87 months.

## II. Discussion.

Ordinarily, a § 2255 movant is procedurally barred from raising issues that could have been presented on direct appeal absent a showing of both "cause" for the default and "prejudice" or, alternatively, that he is "actually innocent." E.g., Brache v. United States, 165 F.3d 99, 102 (1<sup>st</sup> Cir. 1999). Moreover, claims of sentencing guideline error usually are not cognizable under § 2255. Knight v. United States, 37 F.3d 769, 773-74 (1<sup>st</sup> Cir. 1994). Generally, non-constitutional, non-jurisdictional claims "are properly brought under § 2255 only if the claimed error is 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'an omission inconsistent with the rudimentary demands of fair procedure'." Id. at 772 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

However, in this case, the government, although asserting that Brough's § 2255 motion is procedurally barred, does not seek dismissal on that basis. Rather, it acknowledges that Brough's sentence was unfair and it invites the Court to grant "any relief that the Court finds just." Government's Response to Defendant's Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28

U.S.C. § 2255 (9/28/01) at 1, 4.

Although Brough's claim does not fall within the narrow category of cognizable non-constitutional and non-jurisdictional errors, see Knight, 37 F.3d at 773 (no "miscarriage of justice" where sentence imposed was within sentencing range that would have been applicable if alleged error had not occurred), it would be "patently unfair and unjust" for the same amount of cash to "mean one thing in Brough's case and another in Tucker's case"<sup>1</sup>. Accordingly, Brough's guideline range should have been 70-87 months. Since the government recommended and the Court determined that Brough should be sentenced to the minimum sentence under the applicable guideline range, her § 2255 motion is granted, in part, and her term of incarceration, hereby, is reduced to 70-months on each of the four counts of conviction, with those sentences to be served concurrently with each other. All other terms and conditions of the sentence imposed on August 8, 2000 shall remain unchanged.

The Clerk shall prepare an amended judgment in accordance with this order.

IT IS SO ORDERED.

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Ernest C. Torres  
Chief Judge  
Date:

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<sup>1</sup> Government's Response at 7.

