

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

United States of America,

Plaintiff,

v.

Shaun O'Brien Johnson,

Defendant.

CRIMINAL ACTION No. 6:05cr00021-1

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on Defendant's motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706,¹ as amended by 711, to the United States Sentencing Guidelines. (docket entry no. 35). For the following reasons, Defendant's motion is denied.

The Court sentenced Defendant on July 28, 2006, to a 120-month term of incarceration for the distribution of more than fifty grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). The Court found under the advisory guidelines that Defendant's Total Offense Level was 29 and his Criminal History Category was II, which resulted in an advisory guidelines range of 120 to 121 months of imprisonment.² Thus, the Court sentenced Defendant to the bottom of the applicable

¹The United States Sentencing Commission has amended the federal sentencing guidelines applicable to crack cocaine offenses. The Sentencing Commission has also decided, pursuant to its authority under 28 U.S.C. § 994(u), that effective March 3, 2008, the amendment will apply retroactively to offenders who were sentenced under prior versions of the Guidelines Manual and who are still incarcerated.

²Ordinarily, the bottom of the advisory guideline range would only be 97 months, but the charge to which Defendant pled guilty required a minimum term of incarceration of 120 months and, therefore, the bottom of the guidelines range could not be below the statutory mandatory minimum. See U.S.S.G. § 5G1.1(c)(2) ("[T]he sentence may be imposed at any point within the applicable guideline range, provided that the sentence is not less than any statutorily required minimum sentence.").

guideline range—the statutory mandatory minimum term of 120 months.

The Court is permitted to modify an imposed term of imprisonment in only limited circumstances. 18 U.S.C. § 3582(c). One of these circumstances arises when the term of imprisonment was based on a guidelines range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. § 3582(c)(2). The Court may only reduce the sentence, however, if the reduction is consistent with applicable policy statements issued by the Sentencing Commission. Id.

The applicable policy statement, U.S.S.G. § 1B1.10, provides that the Court shall determine the amended guideline range that would have been applicable to the defendant if the amendment had been in effect at the time the defendant was sentenced. U.S.S.G. § 1B1.10(b)(1). In this case, the amended guideline range is 120 months because the bottom of his range cannot be below the statutory minimum. As a result, Amendment 706 has no effect on Defendant's sentence and the Court has no authority to reduce his sentence. See U.S.S.G. § 1B1.10(b)(2)(A) (prohibiting district court from reducing a defendant's sentence below the minimum of the amended guideline range); id., comment 1(A)(ii) (providing that a defendant is not eligible for a reduction if the amendment does not lower the defendant's applicable guideline range because of a statutory provision, *e.g.*, a statutory mandatory minimum term of incarceration); see also United States v. Peters, 524 F.3d 905, 906 (8th Cir. 2008). Accordingly, it is hereby

ORDERED and ADJUDGED

that Defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 706, as amended by Amendment 711, shall be and hereby is DENIED.

The Clerk of the Court is hereby directed to send a copy of this Order to Defendant and counsel of record for the United States.

It is so ORDERED.

Entered this _____ day of June, 2008



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE