IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Crim. No. 94-04-SLR
	)	
SAMUEL GREEN,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

At Wilmington this 16th day of August, 2012, having considered defendant's petition for reduction of sentence pursuant to 18 U.S.C. § 3582(C)(2);

IT IS ORDERED that, for the reasons that follow, defendant's petition (D.I. 110) is denied.

1. On May 11, 1994, a jury found defendant guilty of three counts of: (1) possession with intent to distribute cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) (count one); (2) using a firearm during a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (count two); and (3) possession of a firearm by a prohibited person, in violation of 18 U.S.C. § 922(g)(1) (count three). (D.I. 31)

2. On July 18, 1994, the court sentenced defendant[1] as a career offender pursuant to U.S.S.G. § 4B1.1,[2] to a term of 360 months imprisonment on count one;

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[1]Defendant's total offense level was calculated at 35 and criminal history category at VI, resulting in an imprisonment range of 292-365 months. (D.I. 36)

[2]A defendant is a classified as a career offender if:
(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is either a felony that is a crime of violence or

60 months of incarceration on count two, to run consecutively with the sentence imposed on count one; and a term of imprisonment of 120 months on count three, to run concurrently with count one. (D.I. 36) Defendant appealed his conviction and sentence to the United States Court of Appeals for the Third Circuit. (D.I. 41)

3. On February 24, 1995, the Third Circuit affirmed defendant's judgment of conviction and sentence. (D.I. 51) He subsequently filed a petition for writ of certiorari with the Supreme Court. (D.I. 52) The Court denied his petition for certiorari on May 15, 1995. (D.I. 53)

4. Defendant filed a pro se motion to vacate pursuant to 28 U.S.C. § 2255 in September 1995. (D.I. 54) The motion was denied on March 25, 1997. (D.I. 74)

5. On June 10, 1997, defendant was resentenced to the same sentence imposed in 1994 except for count two, which was dismissed in light of *Bailey v. United States*, 516 U.S. 137 (1995). (D.I. 82)

6. On June 8, 1998, defendant filed a second application for federal habeas relief pursuant to 28 U.S.C. § 2255. (D.I. 88) Defendant's application for habeas corpus relief was dismissed and the writ denied on January 21, 2000. (D.I. 93)

7. Defendant filed the instant petition seeking reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2), on the basis of amendment 750 to the U.S. Sentencing Guidelines ("Guidelines"), that lowered the base offense levels applicable to crack offenses. (D.I. 110, 113) He further asserts that a sentence reduction is warranted

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> a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a).

because his status as a career offender over represented the seriousness of his criminal history.

8. On November 1, 2007, the United States Sentencing Commission ("Commission") issued Amendment 706, which revised the crack quantities in the drug quantity table in § 2D1.1(c), effectively lowering by two levels the base offense levels for most crack offenses. U.S.S.G. App. C, Amend. 706 (Nov. 1, 2007). On May 12, 2008, the Commission ruled Amendment 706 retroactive. U.S.S.G. App. C, Amend.713 (Supp. May 1, 2008); U.S.S.G. § 1B1.10(c).

9. On March 24, 2009, the Third Circuit concluded that Amendment 706 "provides no benefit to career offenders because it has no effect on the sentencing range determined under the career-offender guidelines in § 4B1.1(b)." *United States v. Mateo*, 560 F.3d 152, 155 (3d Cir. 2009) (career offender defendants who were sentenced under the career offender guideline are not eligible for a retroactive sentence as the "applicable guideline range" was not lowered).

10. On August 3, 2010, Congress enacted the Fair Sentencing Act ("FSA"), which reduced the disparity between crack and powder cocaine by lowering the statutory penalties for crack. In light of FSA, the Commission adopted Amendment 750, which revised the crack cocaine guidelines commensurate with the reductions in the FSA. U.S.S.G. App. C, Amend. 750 (effective Nov. 1, 2011).

11. On June 30, 2011, the Commission issued Amendment 759, making the changes in Amendment 750 retroactive to offenders who are serving terms of imprisonment. U.S.S.G. App. C, Amend. 759 (effective Nov. 1, 2011).

12. Although Amendment 750 essentially lowered the base offense levels for

most crack offenses, Amendment 750 did not alter the offense levels that apply to career offenders under § 4B1.1(b). *United States v. Davidson*, 2012 WL 2914495 (3d Cir. July 18, 2012)("Like Amendment 706, Amendment 750 has no effect on his offense level, which was based on his designation as a career offender."); *United States v. Thompson*, 682 F.3d 285 (3d Cir. 2012)(noting that *Mateo* remains good law).

13. Generally, a court may not modify a term of imprisonment once it has been imposed. 18 U.S.C. § 3582(c). Congress, however, has provided an exception to that rule "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." *Id.* § 3582(c)(2). In that case, a court may "reduce the term of imprisonment . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* The applicable and binding policy statement, U.S.S.G. § 1B1.10, provides that a sentence reduction resulting in the application of a retroactive amendment to the Guidelines is not consistent with the policy statement if the amendment "does not have the effect of lowering the defendant's applicable guideline range." U.S.S.G. § 1B1.10(a)(2)(B); *Dillon v. United States*, __ U.S. ___, 130 S.Ct. 2683, 2691 (2010).

14. In this case, defendant qualified as a career offender under § 4B1.1 and his guideline range was based on an offense level of 35 and criminal history category of VI. Considering the amendments to § 1B1.10, defendant's career offender guideline range constitutes the "applicable guideline range" which must be considered in determining whether a sentence reduction is consistent with the policy statements. In light of *Mateo*

and its progeny, it is evident that Amendment 750 does not have the effect of lowering defendant's guideline range and, consequently, would not be consistent with § 1B1.10.

15. With respect to defendant's contention that his classification as a career offender over-represented his criminal history, the court finds that 18 U.S.C. § 3582(c)(2) precludes such relief. Specifically, a sentence reduction is authorized only when "such reduction is consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Because defendant seeks to correct aspects of his sentence that were "not affected by the Commission's amendment to § 2D1.1, they are outside the scope of the proceeding authorized by § 3582(c)(2)" and must be denied. *Dillon v. United States*, __ U.S. __, 130 S.Ct. at 2694.

United States District Judge