

OCT 05 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SUSANA CRUZ,

Defendant - Appellant.

No. 08-30426

D.C. No. 3:98-cr-00133-HRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Submitted September 14, 2009**

Before: SILVERMAN, RAWLINSON, and CLIFTON, Circuit Judges.

Susana Cruz appeals from the district court's order denying her pro se 18 U.S.C. § 3582(c)(2) motion for reduction of sentence. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Cruz contends that, notwithstanding the Sentencing Commission's failure to designate Amendment 709 to the United States Sentencing Guidelines as explicitly retroactive, the district court had discretion to resentence her under § 3582(c)(2). This contention lacks merit. *See* U.S.S.G. § 1B1.10(c) (2008); *see also United States v. Marler*, 527 F.3d 874, 877-78 n.1 (9th Cir. 2008). Cruz also contends that under *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, a district court may reject the failure of the Guidelines to designate Amendment 709 as retroactive. We disagree. *See United States v. Leniear*, 574 F.3d 668, 673 (9th Cir. 2009). Even if Amendment 709 applied retroactively, it would not benefit Cruz because her sentence was not based upon a sentencing range that has subsequently been lowered by the sentencing commission. *See United States v. Townsend*, 98 F.3d 510, 513 (9th Cir. 1996) (per curiam).

AFFIRMED.