

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

UNITED STATES OF AMERICA

v.

MARCO BURTON

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**CRIMINAL ACTION
NO. 99-109-01**

ORDER AND MEMORANDUM

ORDER

AND NOW, this 23rd day of May, 2007, upon consideration of petitioner's *pro se* Motion to Modify Term of Imprisonment [Pursuant to] 18 U.S.C. § 3582(c)(2) (Document No. 135, filed March 19, 2007); the Government's Response to Defendant's Pro se Motion to Modify Terms of Imprisonment Pursuant to Section 3582(c)(2) (Document No. 138, filed April 12, 2007); and Petitioner's Traverse to the Government's Response Surrounding, Petitioner's Motion for Modification of Sentence Pursuant to 18 United States Code, 3582(c)(2) (Doc. No. 139, filed May 14, 2007), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that:

1. The *pro se* Motion to Modify Term of Imprisonment [Pursuant to] 18 U.S.C. § 3582(c)(2) filed by Marco Burton is **DENIED**; and
2. A certificate of appealability will not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c).

MEMORANDUM

I. INTRODUCTION

Presently before the Court is petitioner Marco Burton's *pro se* Motion to Modify Term of

Imprisonment [Pursuant to] 18 U.S.C. § 3582(c)(2). For the reasons set forth below, petitioner's *pro se* Motion is denied.

II. BACKGROUND

A detailed factual and procedural history is included in this Court's previous opinion in this case. See *United States v. Burton*, 2004 WL 1813105, *1-2 (E.D. Pa. July 21, 2004).

Accordingly, this Memorandum sets forth only the factual and procedural history necessary to explain the Court's ruling.

On July 6, 1999, petitioner was charged in a five count Superseding Indictment with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) (Count One); possession with intent to deliver cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count Two); possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c) (Count Three); and two counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Counts Four and Five).

On February 1, 2000, the government filed a Notice of Defendant's Prior Convictions for Enhanced Sentencing pursuant to the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).¹ On February 25, 2000, the government filed an Information Charging Prior Offenses

¹ 18 U.S.C. § 924(e) provides, in relevant part, as follows:

In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

(2) As used in this subsection—(A) the term "serious drug offense" means . . .

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . .

pursuant to 21 U.S.C. § 851. The Notice and Section 851 Information notified petitioner of the government's intention to rely on his prior drug convictions to seek enhanced penalties at sentencing under 18 U.S.C. § 924(e). Section 924(e) "raises the penalty for possession of a firearm by a felon from a maximum of 10 years in prison to a mandatory minimum sentence of 15 years and a maximum of life in prison without parole if the defendant 'has three previous convictions . . . for a violent felony or a serious drug offense.'" Custis v. United States, 511 U.S. 485, 487 (1994) (quoting 18 U.S.C. § 924(e)).

On February 29, 2000, petitioner pled guilty to all five counts of the Superseding Indictment.

A. Sentencing

On September 19, 2000, this Court sentenced petitioner to, *inter alia*, 240 months imprisonment and eight years supervised release. Tr. 9/19/00 at 46. The Court determined petitioner's sentence as follows.

1. Counts One, Two, Four and Five

Pursuant to § 3D1.2(d) of the United States Sentencing Guidelines (the "Sentencing Guidelines"), the Court grouped Counts One and Two, the drug counts. Also pursuant to § 3D1.2(d), the Court grouped Counts Four and Five, the felon in possession counts. Thereafter, pursuant to § 3D1.2(c), the Court grouped Counts One and Two and Counts Four and Five because Counts Four and Five embody conduct that is a specific offense characteristic in the guideline applicable to Counts One and Two.

Where counts are grouped as they were in this case, § 3D1.3(a) instructs that the offense level applicable to the group is the offense level, determined in accordance with Chapter II and

parts (A), (B) and (C) of Chapter III, for the most serious of the counts comprising the group, i.e., the highest offense level of the counts in the group. The counts in this case which carried the highest offense level excluding enhancements under Chapter IV were Counts One and Two.

Counts One and Two of the Superseding Indictment charged petitioner with possession with intent to distribute in excess of 500 grams of cocaine (Count One) and 5 grams of cocaine base (“crack”) (Count Two) in violation of 21 U.S.C. § 841(a). At the change of plea hearing, petitioner admitted to possessing with intent to distribute 7.9 grams of cocaine base (“crack”), Tr. 2/29/00 at 49, and 742 grams of cocaine, *id.* at 43, 47. Petitioner also admitted to selling “several kilograms” of cocaine at 2851 North Darien Street in Philadelphia. *Id.* at 41, 47. At sentencing, the Court found that petitioner was criminally responsible for 2.742 kilograms of cocaine and 7.9 grams of cocaine base (“crack”). For this drug quantity, § 2D1.1 provided a base offense level of 30. The adjusted offense level was also 30.

Thereafter, the Court determined that petitioner was an armed career criminal under § 4B1.4, the applicable guideline provision for calculating the base offense level of a defendant under the ACCA. Calculated under that provision, petitioner had a total offense level of 35, in Criminal History Category VI, for the grouped counts, Counts One, Two, Four and Five. That offense level and criminal history category called for a Guideline Imprisonment Range of 292 to 365 months on those counts.

The Court subsequently granted petitioner’s Motion for Downward Departure under § 4A1.3 on the ground that petitioner’s Criminal History Category significantly over-represented the seriousness of his criminal history and the likelihood that he would commit further crimes. The downward departure produced an offense level of 28 and a Criminal History Category of III

on Counts One, Two, Four, and Five. That offense level and Criminal History Category resulted in a Guideline Imprisonment Range of 97 to 121 months on the grouped counts. Tr. 9/19/00 at 38.

However, the ACCA provided a mandatory minimum sentence of fifteen years on Counts Four and Five, and that was the guideline sentence for the grouped counts, Counts One, Two, Four and Five. *Id.* at 39. Specifically, petitioner's sentence on Counts Four and Five, charging petitioner with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), was based upon § 924(e) of the ACCA. The mandatory minimum sentence provided by the ACCA also applied to Counts One and Two because those Counts were grouped with Counts Four and Five.

Section 924(e) provides, in relevant part, that: "a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years. . . ." 18 U.S.C. § 924(e). A "serious drug offense" is defined as, *inter alia*, "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law. . . ." 18 U.S.C. § 924(e)(2)(ii).

The Court's determination that petitioner was an armed career criminal under the ACCA was based upon petitioner's three prior convictions for "serious drug offense[s]," set forth in paragraphs 48, 49 and 52 of the Presentence Report. Tr. 9/19/00 at 14; see also PSR ¶¶ 48, 49, 52. Specifically, in three prior convictions, petitioner pled guilty to "manufactur[ing], delivery,

or possession with intent to manufacture or deliver, a controlled substance” in violation of 35 P.S. § 780-113(a)(30). See PSR ¶¶ 48, 49, 52. At sentencing, the Court summarized these convictions, as follows:

The first, Paragraph 48, arrest November 9th, 1990, defendant was 19 years old, 2.9 grams of cocaine base were involved. Defendant pled guilty and was placed on probation for two years.

The second, Paragraph 49 of the presentence report, the date of the offense July 9th, 1991, defendant was 20 years of age, 400 milligrams of cocaine base were involved. And defendant was 20 years of age. I think the value of that 400 milligrams on the street was ten dollars. Defendant pled guilty and was placed on probation for two years.

And the third offense, Paragraph 52, occurred November 22nd, 1994, defendant was 23 years of age. That offense involved 50 milligrams of cocaine base, defendant was placed on two years probation, he pled guilty.

Tr. 9/19/00 at 14-15.

All three of petitioner’s prior drug convictions provided for a maximum penalty of “imprisonment not exceeding fifteen years.” See 35 P.S. § 780-113(f)(1);² see also Tr. 9/19/00 at 15, 30-31. Thus, they were considered “serious drug offense[s]” under § 924(e) and resulted in defendant’s designation as an armed career criminal. The Court sentenced petitioner to fifteen years imprisonment on Counts One, Two, Four and Five. Tr. 9/19/00 at 46. That was the lowest sentence the Court could have imposed on those Counts, and was based entirely on the mandatory minimum sentence required by the ACCA.

² 35 P.S. § 780-113(f)(1) provides, in relevant part, as follows: “Any person who violates clause (12), (14) or (30) of subsection (a) with respect to: (1) A controlled substance or counterfeit substance classified in Schedule I or II which is a narcotic drug is guilty of a felony and upon conviction thereof shall be sentenced to imprisonment not exceeding fifteen years. . . .” See also 35 P.S. § 780-104 (categorizing cocaine as a Schedule II substance).

2. Count Three

Count Three, charging possession of a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c), was excluded from grouping and from the Court's sentencing calculations under the Guidelines. See U.S.S.G. § 5G1.2(a). The crime charged in Count Three required a five year consecutive sentence. Tr. 9/19/00 at 44. Accordingly, the Court imposed a five year consecutive sentence of imprisonment on Count Three. Id. at 46.

B. Petitioner's Direct Appeal and § 2255 Motion

On September 20, 2000, petitioner filed a Notice of Appeal in the United States Court of Appeals for the Third Circuit. The appeal raised a single issue—denial of petitioner's motion to suppress evidence. See Burton, 2004 WL 1813105 at *2. On April 29, 2002, the Third Circuit affirmed this Court's ruling denying the motion to suppress.

On February 17, 2003, petitioner filed a Section 2255 habeas corpus motion, in which he alleged that the sentence on Counts One and Two violated Apprendi v. New Jersey, 530 U.S. 466 (2000); that the sentence imposed on Counts One and Two was in excess of the applicable statutory maximum penalties; that the Court lacked jurisdiction over the felon in possession charges in Counts Four and Five; that the Superseding Indictment failed to provide adequate written notice of the government's intention to seek enhanced penalties pursuant to 18 U.S.C. § 924(e); and that defense counsel was ineffective for failing to raise each of these issues on direct appeal. Burton, 2004 WL 1813105 at *2.

By Memorandum and Order dated July 21, 2004, this Court denied petitioner's ineffective assistance of counsel claims. Id. at *11. The Court dismissed the remainder of petitioner's claims as procedurally defaulted because petitioner did not raise those claims on

direct appeal, and did not satisfy the “cause” and “prejudice” or “actual innocence” exceptions to procedural default. Id. at *3-5.

C. The *Pro Se* § 3582(c)(2) Motion

On March 19, 2007, petitioner filed the instant *pro se* Motion to Modify Term of Imprisonment [Pursuant to] 18 U.S.C. § 3582(c)(2) (the “*pro se* § 3582(c)(2) Motion”). In the *pro se* § 3582(c)(2) Motion, petitioner challenges his sentence on Counts One, Two, Four and Five. Specifically, petitioner asserts that his prior convictions were not “serious drug offense[s]” under the ACCA. Pet.’s Mot. at 1. In addition, in his *pro se* Traverse to the Government’s Response, petitioner asserts that he was sentenced in violation of Amendment 599 of the Sentencing Guidelines.

III. LEGAL STANDARD

“Title 18 U.S.C. § 3582(c)(2) provides an exception to the general rule that a court may not modify a term of imprisonment once imposed.” United States v. Enigwe, 379 F. Supp. 2d 724, 725 (E.D. Pa. 2005), aff’d 181 Fed. App’x 321 (3d Cir. 2006). Section 3582 provides, in relevant part, as follows:

[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) . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 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).

Because petitioner filed the instant § 3582(c)(2) Motion *pro se*, the Court construes petitioner’s arguments liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

IV. DISCUSSION

Petitioner's *pro se* § 3582(c)(2) Motion raises two arguments. First, petitioner asserts that he was sentenced in violation of Amendment 599 of the Sentencing Guidelines. Second, petitioner asserts that his prior convictions were not "serious drug offense[s]" under the ACCA. The Court considers each issue in turn.

A. Petitioner Was Properly Sentenced Under Amendment 599

In this case, petitioner moves the Court to modify his term of imprisonment under § 3582(c)(2) on the basis of Amendment 599 of the Sentencing Guidelines. Petitioner asserts, but not explain why, "Amendment 599 to the federal Sentencing Guidelines, had caused petitioner to satisfy the first prong of 3582(c)(2)." Pet.'s Traverse at 10. The Court concludes that Amendment 599 does not afford petitioner any grounds for reducing his sentence.

Amendment 599, effective November 1, 2000, "expanded the commentary to U.S.S.G. § 2K2.4 on use of a firearm during or in relation to certain crimes." See United States v. Jacobs, 162 Fed. App'x 148, 149 (3d Cir. 2006). Specifically, "Amendment 599 makes clear that when a defendant is convicted under section 924(c) for conduct related to an underlying offense, the sentence for the underlying offense cannot be enhanced by 'any specific characteristic for possession, brandishing, use, or discharge of an explosive or firearm'" United States v. Johnson, 2007 WL 1412241, *2 (M.D. Pa. May 11, 2007) (quoting U.S.S.G. § 2K2.4 n.4). "The rationale is that the sixty-month sentence for the section 924(c) conviction already takes into account the offense conduct for the firearm." Id.

Petitioner's Amendment 599 argument is inapplicable to this case because petitioner did not receive a sentencing enhancement under § 2K2.4. Indeed, at sentencing on September 19,

2000, the Court explicitly took into account Amendment 599, which was then a proposed amendment. The discussion between the Court and Assistant United States Attorney M. Taylor Aspinwall, Esq. regarding Amendment 599 makes this point clear:

The Court: The Government raised a question as to whether there should be a two-level adjustment for – a two-level enhancement for possession of a weapon in connection with a crime.

...

Ms. Aspinwall: That was before [U.S. Probation Officer] Mr. Hassinger filed his revised report or maybe it was around the same time, but Mr. Hassinger subsequently sent me a copy –

The Court: Of the proposed amendments to the Sentencing Guidelines –

Ms. Aspinwall: Yes.

The Court: – effective November 1st, 2000.

...

The Court: Well, Mr. Hassinger pulled those amendments off the Sentencing Commission's website. And they say where there's a 924(c) count for which there will be a statutory maximum five-year consecutive sentence there are no gun enhancements even if you're talking about the same weapon or other weapons and other counts. So that puts that to rest.

Tr. 9/19/00 at 22-23.

Moreover, even if Amendment 599 were applicable to this case, petitioner's § 3582(c)(2) argument lacks merit for the additional reason that a lower guideline range would not have reduced petitioner's sentence. Under the ACCA, the mandatory minimum sentence on Counts Four and Five was fifteen years. That mandatory minimum sentence exceeded the applicable guideline range. Accordingly, under § 5G1.1(B), the mandatory minimum became the Guideline sentence for the grouped counts, Counts One, Two, Four and Five.

Thus, the Court denies the *pro se* § 3582(c)(2) Motion to the extent that it is based upon Amendment 599 of the Sentencing Guidelines.

B. Petitioner’s Prior Convictions Are “Serious Drug Offense[s]” Under the ACCA

In the *pro se* § 3582(c)(2) Motion, petitioner further argues that he was improperly sentenced on Counts One, Two, Four and Five because his prior drug convictions are not “serious drug offense[s]” under the ACCA.

These claims cannot properly be asserted under § 3582(c)(2) because they are not based on a retroactive amendment to the Sentencing Guidelines. See Jacobs, 162 Fed. App’x at 194. Moreover, to the extent that petitioner seeks to collaterally attack his sentence on the ground that his prior drug convictions were not “serious drug offense[s]” he was required to obtain the authorization of the Court of Appeals for the Third Circuit to file a second or successive habeas motion under § 2255. See 28 U.S.C. § 2255.

Finally, even if petitioner’s claim that his prior convictions are not “serious drug offense[s]” was properly before the Court, petitioner is not entitled to relief. Section 924(e) defines a “serious drug offense” as, *inter alia*, “[1] an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), [2] for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e). In this case, petitioner has three prior convictions for “manufactur[ing], delivery, or possession with intent to manufacture or deliver, a controlled substance” in violation of 35 P.S. § 780-113(a)(30). See PSR ¶¶ 48, 49, 52. Contrary to petitioner’s assertion, and as stated

previously, each of these convictions provided a maximum penalty of fifteen years imprisonment under Pennsylvania law. See 35 P.S. § 780-113(f)(1). That these offenses involved small drug quantities and resulted in sentences of probation is irrelevant under the ACCA. See Pet.’s Traverse at 7-8.³

C. A Certificate of Appealability Shall Not Issue

A certificate of appealability shall issue only if the petitioner establishes: “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also 28 U.S.C. § 2253(c). The Court concludes that the petitioner has not made such a showing with respect to the *pro se* § 3582(c)(2) Motion. Thus, a certificate of appealability will not issue.

V. CONCLUSION

For the foregoing reasons, petitioner’s *pro se* Motion to Modify Term of Imprisonment [Pursuant to] 18 U.S.C. § 3582(c)(2) is denied. Because petitioner has not made the requisite showing of a denial of a constitutional right, a certificate of appealability will not issue.

BY THE COURT:

/s/ **JAN E. DUBOIS, J.**

JAN E. DUBOIS, J.

³ The Court took these facts into account in ruling on petitioner’s Motion for Downward Departure under § 4A1.3, which the Court granted. See Tr. 9/19/00 at 15, 24, 38. The downward departure produced a Guideline range of 97 to 121 months on Counts One, Two, Four and Five. Tr. 9/19/00 at 38. Had the Court not departed downward, the Guideline range on those Counts would have been 292 to 365 months—higher than the mandatory minimum sentence. Id. at 45.