

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

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**UNITED STATES OF AMERICA**

**v.**

**JEROD L. HINES**

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**CRIMINAL ACTION  
NO. 99-543**

**ORDER AND MEMORANDUM**

**ORDER**

**AND NOW**, this 15th day of June, 2007, upon consideration of Petitioner's [*pro se*] Motion for Reduction Modification [sic] of an Imposed Term of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(2) (Document No. 100, filed May 2, 2007) and the Government's Response to the Defendant's Motion for a Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(2) (Document No. 104, filed June 1, 2007), **IT IS ORDERED** that:

1. Petitioner's [*pro se*] Motion for Reduction Modification [sic] of an Imposed Term of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(2) is **DENIED**.
2. A certificate of appealability will not issue on the ground that defendant 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 defendant Jerod Hines's *pro se* Motion for Reduction Modification [sic] of an Imposed Term of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(2) (the "*pro se* § 3582(c)(2) Motion"). For the reasons set forth below, defendant's *pro se* § 3582(c)(2)

Motion is denied.

## **II. BACKGROUND**

A detailed factual and procedural history is included in two previous opinions in this case. See United States v. Hines, No. 00-3806, slip. op. at 3-8 (3d Cir. Nov. 29, 2001); United States v. Hines, 2003 WL 22232886, \*1-3 (E.D. Pa. Aug. 15, 2003). Accordingly, this Memorandum sets forth only the factual and procedural history necessary to explain the Court's ruling.

On November 3, 1999, a federal grand jury returned a five-count Superseding Indictment, charging defendant with possession with intent to deliver more than five grams of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count One); possession with intent to deliver more than five grams of cocaine base ("crack") within 1000 feet of a school in violation of 21 U.S.C. § 860 (Count Two); possession with intent to deliver more than five grams of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1) (Count Three); possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g) (Count Four); and possession of a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c) (Count Five).

On February 7, 2000, defendant pled guilty to Counts One, Two, Three and Four of the Superseding Indictment. Tr. 2/7/00 at 51-52. At sentencing, the government moved to dismiss Count Five of the Superseding Indictment and that Count was dismissed. Tr. 2/7/00 at 11.

On November 2, 2000, the Court sentenced defendant to, *inter alia*, concurrent terms of 135 months imprisonment on Counts One, Two and Three of the Superseding Indictment, and a concurrent term of 120 months imprisonment on Count Four. Defendant was ordered to pay a special assessment of \$400.

At the November 2, 2000 sentencing hearing, the Court calculated petitioner's sentence under the November 1, 1998 edition of the United States Sentencing Guidelines ("Sentencing Guidelines"). Tr. 11/2/00 at 38. Counts One, Two and Three were grouped pursuant to § 3D1.2(d) of the Sentencing Guidelines because the offense level for those Counts was determined based on drug quantity. Count Four, charging possession of a firearm by a convicted felon, was grouped with Counts One, Two and Three because the firearm was treated as a specific offense characteristic in the guideline applicable to Counts One, Two and Three. The parties agreed to this grouping, "obviating the need for long evidentiary hearings on those issues." Hines, No. 00-3806, slip. op. at 7; Tr. 11/2/00 at 38.

Where counts are grouped, as in this case, the offense level applicable to the entire group is the offense level for the most serious count in the group. The count in this case that carried the highest offense level was Count Two, charging a violation of 21 U.S.C. § 860.

Pursuant to Appendix A of the Sentencing Guidelines, the guideline for a violation of 21 U.S.C. § 860 is § 2D1.2. Under § 2D1.2(a)(2), the offense level is calculated by adding one level to the offense level determined under § 2D1.1 based on the total amount of drugs involved in the offense.

At the November 2, 2000 sentencing hearing, defendant agreed and the Court found, that the total drug quantity at issue was 49.8 grams of cocaine base ("crack"). Tr. 11/2/00 at 10, 38. In addition, defendant signed a Guilty Plea Agreement Addendum, in which the parties stipulated that defendant was criminally responsible for possession with intent to distribute cocaine base ("crack") which weighed 49.8 grams. Guilty Plea Agreement Addendum ¶¶ 12-13. The parties' stipulation was based on "the final lab reports which showed a total quantity of 49.8 grams of

crack cocaine, slightly less than previously” charged in the Superseding Indictment, which charged possession with intent to distribute 51.0 grams of cocaine base (“crack”). Hines, No. 00-3806, slip. op. at 7. “That [decrease in the total drug quantity] resulted in a lower base offense level.” Id.

Specifically, for 49.8 grams of cocaine base (“crack”), § 2D1.1(c)(5) provided a base offense level of 30. Tr. 11/2/00 at 38. With the addition of a one-level adjustment under § 2D1.2(a)(2), the base offense level was 31. Id. That one-level adjustment was required because some, but not all, of the cocaine base (“crack”) was possessed with intent to distribute within a protected location; that is, within 1,000 feet of a school. Id. Defendant received a two-level enhancement for possession of a weapon under § 2D1.1(b)(1). Id. Accordingly, the adjusted offense level was 33. Defendant was entitled to a three-level reduction for acceptance of responsibility under § 3E1.1(a) and (b). Id. Thus, the total offense level was 30. Id.

The Court determined that defendant was in Criminal History IV. That Criminal History Category and an offense level of 30 resulted in a Guideline Imprisonment Range of 135 to 168 months. Tr. 11/2/00 at 39. The Court sentenced defendant at the low end of that guideline range.

Following sentencing, defendant appealed his conviction and sentence to the Court of Appeals for the Third Circuit arguing, *inter alia*, that his conviction on Counts One and Two violated the double jeopardy clause of the United States Constitution. Hines, No. 00-3806, slip. op. at 2. On direct appeal, the government acknowledged that Counts One and Two were based on the same conduct and that Count One was a lesser included offense of Count Two. Id. at 10. On November 29, 2001, at the request of the government, the Third Circuit remanded the case to this Court with instructions to “revise the judgment in a criminal case to remove references to

Count 1 and reduce the special assessment by \$100.” Id.

By Order dated January 23, 2002, this Court amended defendant’s sentence in accordance with the Third Circuit’s instructions. Specifically, the Court dismissed Count One, removed all references to Count One in the judgment, and reduced the special assessment by \$100 to \$300. By Order dated June 20, 2002, by agreement of the parties, the Court further reduced defendant’s term of supervised release from sixteen to eight years on Count Two.

On December 30, 2002, defendant filed a *pro se* habeas corpus motion under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. By Order and Memorandum dated August 14, 2003, the Court denied defendant’s *pro se* § 2255 Motion. The Court denied defendant’s *pro se* Motion for Reconsideration of the August 14, 2003 Order on September 11, 2003.

Defendant filed the instant *pro se* § 3582(c)(2) Motion on May 2, 2007. In the *pro se* § 3582(c)(2) Motion, defendant asserts that he was sentenced in violation of Amendment 591 of the Sentencing Guidelines. In addition, defendant asserts that “[t]he indictment, [and] the pre-sentencing report, attribute different drug quantities to defendant’s 21 U.S.C. § 860 protected location counts.” Mot. at 8.

### **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 591 of the Sentencing Guidelines. Second, petitioner asserts that "[t]he indictment, [and] the pre-sentencing report, attribute different drug quantities to defendant's 21 U.S.C. § 860 protected location counts." Mot. at 8. The Court considers each issue in turn.

##### **A. Petitioner Was Properly Sentenced Under Amendment 591**

Defendant moves the Court to modify his term of imprisonment under § 3582(c)(2) on the basis of Amendment 591 of the Sentencing Guidelines. The Court concludes that Amendment 591 does not afford petitioner any grounds for reducing his sentence.

Amendment 591, effective November 1, 2000, "reflects a change from the permissive to the mandatory. The sentencing court no longer uses the Statutory Index (Appendix A) as an aid in finding the most applicable guideline among several possibilities; the Statutory Index (Appendix A) now conclusively points the court to the one guideline applicable in a given case." United States v. Diaz, 245 F.3d 294, 301 (3d Cir. 2001). Amendment 591 "requires only that the sentencing court determine the base offense level with reference to the offense of conviction." United States v. Blount, 2007 WL 1655651, \*2 (3d Cir. 2007).

In this case, the count that carried the highest offense level was Count Two, charging a violation of 21 U.S.C. § 860. The Court selected the offense guideline, § 2D1.2, “with reference to” defendant’s conviction under 21 U.S.C. § 860. See U.S. Sentencing Guidelines Manual App’x A (1998). Thus, no violation of Amendment 591 occurred. See Blount, 2007 WL 1655651, \*2 (no violation of Amendment 591 where sentencing court selected the applicable guideline range on the basis of the statute of conviction); United States v. Benanti, 137 Fed. App’x 479, 482 (3d Cir. 2005) (same).<sup>1</sup>

Thus, the Court denies defendant’s *pro se* § 3582(c)(2) Motion to the extent that it is based upon Amendment 591 of the Sentencing Guidelines.

**B. Defendant Was Properly Sentenced Under Apprendi: Stipulation and Finding as to Drug Quantity**

In the *pro se* § 3582(c)(2) Motion, defendant further asserts that “[t]he indictment, [and] the pre-sentencing report, attribute different drug quantities to defendant’s 21 U.S.C. § 860 protected location counts.” Mot. at 8.

Construing the *pro se* § 3582(c)(2) Motion liberally, the Court concludes that defendant’s argument invokes Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi, decided June 26, 2000, the Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 490. Apprendi “applies where the District Court imposes a sentence in excess of the otherwise applicable statutory maximum on the basis

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<sup>1</sup> In addition, the Court observes that defendant was sentenced on November 2, 2000, one day after Amendment 591 became effective. Accordingly, as to defendant, Amendment 591 is not a “subsequent[.]” change to the Sentencing Guidelines under § 3582(c)(2).

of a fact not found by a jury beyond a reasonable doubt.” United States v. Zimmerman, 80 Fed. App’x 160, 164 (3d Cir. 2003).

There was no violation of Apprendi in this case. As the Third Circuit observed on direct appeal, this Court “resolved” the Apprendi issue at the November 2, 2000 sentencing hearing by “treating the drug type and quantity as an essential element for the purpose of the proceeding.” Hines, No. 00-3806, slip. op. at 7. Specifically, at the November 2, 2000 sentencing hearing, the Court engaged in a colloquy with defendant under Federal Rule of Civil Procedure 11 as to drug quantity. Defendant agreed and the Court found that the total drug quantity was 49.8 grams of cocaine base (“crack”). Tr. 11/2/00 at 10, 38. Thereafter, the Court explained the holding of Apprendi to defendant and asked: “Having been told . . . the government has the burden of proving that drug quantity beyond a reasonable doubt, do you still wish to go forward with your guilty plea?” Id. at 12. Defendant answered “Yes.” Id. In addition, on November 2, 2000, defendant signed a Guilty Plea Agreement Addendum, in which he stipulated that he was criminally responsible for possession with intent to distribute cocaine base (“crack”) which weighed 49.8 grams. Guilty Plea Agreement Addendum ¶¶ 12-13. The parties’ stipulation was based on “the final lab reports which showed a total quantity of 49.8 grams of crack cocaine.” Hines, No. 00-3806, slip. op. at 7. That quantity was slightly less than the drug quantity charged in the Superseding Indictment, which was 51.0 grams.

Moreover, to the extent that defendant invokes Apprendi, his claim cannot properly be asserted under § 3582(c)(2) because such a claim is not based on a retroactive amendment to the Sentencing Guidelines. See Jacobs, 162 Fed. App’x at 194. Rather, defendant was required to obtain the authorization of the Court of Appeals for the Third Circuit to file a second or

successive habeas corpus motion under 28 U.S.C. § 2255, and he failed to do so.

Thus, to the extent that defendant seeks to assert a claim under Apprendi, that claim is denied.

**C. A Certificate of Appealability Will 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 defendant 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, defendant’s *pro se* Motion for Reduction Modification [sic] of an Imposed Term of Imprisonment Pursuant to 18 U.S.C. § 3582(c)(2) is denied. Because defendant has not made the requisite showing of a denial of a constitutional right, a certificate of appealability will not issue.

**BY THE COURT:**

/s/ Honorable Jan E. DuBois

**JAN E. DUBOIS, J.**