IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Crim. No. 95-69-SLR
	)	
ROYCE BROWN,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

At Wilmington this 16th day of August, 2012, having considered defendant's petition for sentence reduction and the papers submitted in connection therewith;

IT IS ORDERED that, for the reasons that follow, defendant's petitions (D.I. 204, 208) and motion for expedience (D.I. 209) are denied.

1. On June 27, 1996, at the conclusion of a four-day trial, a jury found defendant guilty of possession with intent to distribute cocaine base ("crack"), in violation of 21 U.S.C. § 841(a)(1) and (b)(1(A), and guilty of possession of a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1). (D.I. 57) Sentencing was scheduled for September 13, 1996. (D.I. 60)

2. On July 5, 1996, defendant,[1] proceeding pro se, filed a series of letters and

[1]The record reflects defense counsel moved for judgment of acquittal and new trial on July 8, 1996. (D.I. 64) Approximately two months later, a different attorney ("attorney two") entered his appearance and requested additional time to review the case, file motions and prepare for sentencing. (D.I. 76, 77, 78) Sentencing was postponed and additional time afforded for briefing on the previously filed motion for judgment of acquittal and new trial. Although defendant was represented by counsel, he continued to file letters, pro se, requesting various forms of relief. (D.I. 76, 77, 81,

notices in support of his request for a judgment of acquittal and/or for a new trial. (D.I. 61- 63, 65, 66, 68) This motion was denied. (D.I.137)

3. On November 6, 1997, the court sentenced defendant as a career offender pursuant to U.S.S.G. § 4B1.1,[2] to a total term of 360 months of imprisonment and five years of supervised release. (D.I. 140) The Third Circuit affirmed defendant's judgment of conviction on December 16, 1998. (D.I. 147) Defendant then filed a writ of certiorari to the Supreme Court which was denied on June 1, 1999. (D.I. 148)

4. On August 2, 1999, defendant, proceeding pro se, filed a second motion for a new trial under Fed. R. Crim. P. Rule 33. (D.I.150) The court denied this motion and the Third Circuit affirmed. (D.I.165, 171)

5. On May 28, 2000, defendant, proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255. (D.I.155) On September 25, 2001, defendant filed an extensive amendment to his § 2255 petition.[3] (D.I.174) On February

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82, 84, 85, 88) Subsequently, a breakdown in the attorney-client relationship between defendant and attorney two occurred. (D.I. 99-104) On April 16, 1997, the Office of the Federal Public Defender was appointed to represent defendant. (D.I. 118)

[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 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).

[3]Defendant asserted six claims for relief based on ineffective assistance of counsel. Only one claim implicates the issues at bar, to wit, ineffective assistance of counsel for failure to object to defendant's to career offender status. After an extensive review, the court concluded that the argument was without merit and the record clearly supported a finding of defendant's classification as a career offender. Specifically, the

5, 2003, the court denied defendant's motion and dismissed the writ. *United States v. Brown*, 2002 WL 277356 (D. Del. 2003).

6. The Third Circuit affirmed the decision and denied a certificate of appealability on November 10, 2003. *United States v. Brown*, 85 Fed. Appx. 875 (3d Cir. 2003). Defendant petitioned for a writ of certiorari with Supreme Court, which was denied on April 19, 2004. *Brown v. United States,* 541 U.S. 1003 (2004).

7. On March 13, 2009, defendant filed a pro se motion for reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2)[4] and Guideline Amendment 706.[5] (D.I. 196) Defendant's counsel moved to withdraw, asserting that, because defendant was a career offender, his § 3582 claim was without merit in light of *United States v. Mateo*,

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court pointed to defendant's presentence report, which detailed numerous instances of defendant's encounters with the criminal justice system. Pursuant to U.S. Sentencing Guidelines ("Guidelines"), defendant's offense level was calculated at 37 and criminal history points totaled 23, placing him in a criminal history category of VI. (D.I. 145 at 23) A minimum of 13 criminal history points places a person in criminal history category VI. (*Id.* at 15) Further, the court observed that at sentencing, defendant's counsel raised mitigating circumstances for the consideration. (*Id.* at 13–14)

[4]Under § 3582, "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 . . . ." a District Court may reduce a defendant's sentence, "after considering the factors set forth in § 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

[5]On November 1, 2007, the U.S. Sentencing Commission ("the Commission") adopted Amendment 706, which reduced the base offense for crack offenses under § 2D1.1(c) by two levels. U.S.S.G. App. C, Amend. 706 (Nov. 1, 2007). On May 12, 2008, the Sentencing Commission ruled Amendment 706 retroactive. U.S.S.G. App. C, Amend. 713 (Supp. May 1, 2008).

560 F.3d 152, 155 (3d Cir. 2009).[6] (D.I. 197) On May 8, 2009, the court denied defendant's motion, concluding that Amendment 706 does not affect the sentencing range of an individual classified as a career offender. (D.I. 200) Defendant appealed the decision. (D.I. 201)

8. On appeal, defendant asserted that he was actually innocent of the career criminal enhancement imposed and, as a result, should have been sentenced under U.S.S.G. § 2D1.1(c) instead of § 4B1.1. Specifically, he averred that "his third degree arson conviction has a mens rea of 'recklessness' and, therefore, should not qualify as a 'crime of violence.'" *United States v. Brown*, 369 Fed. Appx. 388, 390, fn.4 (3d Cir. 2010).

9. The Third Circuit rejected defendant's arguments on the basis of *Mateo* and, further, explained that the Commission has the "power to expand the category of 'career offender from the definition set forth in 18 U.S.C. § 16,'" and that "the definition of "crime of violence" set forth in the Guidelines expressly includes arson. Specifically, the Court wrote:

> Apparently recognizing that *Mateo* forecloses his efforts under § 3582 to attack his initial classification as a career offender, defendant now attempts to proceed under 18 U.S.C. § 3742(a)(2),[7] which permits a defendant to

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[6]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).

[7]"A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence: (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more

> appeal an otherwise final sentence if it was "imposed as a result of an incorrect application of the sentencing guidelines." However, defendant has already taken a direct appeal of his conviction. . . . Moreover, an attempt to appeal more than a decade after sentencing is clearly untimely. Looking to the substance of his claim, defendant is attempting to collaterally attack his sentence. Such a claim should be pursued as a motion under 28 U.S.C. § 2255. Defendant already filed one § 2255 motion in June 2000, which the district court denied in February 2003. Accordingly, defendant must seek [Third Circuit's] authorization before filing a second or successive § 2255 motion [pursuant to 28 U.S.C. § 2244].

Id. at 392.

10. On March 8, 2012, defendant, proceeding pro se, filed a second application for sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and Guideline Amendments 433, 461, 461, 706 and 750. (D.I. 204, 205) In this application, defendant submits that he should never have been characterized as a career offender because third degree arson has a mens rea of recklessness. He argues that he was mis-classified as a career offender under § 4B1.2 because the third degree arson conviction is not a crime of violence in federal or state courts. (D.I. 205 at 1; 208 at 6-8) Defendant also maintains that the career offender classification was an unexplained sentencing variance. (D.I. 208)

11. The assertions made in defendant's second application for sentence reduction are virtually identical to those previously raised in his § 3582(c)(2) motion before this court and on appeal before the Third Circuit. Since these claims were unequivocally rejected by the Third Circuit and there is nothing of record implicating any

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limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable."

reason to revisit the issues anew, the court turns to the only new assertion in defendant's sentence motion, Amendment 750.[8]

12. Amendment 750 revised the crack Guidelines commensurate with the reductions in the Fair Sentencing Act of 2010 ("FSA").[9] U.S.S.G. App. C, Amend. 750 (effective Nov. 1, 2011). 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).

13. 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).

14. In considering an application pursuant to § 3582(c)(2), the 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

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[8]The other Amendments were in effect at the time of the Third Circuit's decision, e.g., Amendments 433 was effective November 1, 1991, Amendment 461 was effective November 1, 1992 and Amendment 568 was effective November 1, 1997.

[9]On August 3, 2010, Congress enacted the FSA, which reduced the disparity between crack and powder cocaine by reducing the statutory penalties for crack cocaine. In light of FSA, the Commission adopted Amendments 750 and 759.

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).

15. In this case, defendant qualified as a career offender under § 4B1.1 and his guideline range was based on an offense level of 37 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 applicable guideline range and, consequently, would not be consistent with § 1B1.10.

United States District Judge