

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align:center">v.</p> <p>JAMES MCINTOSH, Defendant.</p>	<p style="text-align:center">CRIMINAL ACTION NO. 97-203-2</p>
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MEMORANDUM & ORDER

Katz, S.J.

March 7, 2007

Before the court are Defendant's "Motion for Adjustment/Modification of Imposed Term of Imprisonment Due to a Sentencing Range That Has Subsequently Been Lowered by the Sentencing Commission Pursuant to 28 U.S.C. 994(o)" (Document No. 412), and the government's response thereto (Document No. 414). For the following reasons, Defendant's motion will be denied.

I. Summary of Facts

On November 10, 1997, a jury convicted Defendant of one count of conspiracy to commit Hobbs Act robbery (in violation of 18 U.S.C. § 1951), one count of Hobbs Act robbery (also in violation of 18 U.S.C. § 1951), and one count of using and carrying a firearm in relation to a crime of violence (in violation of 18 U.S.C. § 924(c)). The court deemed Defendant a "career offender" under the Sentencing Guidelines and sentenced him, on March 27, 1998, to concurrent 262-

month terms of imprisonment on the conspiracy and robbery counts,¹ a mandatory consecutive term of 60 months' imprisonment on the firearm count (for a total of 322 months' imprisonment),² 3 years of supervised release, and a \$300 special assessment. Defendant was also ordered to pay \$21,125.87 in restitution. Defendant appealed his convictions and sentence, and on May 20, 1999, the Court of Appeals for the Third Circuit affirmed Defendant's convictions, vacated his sentence, and remanded the case for resentencing. On July 27, 1999, the court sentenced Defendant to exactly the same punishment he had received previously.

II. Legal Standard

Defendant has moved the court to reduce his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2),³ which provides that:

[I]n 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 pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent

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1. The guideline range for these offenses was 210–262 months' imprisonment, based on an offense level of 32, and a criminal history category of VI. See U.S.S.G. § 4B1.1 (1997).
 2. The mandatory minimum sentence for this offense was 60 months' imprisonment. See 18 U.S.C. § 924(c)(1)(A)(i).
 3. Contrary to the government's position, Defendant's motion is not an improper second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

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) (2006) (emphasis added).

III. Discussion

Defendant has moved the court to reduce his term of imprisonment in light of Amendment 591 of the Sentencing Guidelines, effective November 1, 2000. See Defendant’s Motion, at 1. In support of his motion, Defendant argues that “[t]he [United States Probation Department] failed to conduct the appropriate relevant conduct determination as directed by 1B1.2(b) [and 1B1.3(a)], after determining the appropriate offense guidelines. As a result, the U.S.P.D. by-passed determining Petitioner’s sentence under Chapter Fives [sic] 5G1.2 and 3.” Id. at 2. According to Defendant, if he were resentenced under these Guidelines provisions, as subsequently amended, his Guideline sentence would be only 262 months’ imprisonment – 60 months lower than the 322-month sentence he received.⁴ Id.

Defendant’s argument fails, because Amendment 591 did not affect his Guidelines sentencing range. The text of Amendment 591 explains that:

4. Defendant also argues, incorrectly, that his counsel’s ineffectiveness at his sentencing is an additional reason to grant his motion under 18 U.S.C. § 3582(c)(2). Id. at 2–3. Defendant’s counsel cannot be faulted for not seeking, at the time of Defendant’s sentencing in March 1998, the advantageous application of Guidelines amendments that did not yet exist.

The amendment modifies §§ 1B1.1(a), 1B1.2(a), and the Statutory Index's introductory commentary to clarify the inter-relationship among these provisions. The clarification is intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction unless the case falls within the limited "stipulation" exception set forth in § 1B1.2(a).

U.S. SENTENCING GUIDELINES MANUAL app. C at 579 (2006); see also United States v. Diaz, 245 F.3d 294, 301–02 (3d Cir. 2001). Since the court correctly applied the Guidelines provisions listed in the Statutory Index to calculate Defendants' sentencing range – i.e., § 2B3.1 for the Hobbs Act counts and § 2K2.4 for the firearm count – Defendant cannot invoke Amendment 591 to request a reduced term of imprisonment under 18 U.S.C. § 3582(c)(2). Cf. United States v. Benanti, 137 Fed. Appx. 479, 481–82 (3d Cir. 2005) (similarly denying the defendant's motion for a reduced term of imprisonment based on Amendment 591).⁵

Defendant's Guidelines sentencing range would, however, be 60 months lower under U.S.S.G. § 5G1.2, as amended by Amendment 642 (effective November 1, 2002). See U.S.S.G. § 5G1.2(e), cmt. 3 ("The sentence imposed for a conviction under 18 U.S.C. § 924(c) or § 929(a) shall, under that statute, consist of a minimum term of imprisonment imposed to run consecutively to the sentence on any other count. Subsection (e) requires that the total punishment determined under § 4B1.1(c)

5. U.S.S.G. § 5G1.3 is also irrelevant to Defendant's situation, because Defendant was not subject to an undischarged term of imprisonment at the time he was sentenced in this case.

[i.e., the Career Offender provision] be apportioned among all the counts of conviction. In most cases, this can be achieved by imposing the statutory mandatory minimum term of imprisonment on the 18 U.S.C. § 924(c) or § 929(a) count, subtracting that minimum term of imprisonment from the total punishment determined under § 4B1.1(c), and then imposing the balance of the total punishment on the other counts of conviction.”).⁶

Defendant’s misidentification of the Guidelines Amendment under which he seeks 18 U.S.C. § 3582(c)(2) relief matters, because the court can reduce Defendant’s sentence based on Amendment 591, but not based on Amendment 642. See U.S.S.G. § 1B1.10(a) (“Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant’s term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). *If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.*”) (emphasis

6. The court suspects that this reduction in Defendant’s guideline range would be negated by § 4B1.1(c), which also was amended by Amendment 642, and which appears to prescribe a guideline range of 360 months to life imprisonment for Defendant’s offenses. Nevertheless, the court will assume arguendo that Defendant would qualify for the 60-month reduction he seeks.

added); see also U.S.S.G. § 1B1.10(c) (listing the Guidelines Amendments that may form the basis for relief under 18 U.S.C. § 3582(c)(2), which list includes Amendment 591, but not Amendment 642). All the Circuits to have addressed this issue agree on this point. See United States v. Thompson, 70 F.3d 279, 281 (3d Cir. 1995); United States v. Cruz, 814 F. Supp. 14, 15 (E.D. Pa. 1993); see also United States v. Armstrong, 347 F.3d 905, 907–09 (11th Cir. 2003); United States v. Chavez-Salais, 337 F.3d 1170, 1174–75 (10th Cir. 2003); United States v. Perez, 129 F.3d 255, 258–59 (2d Cir. 1997); United States v. Drath, 89 F.3d 216, 217–18 (5th Cir. 1996); United States v. Dullen, 15 F.3d 68, 69–71 (6th Cir. 1994); United States v. Cueto, 9 F.3d 1438, 1440–41 (9th Cir. 1993); Ebbole v. United States, 8 F.3d 530, 539 (7th Cir. 1993); United States v. Dowty, 996 F.3d 937, 938–39 (8th Cir. 1993);

Desouza v. United States, 995 F.2d 323, 324 (1st Cir. 1993).^{7, 8} Since Defendant’s

7. The court need not determine whether Amendment 642 is a “clarifying” or “substantive” amendment to the Sentencing Guidelines, *see, e.g., United States v. Marmolejos*, 140 F.3d 488, 491 (3d Cir. 1998) (holding that “courts can give retroactive effect to a clarifying (as opposed to substantive) amendment regardless of whether it is listed in U.S.S.G. § 1B1.10”), because such analysis is appropriate only when ruling on a direct appeal or a motion under 28 U.S.C. § 2255. *See United States v. Gill*, 68 Fed. Appx. 354, 355 n.2 (3d Cir. 2003) (distinguishing *Marmolejos* on this ground and criticizing *United States v. Edwards*, *infra*); *see also Armstrong*, 347 F.3d at 909; *Chavez-Salais*, 337 F.3d at 1174–75; *Lee v. United States*, 221 F.3d 1335, at *1 (6th Cir. 2000) (unpublished opinion); *Drath*, 89 F.3d at 217; accord *United States v. Spinello*, 265 F.3d 150, 159–62 (3d Cir. 2001) (direct appeal); *Diaz*, 245 F.3d at 300–05 (direct appeal); *Marmolejos*, 140 F.3d at 490–93 (motion under 28 U.S.C. § 2255). *But see United States v. Edwards*, 309 F.3d 110, 112–13 (3d Cir. 2002) (applying “substantive versus clarifying” analysis in the 18 U.S.C. § 3582(c)(2) context, but relying entirely on cases that applied the analysis on direct appeal).

8. The court is aware of no case holding that Amendment 642 is either clarifying or substantive. But assuming *arguendo* that it is necessary to so hold, the court concludes that Amendment 642 is substantive, because it substantively changed the meaning of U.S.S.G. § 5G1.2 – so much so that Defendant would qualify for a 60-month reduction in his term of imprisonment if the court had the power grant such relief under 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10. Under *Marmolejos*:

[A] post-sentencing amendment to a sentencing guideline or its comments should be given effect if it “clarifies” the guideline or comment in place at the time of sentencing. If, however, the amendment effects a substantive change in the law, the defendant does not reap the benefit of the new provision.

Marmolejos, 140 F.3d at 491 (citing U.S.S.G. § 1B1.11 (b)(2)). The Third Circuit has expounded this test as follows:

In *Marmolejos*, we acknowledged that there was no bright-line test for ascertaining whether an amendment was a clarification or a substantive change. We stressed, however, that our point of reference was “the guideline or comment in place at the time of sentencing,” and that the important factors to consider with respect to that point of reference were (1) whether, as a matter of construction, that point of reference was consistent with the amended manual, (2) the purpose and effect of the enabling amendment, and (3) the language of the amendment itself.

Spinello, 265 F.3d at 160. Considering these three factors, it is clear (1) that Amendment 642

(continued...)

motion really seeks a reduced term of imprisonment under 18 U.S.C. § 3582(c)(2) based on Amendment 642 (as opposed to Amendment 591), the court must deny the motion under U.S.S.G. § 1B1.10. See Thompson, 70 F.3d at 281.

IV. Conclusion

For the foregoing reasons, Defendant's motion will be denied.

An appropriate Order follows.

8. (...continued)

added an entirely new subsection – subsection (e) – to U.S.S.G. § 5G1.2, (2) that this amendment sought to, and did, change the composition of sentences involving mandatory consecutive terms of imprisonment under 18 U.S.C. § 924(c) and § 929(a), see U.S.S.G. § 5G1.2(e), cmt. 3 (2006), and (3) that the language of the amendment itself evinces an intent to effect such a change. See U.S. SENTENCING GUIDELINES MANUAL app. C at 829–33 (2006). This is more than enough to make Amendment 642 a substantive amendment. See Edwards, 309 F.3d at 113 (holding that Amendment 634 is substantive, because it “*redefines* the way in which the offense level associated with the crime of money-laundering is calculated”) (emphasis in original); Spinello, 265 F.3d at 160 (holding that “Amendment 603, which added § 5K2.20 [Aberrant Behavior (Policy Statement)], worked a substantive change to the Guidelines rather than a mere clarification of the Guidelines”); Diaz, 245 F.3d at 303 (holding that Amendment 591 was substantive in part because it “alter[ed] courts’ actual practice in sentencing”). The court therefore holds, in the alternative, that Amendment 642 is a substantive amendment to the Guidelines, and that it therefore may not form the basis for the relief that Defendant seeks under 18 U.S.C. § 3582(c)(2). See Edwards, 309 F.3d at 112–13.

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ORDER

AND NOW, this 7th day of March, 2007, upon consideration of Defendant's "Motion for Adjustment/Modification of Imposed Term of Imprisonment Due to a Sentencing Range That Has Subsequently Been Lowered by the Sentencing Commission Pursuant to 28 U.S.C. 994(o)" (Document No. 412), and the government's response thereto (Document No. 414), it is hereby **ORDERED** that said motion is **DENIED**.

BY THE COURT:

/s/ Marvin Katz

MARVIN KATZ, S.J.