IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

PEDRO ZAMORA,

Defendant.

OPINION AND ORDER

05-cr-39-bbc

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On January 14, 2011, defendant Pedro Zamora filed a motion for reduction of his sentence under 18 U.S.C. § 3582(c)(2). I read the motion, incorrectly, as asking for a reduction under the Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2(a)(2), 124 Stat. 2372 (2010), and denied it because the Act is not retroactive. United States v. Bell, 624 F.3d 803 (7th Cir. 2010). Defendant has responded to the order with a motion for relief from judgment under Fed. R. Civ. P. 60(b), contending that the court erred in not considering his motion as one brought under § 3582(c)(2). Defendant is correct in pointing out the error; unfortunately for him, correcting it does not mean that his sentence can be reduced.

In his motion for relief from judgment, defendant makes it clear that he is basing his

motion for reduction on the Sentencing Commission's Amendment 706, which had the effect of lowering the guidelines for many crack cocaine offenses by two levels. The amendment has retroactive effect. Amendment 713.

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 language is critical. Defendant received a sentence of 360 months in 2006, after he had been convicted of conspiring to distribute more than 50 grams of crack cocaine. At that time, his total offense level was 42. With a criminal history category of III, his guideline range was 360 months to life. (He was also given a sentence of 240 months on a separate charge of maintaining a drug house, but that sentence runs concurrently with the 360-month sentence and can be ignored.) His guideline term of imprisonment range would remain the same if his total offense level were lowered to 40. 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. A court is authorized to impose a sentence below the amended guideline range only if the original sentence was below the guideline range, id. at 2691, which defendant's was not. In short, "§ 3582(c)(2) does not authorize a resentencing. Instead, it permits a sentence reduction only within the narrow bounds established by the Commission." Id. at 2694.

ORDER

IT IS ORDERED that defendant Pedro Zamoro's motion under 18 U.S.C. §

3582(c)(2) for a reduction in his sentence is DENIED.

Entered this 23d day of March, 2011.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge