IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JACK ERVAN, III,

Defendant.

OPINION AND ORDER

99-cr-106-bbc

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On March 17, 2011, defendant Jack Ervan wrote to the court to ask for a sentence reduction under 18 U.S.C. § 3582(c)(2), in light of the United States Sentencing Commission's determination that undue disparities existed in the sentences for crack and powder cocaine offenses, that the sentences for crack cocaine were too high, that the disparities should be reduced by two levels and that the reduction should be retroactive. This is not the first time that defendant has asked for a sentence reduction under this statute; he filed exactly the same motion in 2008. I denied it at that time because granting the motion would not have led to any relief for defendant. I must deny it again because nothing has changed that would support a reduction. As I said in the 2008 order, dkt. #410, defendant's sentence was determined by the twenty-year maximum sentence set by statute,

not by the guidelines, which prescribed a sentence within the guideline range of 292-365 months.

18 U.S.C. § 3582(c)(2) authorizes courts to reduce a term of imprisonment for a defendant "who has been sentenced to a *term of imprisonment* that has subsequently been lowered by the Sentencing Commission." The italicized language is critical. Defendant received a sentence of 240 months in 2000 for a crack cocaine offense. At that time, his total offense level was 42. With a criminal history category of I, his guideline range was 360 months to life, but his "term of imprisonment" was established by statute as not exceeding 20 years or 240 months. That term was not lowered by the Sentencing Commission. Therefore, defendant is not entitled to any relief under § 3582(c)(2). United States v. Taylor, 627 F.3d 674 (7th Cir. 2010) ("Relief under [§ 3582(c)(2)] is not available when a retroactive amendment 'does not have the effect of lowering the defendant's applicable guideline range.'") (quoting U.S.S.G. § 1B1.10(a)(2)(b)). See also United States v. Washington, 618 F.3d 869 (8th Cir. 2010) (same).

Because defendant is not eligible for relief under § 3582(c)(2), I cannot consider his argument that Kimbrough v. United States, 522 U.S. 85 (2007), applies when a court is considering a motion for reduction under § 3582(c)(2), and allows the court to give an eligible offender any sentence it deems appropriate under 18 U.S.C. § 3553(a). That argument is doomed in any event by the Supreme Court's decision in Dillon v. United

States, 130 S. Ct. 2683 (2010), holding that the text of § 3582(c)(2) shows that Congress intended to limit any relief under the statute to a reduction consistent with applicable policy statements issued by the Sentencing Commission. U.S.S.G. § 1B1.10(b)(2)(A) confines the extent of the authorized reduction under Amendment 706 to a term that is not less than the minimum applicable under the amended guideline range. Id. at 2691.

ORDER

IT IS ORDERED that the motion for a reduction of sentence under 18 U.S.C. §3582(c)(2) filed by defendant Jack Ervan, III is DENIED.

Entered this 30th day of March, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge