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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID EDWARD FRAZIER,

Defendant - Appellant.

No. 08-30252

D.C. No. 3:00-CR-00046-JKS

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, Senior District Judge, Presiding

Argued and Submitted March 12, 2009
Withdrawn from Submission July 22, 2009
Resubmitted November 17, 2009
Seattle, Washington

Before: W. FLETCHER, GOULD and TALLMAN, Circuit Judges.

David Edward Frazier appeals the district court's denial of his motion to modify his sentence pursuant to 18 U.S.C. § 3582(c)(2). The district court determined that it had no jurisdiction to reduce Frazier's sentence because he was

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

not sentenced under the cocaine base guidelines that have been amended. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Frazier did not waive his right to appeal the district court's denial of his motion in his plea agreement because Frazier does not appeal his sentence. Instead, Frazier appeals the district court's ruling that it lacked jurisdiction to re-sentence Frazier. Therefore, this appeal is properly before us. *See United States v. Leniear*, 574 F.3d 668, 672 (9th Cir. 2009) (construing a plea agreement with the same operative language).

The district court correctly determined that it had no jurisdiction to modify Frazier's sentence because he was sentenced under the career offender guidelines and not the now-amended cocaine base guideline. *See United States v. Wesson*, 583 F.3d 728, 731 (9th Cir. 2009). *Wesson* controls this case. The district court did not err when it denied Frazier's motion to modify his sentence, because the district court had no jurisdiction to modify Frazier's sentence where the retroactive cocaine base amendments would not affect Frazier's guideline range. *See id.* at 732.

AFFIRMED.