

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term, 2006

5
6 (Submitted: April 18, 2007

Decided: May 3, 2007)

7 Docket No. 06-5193-cr
8
9

10 _____
11
12 HERMINIO CORTORREAL,

13
14 *Petitioner,*

15
16 — v. —

17
18 UNITED STATES OF AMERICA,

19
20 *Respondent.*
21
22 _____
23
24

25 Before:

26
27 WALKER, STRAUB, and B.D. PARKER, *Circuit Judges.*
28
29 _____

30 Herminio Cortorreal moves for leave to proceed *in forma pauperis* in his appeal from the
31 order of the United States District Court for the Southern District of New York (Jed S. Rakoff,
32 *District Judge*), denying his motion for resentencing. Because the District Court granted
33 Cortorreal leave to proceed *in forma pauperis*, we deny his motion as unnecessary. Further,
34 because we find that Cortorreal's appeal lacks a basis in law or fact, we dismiss it as frivolous.
35

36
37 HERMINIO CORTORREAL, *pro se*, Fort Dix, NJ, *for Petitioner.*
38

39 BOYD M. JOHNSON, United States Attorney's Office, Southern District of New York, NY, *for*
40 *Respondent.*
41
42 _____

1 *Per Curiam:*

2
3 In May 2006, Herminio Cortorreal, *pro se*, filed in the District Court a motion for
4 resentencing in which he argued that he was entitled to resentencing under 18 U.S.C. §
5 3582(c)(2), and the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220
6 (2005). Specifically, Cortorreal argued that, because *Booker* had constituted both an
7 implicit lowering of the United States Sentencing Guidelines (“Guidelines”) and a new
8 rule of law that was retroactive to cases on collateral review, he was entitled to a new
9 sentence. In July 2006, the District Court issued an order denying the motion, finding,
10 *inter alia*, that (1) because the United States Sentencing Commission had not lowered the
11 Guidelines range applicable to Cortorreal’s case, he was not entitled to resentencing
12 under Section 3582(c)(2); and (2) *Booker* did not apply retroactively to Cortorreal’s case.
13 Thereafter, Cortorreal filed a timely notice of appeal from the District Court decision.
14 Cortorreal now moves this Court for leave to proceed *in forma pauperis*.

15 As a preliminary matter, review of the District Court docket sheet indicates that
16 Cortorreal received counsel pursuant to the Criminal Justice Act, which would have
17 required him to receive *in forma pauperis* status in the District Court. There is no
18 indication that the District Court revoked Cortorreal’s *in forma pauperis* status at any
19 time during the proceedings. Accordingly, Cortorreal’s motion for leave to proceed *in*
20 *forma pauperis* is denied as unnecessary.

21 Further, independent of the *in forma pauperis* motion, this Court must dismiss
22 Cortorreal’s appeal if it is frivolous. *See* 28 U.S.C. § 1915(e)(2)(B)(i). An appeal is

1 frivolous “where it lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*,
2 490 U.S. 319, 325 (1989).

3 We have not previously determined the appropriate standard of review to apply to
4 a district court decision denying a motion under Section 3582(c)(2). Those circuits that
5 have addressed the issue have determined that such a decision should be reviewed for
6 abuse of discretion. *See, e.g., United States v. Rodriguez-Pena*, 470 F.3d 431, 432 (1st
7 Cir. 2006) (per curiam); *United States v. Moreno*, 421 F.3d 1217, 1219 (11th Cir. 2005)
8 (per curiam). We need not decide the standard of review here, however, because
9 Cortorreal’s appeal lacks merit under any standard of review, even in light of the
10 arguments raised in his response to the Government’s opposition, because the District
11 Court properly determined that Cortorreal did not merit resentencing under either Section
12 3582(c)(2) or *Booker*. Accordingly, we find that Cortorreal’s appeal is frivolous.

13 A district court may not generally modify a term of imprisonment once it has been
14 imposed. *See United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998) (“Congress has
15 imposed stringent limitations on the authority of courts to modify sentences, and courts
16 must abide by those strict confines.”). However, under 18 U.S.C. § 3582(c)(2), a court
17 may reduce the term of imprisonment of a “defendant who has been sentenced to a term
18 of imprisonment based on a sentencing range that has subsequently been lowered by the
19 Sentencing Commission pursuant to 28 U.S.C. § 994(o).” Section 994(o) requires the
20 Sentencing Commission to “periodically . . . review and revise . . . the guidelines
21 promulgated pursuant to” the duties of the Sentencing Commission.

1 Cortorreal argues that, because *Booker* rendered the Guidelines advisory, it
2 implicitly lowered the sentencing range applicable to his case, and, thus, constituted
3 sufficient reason for relief under Section 3582(c)(2). We have not yet addressed whether
4 the decision in *Booker* can serve as the basis for a motion to reduce a sentence pursuant to
5 Section 3582(c)(2). However, those courts that have addressed the issue have determined
6 that, although *Booker* affected the application of the Guidelines, because the decision was
7 not a guideline amendment promulgated by the Sentencing Commission, the terms of
8 Section 3582(c)(2) did not apply. *See, e.g., United States v. Price*, 438 F.3d 1005, 1007
9 (10th Cir. 2006); *United States v. Moreno*, 421 F.3d 1217, 1220 (11th Cir. 2005)
10 (“*Booker* is a Supreme Court decision, not a retroactively applicable guideline
11 amendment by the Sentencing Commission. Therefore, *Booker* is inapplicable to §
12 3582(c)(2) motions.”). We follow our sister circuits in holding that, because *Booker* was
13 not a guideline amendment promulgated by the Sentencing Commission, the terms of
14 Section 3582(c)(2) do not apply, and therefore the *Booker* decision cannot be the basis for
15 a Section 3582(c)(2) motion to modify a sentence. Accordingly, the District Court
16 properly denied Cortorreal’s motion to the extent that it sought a reduction in his sentence
17 pursuant to Section 3582(c)(2).

18 Finally, to the extent that Cortorreal sought retroactive application of *Booker* to
19 his case, the District Court also properly denied the motion. We have previously
20 determined that *Booker* does not apply retroactively to cases, such as this one, on
21 collateral review. *See Guzman v. United States*, 404 F.3d 139, 140 (2d Cir. 2005).

1 For the foregoing reasons, Cortorreal's motion to proceed *in forma pauperis* is
2 DENIED and his appeal is DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

3
4
5
6
7
8