

## Appendix - A

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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No: 18-2251

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United States of America

Plaintiff - Appellee

v.

Marcus Jermaine Royston, also known as BD

Defendant - Appellant

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Appeal from U.S. District Court for the District of North Dakota - Fargo  
(3:09-cr-00155-DLH-2)

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**JUDGMENT**

Before BENTON, SHEPHERD and STRAS, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the district court is summarily affirmed. See Eighth Circuit Rule 47A(a). The motion to supplement the record is denied.

July 26, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. The motion for appointment of counsel is denied.

Judge Erickson did not participate in the consideration or decision of this matter.

September 13, 2018

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

## Appendix - B

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA**

Before the Court is Defendant Marcus Royston's *pro se* "Motion Seeking Reduction in Sentence, Pursuant to § 3582(c)(2), Amendments 750 and Amendment 782" filed on November 20, 2017. See Docket No. 746. The Defendant also filed supplements in support of his motion. See Docket Nos. 746, 747, and 750. On December 8, 2017, the Federal Public Defender's Office filed a supplement indicating it had no additional materials or information to present to the Court and requesting the issues be decided based on the Defendant's *pro se* motion. See Docket No. 748. The Government filed a response in opposition on April 13, 2018. See Docket No. 756. No reply was filed. For the reasons set forth below, Royston's motion is denied.

## I. BACKGROUND

On December 10, 2009, a federal grand jury indicted Royston with 1) one count of conspiracy to possess with intent to distribute and distribute more than 50 grams of cocaine base, and more than 500 grams of a mixture and substance containing a detectable amount of cocaine and marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846 and 18 U.S.C. § 2 (Count One); and 2) one count of distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Twelve). See Docket No. 2, pp. 1-3, 14. On February 24, 2010, the Government

filed a Notice Regarding Prior Convictions for Enhanced Sentence, pursuant to 21 U.S.C. § 851(a)(1). See Docket No. 120. Due to Royston's two prior convictions for felony drugs offenses, this notice triggered a mandatory sentence of life imprisonment upon conviction for Count One and increased the maximum sentence to 30 years upon conviction for Count Twelve. See Docket No. 120.

Following a jury trial, Royston was found guilty of both counts on May 28, 2010. See Docket No. 322. The Presentence Investigation Report ("PSR") determined the base offense level for Count One was 32, and the base offense level for Count Twelve was 14. See Docket No. 369, pp. 11-12. The PSR calculated that, with grouping, Royston's total adjusted offense level was 32. See Docket No. 369, p. 12. The PSR also determined Royston met the qualifications for being classified as a career offender under U.S.S.G. § 4B1.1(a), thereby increasing the offense level to 37. See Docket No. 369, p. 12. The PSR determined Royston's criminal history category was VI. See Docket No. 369, p. 16. With a total offense level of 37 and a criminal history category of VI, the PSR determined the advisory Sentencing Guideline range was 360 months to life imprisonment; however, pursuant to 21 U.S.C. § 841(b)(1)(A), Count One had a statutory mandatory term of life imprisonment. See Docket No. 369, p. 21. At the sentencing hearing on August 30, 2010, the district court also found Royston was a career offender, and Royston was sentenced to the statutory mandatory term of life imprisonment. See Dockets Nos. 388, 392, and 461. Judgment was entered on September 1, 2010. See Dockets No. 392.

Royston appealed, and on August 2, 2012, the Eighth Circuit Court of Appeals affirmed his conviction, but vacated his sentence and remanded for resentencing pursuant to the United States Supreme Court's retroactive application of the Fair Sentencing Act of 2010 ("FSA"), Pub. L. 111-220. See Docket No. 558. The Eighth Circuit noted the FSA amended 21 U.S.C. §

Royston is now requesting a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendments 750 and 782 to the United States Sentencing Guidelines. See Docket No. 746. The Government opposes the motion, arguing Royston is not entitled to a reduction in his sentence because he was sentenced as a career offender. See Docket No. 756.

## II. LEGAL ANALYSIS

### A. Amendment 750

Royston argues he was entitled to, but did not receive, the benefit of Amendment 750 when he was resentenced following remand from the Eighth Circuit. Royston now seeks a reduction in his sentence under 18 U.S.C. § 3582(c)(2), based on Amendment 750. The Government argues Royston's status as a career offender under U.S.S.G. § 4B1.1(b) makes him ineligible for relief under Amendment 750. See Docket No. 756, p. 4.

The United States Sentencing Commission passed Amendment 750 in response to the FSA, which changed the statutory penalties for crack cocaine offenses. See U.S.S.G. App. C, Amend. 750; 28 U.S.C. § 994(o) (authorizing changes in the guidelines). Amendment 750 reduced the drug quantity offenses level in U.S.S.G. § 2D1.1 for certain crack cocaine offenses. The Sentencing Commission later adopted Amendment 759 which made Amendment 750 retroactive.

18 U.S.C. § 3582(c)(2) provides that a court may not modify a term of imprisonment once it has been imposed except:

in 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 . . . upon motion of the defendant . . . 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.

According to the policy statement applicable to 18 U.S.C. § 3582(c)(2), “A reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if . . . [the] amendment . . . does not have the effect of lowering the defendant’s applicable guideline range.” U.S.S.G. § 1B1.10(a)(2). Thus,

[i]n determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment[ ] to the guidelines . . . had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendment[ ] . . . for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

U.S.S.G. § 1B1.10(b)(1); see also U.S.S.G. § 1B1.10, App. Note 1(A) (“[A] reduction in the defendant’s term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if . . . an amendment [to the guidelines] is applicable to the defendant but the amendment does not have the effect of lowering the defendant’s applicable guideline range because of the operation of another guideline or statutory provision”). The Sentencing Commission also noted that not all crack cocaine offenders would receive a lower sentence as a result of Amendment 750, noting some offenders are sentenced as career offenders, pursuant to U.S.S.G. § 4B1.1, which results in Sentencing Guideline ranges that are unaffected by a reduction in the drug quantity table. See U.S.S.G. App. C, Vol III, Amend. 750, p. 394.

The Eighth Circuit has construed these guideline provisions and the applicable policy statements and has held “[w]hen a defendant is found to be a career offender [and is sentenced] under [U.S.S.G.] section 4B1.1, the applicable [G]uideline[s] range under section 3582(c)(2) is his career[-]offender range, even if the actual sentence is a downward departure [or variance] from it.” United States v. Harris, 688 F.3d 950, 952-53 (8th Cir. 2012) (quoting United States v. Blackmon, 584 F.3d 1115, 1116 (8th Cir. 2009)). Thus, a defendant is not eligible for a reduced

sentence based on amendments to the crack cocaine guidelines in U.S.S.G. § 2D1.1 if his sentence was not based on the crack cocaine guidelines but, rather, on the applicable career offender range set forth in U.S.S.G. § 4B1.1(b). Harris, 688 F.3d at 953.

On remand from the Eighth Circuit, the district court sentenced Royston under the career offender guideline. With a total offense level of 37 and a criminal history category of VI as a result of his career offender status under § 4B1.1(b), the district court determined Royston's advisory Sentencing Guideline range was 360 months to life imprisonment. See Docket No. 738, p. 4. Royston's defense counsel at the resentencing hearing argued categorizing Royston as a career offender "overstates [his] criminal history" because the convictions were older, and one conviction occurred when Royston was a juvenile. See Docket No. 738, p. 11. The district court rejected that argument, stating, "The defendant is a career offender and by any rational analysis of the history of convictions he's a career offender . . . it appears to me that no plausible argument can be advanced that he is not a career offender under the application of the guidelines . . ." See Docket No. 738, pp. 21-22.

The record is clear that the district court sentenced Royston as a career offender under U.S.S.G. § 4B1.1(b), not under U.S.S.G. § 2D1.1. Accordingly, this Court finds Royston is not eligible for a reduced sentence under Amendment 750 because his sentence was not based on the crack-cocaine guidelines but, rather, on the applicable career offender range set forth in U.S.S.G. § 4B1.1(b). See Harris, 688 F.3d at 953.

**B. Amendment 782**

Royston also argues he is entitled to a sentence reduction under Amendment 782, pursuant to Section 3582(c)(2). The Government argues Royston is not entitled to the relief he seeks. See Docket No. 756, p. 7.

A district court may reduce a term of imprisonment that was previously imposed if the defendant's sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). A defendant's sentence may be reduced under Section 3582(c)(2) if a guidelines amendment which has been made retroactive reduces a defendant's applicable guidelines range. See U.S.S.G. § 1B1.10(a). The United States Supreme Court has directed that, at resentencing, the district court "shall substitute" the amended Sentencing Guidelines range for the initial range, "and shall leave all other guideline application decisions unaffected." Dillon v. United States, 560 U.S. 817, 831 (2010) (quoting U.S.S.G. § 1B1.10(b)(1)).

Amendment 782 became effective on November 1, 2014, and retroactively lowered by two levels the base offense level for most drug quantity offenses under U.S.S.G. § 2D1.1. See United States v. Lawin, 779 F.3d 780, 781 n. 2 (8th Cir. 2015); United States v. Thomas, 775 F.3d 982, 982-83 (8th Cir. 2014). Under the version of U.S.S.G. § 2D1.1 in effect at the time of Royston's resentencing, Royston's base offense level was 32. See Docket No. 369, pp. 11-12. Amendment 782 reduced that base offense level to 30. U.S.S.G. § 2D1.1(5). However, it did not lower the offense level for a career offender under U.S.S.G. § 4B1.1, which was the guideline under which the district court calculated Royston's Sentencing Guideline range at his resentencing. See Thomas, 775 F.3d at 983.

At Royston's resentencing hearing on November 14, 2012, the district court determined Royston qualified as a career offender under U.S.S.G. § 4B1.1, the total offense level was 37, and his criminal history category was VI. See Docket No. 738, p. 4. The district court determined Royston's advisory Sentencing Guidelines range was 360 months to life imprisonment. See Docket No. 763, p. 4. Amendment 782 does not apply in this case because the Defendant's Sentencing Guideline range was established by U.S.S.G. § 4B1.1, rather than U.S.S.G. § 2D1.1. Because the career offender guideline drove Royston's advisory Sentencing Guideline range, Amendment 782 has no effect on the "applicable guidelines range" that guided the district court's analysis at resentencing. See Thomas, 775 F.3d at 983. Accordingly, the Court finds Royston is ineligible for a Section 3582(c)(2) reduction based on Amendment 782. See id. Therefore, the Defendant is not entitled to the relief he seeks.

### **III. CONCLUSION**

The Court has carefully reviewed the entire record, the parties' briefs, and relevant case law. For the reasons set forth above, Royston's motion to reduce his sentence (Docket No. 746) is **DENIED**.

**IT IS SO ORDERED.**

Dated this 21st day of May, 2018.

/s/ Daniel L. Hovland  
Daniel L. Hovland, Chief Judge  
United States District Court

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA**

Before the Court is the Defendant's *pro se* "Motion to Add Clarity to Motion to Supplement Record in Regards to 3582(c)(2) Motion" filed on July 23, 2018. See Docket No. 774.

On November 20, 2017, Royston filed a motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendments 750 and 782 to the United States Sentencing Guidelines. See Docket No. 746. On May 21, 2018, the Court denied Royston's motion, finding Royston was not eligible for a reduction because his sentence was not based on the crack-cocaine guidelines, but rather the career offender guideline. See Docket No. 759. On June 7, 2018, Royston filed a motion for reconsideration which the Court denied, finding no basis to reconsider or vacate its prior order. See Docket Nos. 766 and 767. Royston subsequently filed motions to supplement his motion for reconsideration; however, the Court found both motions moot as it found the record was clear that the district court resentenced Royston as a career offender. See Docket Nos. 769, 770, and 772.

Royston's current motion simply reiterates his previous arguments which the Court has previously determined are without merit. The Court has thoroughly reviewed the record in this case, and has previously adequately addressed Royston's arguments in its prior orders. The Court continues to find no basis to reconsider or vacate the Court's prior orders on the Defendant's

motion for a sentence reduction and his motion for reconsideration. Accordingly, the Court **DENIES** Royston's motion (Docket No. 774).

**IT IS SO ORDERED.**

Dated this 23rd day of July, 2018.

*/s/ Daniel L. Hovland*  
Daniel L. Hovland, Chief Judge  
United States District Court