

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA)	
)	
)	Case No. 2:04CR10064-005
)	
v.)	OPINION AND ORDER
)	
JAMES T. WIGNALL,)	By: James P. Jones
)	Chief United States District Judge
Defendant.)	

James T. Wignall, Pro Se Defendant.

The defendant has filed a “Motion for Reduction in Sentence Pursuant to Title 18 U.S.C. § 3582(c)(2),” in which he seeks to reduce his sentence because of a later amendment to the U.S. Sentencing Guidelines. The motion will be denied.

The defendant was sentenced by this court on September 27, 2005, to 100 months imprisonment. He asserts that he is entitled to a sentence reduction because thereafter the Sentencing Commission adopted Amendment 709 to the Sentencing Guidelines, altering the manner in which certain prior convictions may be counted in calculating a defendant’s criminal history category. *See* U.S. Sentencing Guideline Manual (“USSG”) app. C supp., amend. 709 (Nov. 1, 2007). According to the defendant, if this amendment were applied to him, he would be eligible for a reduction in sentence pursuant to 18 U.S.C.A. § 3582(c)(2) (West 2000).

The defendant concedes that Amendment 709 is not listed in the applicable Sentencing Commission policy statement, USSG § 1B1.10 (2008), but argues that the amendment is only “clarifying” and thus may be applied retroactively.

Unfortunately for the defendant, the law of this circuit is that only amendments listed in USSG § 1B1.10(c) may be the subject of a motion under 18 U.S.C.A. § 3582(c)(2). *United States v. McHan*, 386 F.3d 620, 622 (4th Cir. 2004). Where a case is on direct appeal and a clarifying amendment is effective after sentencing, the amendment may be applied retroactively, *see United States v. Capers*, 61 F.3d 1100, 1109 (4th Cir. 1995), but that rule does not apply to a later collateral motion under § 3582(c)(2).

For the foregoing reasons, it is **ORDERED** that the defendant’s motion (219) is DENIED.

ENTER: December 22, 2008

/s/ JAMES P. JONES
Chief United States District Judge