

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSE HERNANDEZ-MARTINEZ, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME 3

Stephen R. Sady
Chief Deputy Federal Public Defender
Counsel of Record
Elizabeth G. Daily
Assistant Federal Public Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123

Attorneys for Petitioners

INDEX TO APPENDIX

U.S.S.G. 1B1.10 (2018)	179
Historical Versions Of 1B1.10 with Reasons for Amendment	
November 1, 1989	187
November 1, 1991	189
November 1, 1994	191
November 1, 1995	193
November 1, 1997	195
November 1, 2008	198
November 1, 2011	204
November 1, 2014	212

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority—

- (1) **In General**.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) **Exclusions**.—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—
 - (A) none of the amendments listed in subsection (d) is applicable to the defendant; or
 - (B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.
- (3) **Limitation**.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant

(b) Determination of Reduction in Term of Imprisonment.—

- (1) **In General**.—In 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(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
- (2) **Limitation and Prohibition on Extent of Reduction**.— Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
 - (A) **Limitation**.— Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
 - (B) **Exception for Substantial Assistance**.— If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction

comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, 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: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) 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 (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.— The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection(b)(1).— In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.
3. Application of Subsection (b)(2).— Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.
If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.
Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. *Application of Subsection (c).*— As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. *Application to Amendment 750 (Parts A and C Only).*— As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables (currently called Drug Conversion Tables) in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.
6. *Application to Amendment 782.*— As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. *Supervised Release.*—
 - (A) *Exclusion Relating to Revocation.*— Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.
 - (B) *Modification Relating to Early Termination.*— If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would

have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

8. Use of Policy Statement in Effect on Date of Reduction.— Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.”

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.” The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See *Dillon v. United States*, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: “It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.” S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

*So in original. Probably should be “to fall above the amended guidelines”.

Historical Note: Effective November 1, 1989 (amendment 306). Amended effective November 1, 1990 (amendment 360); November 1, 1991 (amendment 423); November 1, 1992 (amendment

469); November 1, 1993 (amendment 502); November 1, 1994 (amendment 504); November 1, 1995 (amendment 536); November 1, 1997 (amendment 548); November 1, 2000 (amendment 607); November 5, 2003 (amendment 662); November 1, 2007 (amendment 710); March 3, 2008 (amendments 712 and 713); May 1, 2008 (amendment 716); November 1, 2011 (amendment 759); November 1, 2012 (amendment 770); November 1, 2014 (amendments 780, 788, and 789); November 1, 2018 (amendment 808).

Historical Versions of U.S.S.G. § 1B1.10 Guidelines and Commentary
From 1989 to 2018

November 1, 1989

November 1, 1991

November 1, 1994

November 1, 1995

November 1, 1997

November 1, 2008

November 1, 2011

November 1, 2014

Original Form of U.S.S.G. § 1B1.10 in 1989

§1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.
- (b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.
- (c) Provided, however, that a reduction in a defendant's term of imprisonment—
 - (1) is not authorized unless the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered by at least six months; and
 - (2) may, in no event, exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.
- (d) Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, and 269.

Commentary

Application Note:

1. *Although eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect).*

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.”

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively.

The requirement in subsection (c)(1) that the maximum of the guideline range be lowered by at least six months for a reduction to be considered is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly §994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 98-225, 98th Cong., 1st Sess. 180 (1983).

Reason for 1989 Amendment

The purpose of this amendment is to implement the directive in 28 U.S.C. § 994(u). U.S.S.G. App. C (Vol. I), Amend. 306 (Nov. 1, 1989), at 152.

November 1, 1991

§1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, a reduction in the defendant's term of imprisonment may be considered under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement.
- (b) In determining whether a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have originally imposed had the guidelines, as amended, been in effect at that time.
- (c) *Provided*, that a reduction in a defendant's term of imprisonment may, in no event exceed the number of months by which the maximum of the guideline range applicable to the defendant (from Chapter Five, Part A) has been lowered.
- (d) Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, 269, 329, 341, 379, and 380.

Commentary

Application Note:

1. *Although eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) of this section, the amended guideline range referred to in subsections (b) and (c) of this section is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect).*

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.”

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. The criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

Reason for 1991 Amendment

This amendment expands the listing in subsection (d) to implement the directive in 28 U.S.C. § 994(u) in respect to the guideline amendments effective November 1, 1991. In addition, the amendment modifies subsection (c) to simplify the operation of this policy statement, expand eligibility under the policy statement to a few additional cases, and remove the potential for an anomalous result.

U.S.S.G. App. C (Vol. I), Amend. 423 (Nov. 1, 1991), at 299.

November 1, 1994

§1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.
- (b) In determining whether, and to what extent, a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.
- (c) Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, and 506.

Commentary

Application Notes:

1. *Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.*
2. *In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.”

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guidelines range made by the amendment, and the difficulty of applying the amendment retroactively.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. The criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

Reason for 1994 Amendment

This amendment simplifies the operation of §1B1.10 by providing that, in determining an amended guideline range, the court will use only those amendments expressly designated as retroactive. In addition, this amendment deletes §1B1.10(c), a rather complex subsection, as an unnecessary restriction on the court's consideration of a revised sentence, redesignated §1B1.10(d) as §1B1.10(c), and make a number of minor clarifying revisions. This amendment also expands the listing in §1B1.10(c) (formerly §1B1.10(d)) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application.

U.S.S.G. App. C (Vol. I) Amend. 504 (Nov. 1, 1993), at 414-415.

November 1, 1995

§1B1.10. Retroactivity of Amended Guideline Range (Policy Statement)

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.
- (b) In determining whether, and to what extent, a reduction in sentence is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the sentence that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.
- (c) Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, and 516.

Commentary

Application Notes:

1. *Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.*
2. *In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.”

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guidelines range made by the amendment, and the difficulty of applying the amendment retroactively.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 98-225, 98th Cong., 1st Sess. 180 (1983).

Reason for 1995 Amendment

This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 994(u) in respect to guideline amendments that may be considered for retroactive application. The amendment also makes an editorial addition to the Commentary to §1B1.10 (Retroactivity of Amended Guideline Range).

U.S.S.G. App. C (Vol. I), Amend. 536 (Nov. 1, 1995), at 468-69.

November 1, 1997

§1B1.10. Reduction in Term of Imprisonment As a Result of Amended Guideline Range (Policy Statement)

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.
- (b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.
- (c) Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, and 516.

Commentary

Application Notes:

1. *Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.*
2. *In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*
3. *Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.*
4. *Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.*
5. *If the limitation in subsection (b) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range, the court may consider any such reduction that it was unable to grant in connection with any motion for early termination*

of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment that the court determines would have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range.

Background: Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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.”

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guidelines range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection(b).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. The criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: “It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.” S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

**So in original. Probably should be “to fall above the amended guidelines.”*

Reason for 1997 Amendment

This amendment makes a number of substantive and clarifying changes in the policy statement relating to retroactive application of an amendment that reduces a guideline range. The amendment provides that, in exercising discretion to reduce the term of imprisonment for an

incarcerated defendant, a court may not reduce the term of imprisonment below time served (or, put differently, grant a greater reduction in imprisonment than the imprisonment time remaining to be served). In those cases in which the combination of time already served and this limitation preclude a defendant from receiving the full reduction the court would be inclined to grant as a result of an amended guideline range, the amended commentary instructs that the court may weigh the equities of such a situation in connection with a separate motion for early termination of supervised release under 18 U.S.C. § 3583(e)(1). The amendment also makes clear that, contrary to the holding in United States v. Etherton, 101 F.3d 80 (9th Cir. 1996), a reduction in the term of imprisonment imposed upon revocation of supervised release is not authorized by the policy statement. Finally, the amendment makes a number of changes in the title and text of the policy statement to improve the precision of the language, adds commentary emphasizing court discretion in applying amendments that the Commission has listed for possible retroactive application, and adds background commentary more fully describing the legal consequences flowing from Commission decision to list an amendment for possible retroactive application, and adds background commentary more fully describing the legal consequences flowing from a Commission decision to list an amendment for possible retroactive application.

U.S.S.G. App. C. (Vol. I) Amend. 548 (Nov. 1, 1997) at 502-03

November 1, 2008

§1B1.10. Reduction in Term of Imprisonment As a Result of Amended Guideline Range (Policy Statement)

(a) Authority

- (1) **In General**.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) **Exclusions**.—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—
 - (A) none of the amendments listed in subsection (c) is applicable to the defendant; or
 - (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.
- (3) **Limitation**.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment

- (1) **In General**.—In 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(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
- (2) **Limitations and Prohibition on Extent of Reduction**.—
 - (A) **In General**.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
 - (B) **Exception**.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.
 - (C) **Prohibition**.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.—Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, 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 (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) 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 (e.g. a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

- (i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection(b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.
3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection(b)(1). For example, in a case in

which: (A) the guideline range applicable to the defendant at the time of sentencing was 41-51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection(b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection(b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection(b)(1)) would amount to a comparable reduction and be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly section 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

**So in original. Probably should be "to fall above the amended guidelines."*

Reasons for 2008 Amendments

Amendment 712

This amendment makes a number of modifications to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) to clarify when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. 3582(c)(2).

The amendment modifies subsection (a) to state the statutory requirement under 18 U.S.C. 3582(c)(2) that a reduction in the defendant's term of imprisonment be consistent with the policy statement. The amendment also modifies subsection (a) to state that, consistent with subsection (b), proceedings under 18 U.S.C. 3582(c)(2) do not constitute a full resentencing of the defendant.

In addition, the amendment amends subsection (a) to clarify circumstances in which a reduction in the defendant's term of imprisonment is not consistent with the policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2). Specifically, the amendment provides that a reduction in the defendant's term of imprisonment is not consistent with § 1B1.10 and therefore is not authorized under 18 U.S.C. 3582(c)(2) if (1) none of the amendments listed in subsection (c) is applicable to the defendant; or (2) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range. Application Note 1 provides further explanation that an amendment may be listed in subsection (c) but not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment). In such a case, a reduction in the defendant's term of imprisonment is not consistent with § 1B1.10 and therefore is not authorized under 18 U.S.C. 3582(c)(2).

The amendment modifies subsection (b) to clarify the limitations on the extent to which a court may reduce the defendant's term of imprisonment under 18 U.S.C. 582(c)(2) and § 1B1.10. Specifically, in subsection (b)(1) the amendment provides that, in determining whether, and to what extent, a reduction in the defendant's term of imprisonment is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced, substituting only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and leaving all other guideline application decisions unaffected.

In subsection (b)(2) the amendment provides further clarification that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range, except if the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate. The amendment clarifies that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served. The amendment adds in Application Note 3 examples illustrating the limitations on the extent to which a court may reduce a defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and § 1B1.10.

The amendment also modifies Application Note 1 to delineate more clearly factors for consideration by the court in determining whether, and to what extent, a reduction in the defendant's term of imprisonment is warranted under 18 U.S.C. 3582(c)(2). Specifically, the amendment provides that the court shall consider the factors set forth in 18 U.S.C. 3553(a), as required by 18 U.S.C. 3582(c)(2), and the nature and seriousness of the danger to any person or the community that may be posed by such a reduction, but only within the limits described in subsection (b). In addition, the amendment provides that the court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment, but only within the limits described in subsection (b).

The amendment makes conforming changes and adds headings to the application notes, and makes conforming changes to the background commentary.

U.S.S.G. App. C (Vol. III), Amend. 712 (Mar. 3, 2008), at 252-53.

Amendment 713

This amendment expands the listing in § 1B1.10(c) to implement the directive in 28 U.S.C. 994(u) with respect to guideline amendments that may be considered for retroactive application. The Commission has determined that Amendment 706, as amended by Amendment 711, should be applied retroactively because the applicable standards set forth in the background commentary to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) appear to be met. Specifically: (1) As stated in the reason for amendment accompanying Amendment 706, the purpose of that amendment was to alleviate some of the urgent and compelling problems associated with the penalty structure for crack cocaine offenses; (2) the Commission's analysis of cases potentially eligible for retroactive application of Amendment 706 (available on the Commission's Web site at <http://www.ussc.gov>) indicates that the number of cases potentially involved is substantial, and the magnitude of the change in the guideline range, i.e., two levels, is not difficult to apply in individual cases; and (3) the Commission received persuasive written comment and testimony at its November 13, 2007 public hearing on retroactivity that the administrative burdens of applying Amendment 706 retroactively are manageable. In addition, public safety will be considered in every case because § 1B1.10, as amended by Amendment 712, requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction.

U.S.S.G. App. C. (Vol. III), Amend. 713 (Mar. 3, 2008), at 253.

Amendment 716

This amendment expands the listing in §1B1.10(c) (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to include Amendment 715 as an amendment that may be applied retroactively pursuant to 28 U.S.C. § 994(u). The Commission determined for the same reasons accompanying Amendment 713 that Amendment 715 also should be applied retroactively (see Amendment 713).

U.S.S.G. App. C (Vol. III), Amend. 716 (May 1, 2008), at 258-59.

November 1, 2011

§1B1.10. Reduction in Term of Imprisonment As a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

- (1) **In General**.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) **Exclusions**.—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—
 - (A) none of the amendments listed in subsection (c) is applicable to the defendant; or
 - (B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.
- (3) **Limitation**.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

- (1) **In General**.—In 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(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
- (2) **Limitation and Prohibition on Extent of Reduction**.—
 - (A) **Limitation**.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
 - (B) **Exception for Substantial Assistance**.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.
 - (C) **Prohibition**.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.—Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, and 750 (parts A and C only).

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, 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 (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effects of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g. a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection(b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as

provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of the sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application to Amendment 750 (Parts A and C only).--As specified in subsection (c), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in § 2D1.1 for crack cocaine and made related revisions to the Application Note 10 to § 2D1.1. Part C deleted the cross reference in §

2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1.

5. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

6. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the

guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly section 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

**So in original. Probably should be "to fall above the amended guidelines."*

Reasons for 2011 Amendment

This amendment amends §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement) in four ways. First, it expands the listing in §1B1.10(c) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. Second, it amends §1B1.a0 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guidelines range at the time of sentencing. Third, it amends the commentary to § 1B1.10 to address an application issue about what constitutes the "applicable guideline range" to purposes of § 1B1.10. Fourth, it adds an application note to §1B1.10 to specify that the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

First, the Commission has determined, under the applicable standards set forth in the background commentary to §1B1.10, that Amendment 750 (Parts A and C only) should be included in §1B1.10(c) as an amendment that may be considered for retroactive application. Part A amended the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

Under the applicable standards set forth in the background commentary to §1B1.10, the Commission considers, among other factors, (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See §1B1.10, comment. (backg'd.). Applying those

standards to Parts A and C of Amendment 750, the Commission determined that, among other factors:

(1) The purposes of Parts A and C of Amendment 750 was to account for the changes in the statutory penalties made by the Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372, for offenses involving cocaine base (“crack cocaine”). See USSG App. C, Amend. 750 (Reason for Amendment). The Fair Sentencing Act of 2010 did not contain a provision making the statutory changes retroactive. The Act directed the Commission to promulgate guideline amendments implementing the Act. The guideline amendments implementing the Act have the effect of reducing the term of imprisonment recommended in the guidelines for certain defendants, and the Commission has a statutory duty to consider whether the resulting guideline amendments should be made available for retroactive application. See 28 U.S.C. § 994(u) (“If the Commission reduces the term of imprisonment recommended in the guidelines . . . it shall specify in what circumstances and by what amount sentences of prisoners . . . may be reduced.”). In carrying out its statutory duty to consider whether to give Amendment 750 retroactive effect, the Commission also considered the purpose of the underlying statutory changes made by the Act. Those statutory changes reflect congressional action consistent with the Commission’s long-held position that the then-existing statutory penalty structure for crack cocaine “significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere” (see USSG App. C., Amend. 706 (Reason for Amendment)). The Fair Sentencing Act of 2010 specified in its statutory text that its purpose was to “restore fairness to Federal cocaine sentencing” and provide “cocaine sentencing disparity reduction”. See 124 Stat. at 2372.

It is important to note that the inclusion of Amendment 750 (Parts A and C) in §1B1.10(c) only allows the guideline changes to be considered for retroactive application; it does not make any of the statutory changes in the Fair Sentencing Act of 2010 retroactive.

- (2) The number of cases potentially involved is substantial, and the magnitude of the change in the guideline range is significant. As indicated in the Commission’s analysis of cases potentially eligible for retroactive application of Parts A and C of Amendment 750, approximately 12,000 offenders would be eligible to seek a reduced sentence and the average sentence reduction would be approximately 23 percent.
- (3) The administrative burdens of applying Parts A and C of Amendment 750 retroactively are manageable. This determination was informed by testimony at the Commission’s June 1, 2011, public hearing on retroactivity. The Commission also considered the administrative burdens that were involved when its 2007 crack cocaine amendments were applied retroactively. See USSG App. C, Amendments 706 and 711 (amending the guidelines applicable to crack cocaine, effective November 1, 2007) and Amendment 713 (expanding the listing in §1B1.10(c) to include Amendments 706 and 711 as amendments that may be considered for retroactive application, effective March 3, 2008). The Commission received comment and testimony indicating that those burdens were manageable and that motions routinely were decided based on the filings, without the need for a hearing or the presence of the defendant, and did not constitute full resentencings. The Commission determined that applying Parts A and C of Amendment 750 would likewise be manageable, given that, among other things, significantly fewer

cases would be involved. As indicated in the Commission's Preliminary Crack Cocaine Retroactivity Report (April 2011 Data) regarding retroactive application of the 2007 crack cocaine amendments, approximately 25,500 offenders have requested a sentence reduction pursuant to retroactive application of the 2007 crack cocaine amendments and approximately 16,500 of those requests have been granted.

In addition, public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. See § 1B1.10, comment.(n.1(B)(ii)).

Second, in light of public comment and testimony and recent case law, the amendment amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of applicable guideline range at the time of sentencing. Under the amendment, the general limitation in subsection (b)(2)(A) continues to be that the court shall not reduce the defendant's term of imprisonment to a term that less than the minimum of the amended guideline range. The amendment restricts the exception in subsection (b)(2)(B) to cases involving a government motion to reflect the defendant's substantial assistance to authorities (*i.e.*, under §5K1.1 (Substantial Assistance to Authorities), 18 U.S.C. § 3353€, or Fed. R. Crim. P. 35(b)). For those cases, a reduction comparably less than the amended guideline range may be appropriate.

The version of §1B1.10 currently in effect draws a different distinction for cases in which the term of imprisonment was less than the minimum of the applicable guideline range, one rule of downward departures (stating that "a reduction comparably less than the amended guideline range . . . may be appropriate") and another rule for variances (stating that "a further reduction generally would not be appropriate"). See § 1B1.10(b)(2)(B). The Commission has received public comment and testimony indicating that this distinction has been difficult to apply and has prompted litigation. The Commission has determined that, in the specific context of § 1B1.10, a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases. The limitation that prohibits a reduction below the amended guideline range in such cases promotes conformity with the amended guideline range and avoids undue complexity and litigation.

Nonetheless, the Commission has determined that, in a case in which the term of imprisonment was below the guideline range pursuant to a government motion to reflect the defendant's substantial assistance to authorities (*e.g.*, under §5K1.1), a reduction comparably less than the amended guideline range may be appropriate. Section 5K1.1 implements the directive to the Commission in its organic statute to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in investigation or prosecution of another person who has committed an offense." See 28 U.S.C. § 994(n). For other provisions authorizing such a government motion, see 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance); Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect a defendant's substantial assistance). The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are

subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.

Third, the amendment amends the commentary to §1B1.10 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies a departure provision before determining the “applicable guideline range” for purposes of §1B1.10. The First, Second, and Fourth Circuits have held that, for §1B1.10 purposes, at least some departures (e.g., departures under §4A1.3 (Departures Based on Inadequacy of Criminal History Category) (Policy Statement)) are considered before determining the applicable guideline range, while the Sixth, Eighth, and Tenth Circuits have held that “the only applicable guideline range is one established before any departures”. See United States v. Guyton, 636 F.3d 316, 320 (7th Cir. 2011) (collecting and discussing cases; holding that departures under §5K1.1 are considered after determining the applicable guideline range but declining to address whether departures under §4A1.3 are considered before or after). Effective November 1, 2010, the Commission amended §1B1.1 (Application Instructions) to provide a three-step approach in determining the sentence to be imposed. See USSG App. C, Amend. 741 (reason for Amendment). Under §1B1.1 as so amended, the court first determines the guideline range and then considers departures. Id. (“As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted.”). Consistent with the three-step approach adopted by Amendment 741 and reflected in §1B1.1, the amendment adopts the approach of the Sixth, Eighth, and Tenth Circuits and amends Application Note 1 to clarify that the applicable guideline range referred to in §1B1.10 is the guideline range determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.

Fourth, the amendment adds an application note to §1B1.10 to specify that, consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Finally, the amendment amends the commentary to §1B1.10 to refer to Dillon v. United States, 130 S. Ct. 2683 (2010). In Dillon, the Supreme Court concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and that § 1B1.10 remains binding on courts in such proceedings.

U.S.S.G. App. C (Vol. I), Amend. 759 (Nov. 1, 2001), at 416-21.

November 1, 2014

§1B1.10. Reduction in Term of Imprisonment As a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

- (1) **In General**.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
- (2) **Exclusions**.—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--
 - (A) none of the amendments listed in subsection (d) is applicable to the defendant; or
 - (B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.
- (3) **Limitation**.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.

- (4) **In General**.—In 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(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.
- (5) **Limitation and Prohibition on Extent of Reduction.**
 - (A) **Limitation**.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
 - (B) **Exception for Substantial Assistance**.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.
 - (C) **Prohibition**.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing of a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).

(d) Covered Amendments.—Amendments covered by this policy statement are listed in Addendum C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.—

(1) The court shall not order a reduced term of imprisonment based on 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection(d) that lowers the applicable guideline range (i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, 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 (i) none of the amendments listed in subsection (d) 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 (e.g. a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is

warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection(b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.
3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined by subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of the sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment , but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are § 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the

defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. *See* subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of § 5.G1.1 (Sentencing on a Single count of Conviction) and § 5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

(A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

(B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. *See* § 5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, § 5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. *See* § 5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of § 5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum

of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. **Application to Amendment 750 (Parts A and C Only)**.—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in § 2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to § 2D1.1 (*see* § 2D1.1, comment. (n.8)). Part C deleted the cross reference in § 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under § 2D1.1.
6. **Application to Amendment 782**.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

7. **Supervised Release**.—
 - (A) **Exclusion Relating to Revocation**.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.
 - (B) **Modification Relating to Early Termination**.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).
8. **Use of Policy Statement in Effect on Date of Reduction**.—Consistent with subsection (a) of § 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n 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 pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, 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."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 560 U.S. 817 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly section 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

*So in original. Probably should be "to fall above the amended guidelines".

Reasons for 2014 Amendments

Reason for Amendment 780

This amendment clarifies an application issue that has arisen with respect to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Circuits have conflicting interpretations of when, if at all, §1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be

reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below the statutory minimum due to substantial assistance.

This issue arises in two situations. First, there are cases in which the defendant's original guideline range was above the mandatory minimum but the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum pursuant to a government motion for substantial assistance. For example, consider a case in which the mandatory minimum was 240 months, the original guideline range was 262 to 327 months, and the defendant's original sentence was 160 months, representing a 39 percent reduction for substantial assistance below the bottom of the guideline range. In a sentence reduction proceeding pursuant to Amendment 7590, the amended guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the "trumping" mechanism in §5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. See §5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eighth Circuit has taken the view that the bottom of the amended guideline range in such a case would be 240 months, *i.e.*, the guideline sentence that results after application of the "trumping" mechanism in §5G1.1. See United States v. Golden, 709 F.3d 1229-1231-33 (8th Cir. 2013). In contrast, the Seventh Circuit has taken the view that the bottom of the amended guideline range in such a case would be 168 months, *i.e.*, the bottom of the amended range as determined by the Sentencing Table, without application of the "trumping" mechanism in §5G1.1. See United States v. Wren, 706 F.3d 861, 863 (7th Cir. 2013). Each circuit found support for its view in an Eleventh Circuit decision, United States v. Liberse, 688 F.3d 1198 (11th Cir. 2012), which also discussed this issue.

Second, there are cases in which the defendant's original guideline range as determined by the Sentencing Table was, at least in part, below the mandatory minimum, and the defendant received a sentence below the mandatory minimum pursuant to a government motion for substantial assistance. In these cases, the "trumping" mechanism in §5G1.1 operated at the original sentence to restrict the guideline range to be no less than the mandatory minimum. For example. Consider a case in which the original Sentencing Table guideline range was 140 to 175 months but the mandatory minimum was 240 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. The defendant's original sentence was 96 months, representing a 60 percent reduction for substantial assistance below the statutory and guideline minimum. In a sentence reduction proceeding, the amended Sentencing Table guideline range is 110 to 137 months, resulting (after operation of §5G1.1) in a guideline sentence of 240 months. Section 1B1.10(b)(2)(B) provides that such a defendant may receive a reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, *i.e.*, the guideline sentence that results after application of the "trumping" mechanism in §5G1.1. See United States v. Glover, 686 F.3d 1203, 1208 (11th Cir. 2012); United States v. Joiner, 727 F.3d 601 (6th Cir. 2013); United States v. Johnson, 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered.

In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, *i.e.*, the bottom of the sentencing Table guideline range. See United States v. Savani, 733 F.3d 56-66-7 (3d. Cir. 2013); In re Sealed Case, 722 F.3d 361, 369-70 (D.C. Cir. 2013).

The amendment generally adopts the approach of the Third Circuit in Savani, and the District of Columbia Circuit in In re Sealed Case. It amends §1B1.10 to specify that, if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of §1B1.10 the amended guideline range shall be determined without regard to the operation of §5G1.1 and §5G1.2. The amendment also adds a new application note with examples.

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance. See USSG App. C Amend 759 (Reason for Amendment). As the Commission noted in the reason for the amendment: "The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purpose of sentencing. *Id.*

U.S.S.G. Supp. to App. C, Amend. 780 (Nov. 1, 2014) at 54-56.

Reason for Amendment 788

This amendment expands the listing in §1B1.10(d) to implement the directive in 28 U.S.C. § 9949u) with respect to guideline amendments that may be considered for retroactive application. The Commission had determined that Amendment 782, subject to the limitation in new §1B1.109e) delaying the effective date of sentence reduction orders until November 1, 2015, should be applied retroactively.

Amendment 782 reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties in §2D1.1, and make parallel changes to §2D1.11. Under the applicable standards set forth in the background commentary to §1B1.10, the Commission considers the following factors, among others: (1) the purpose of the amendment, (2), the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See §1B1.10, comment. (backg'd). Applying those standards to Amendment 782, the Commission determined that, among other factors:

- (1) The purposes of the amendment are to reflect the Commission's determination that setting the base offense levels above mandatory minimum penalties is no longer necessary and that a reduction would be an appropriate step toward alleviating the overcapacity of the federal prisons. See 28 U.S.C. § 994(g) (requiring the Commission to formulate guidelines to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons").
- (2) The number of cases potentially involved is large, and the magnitude of the change in the guideline range is significant. The Commission determined that an estimated 46,000

offenders may benefit from retroactive application of Amendment 782 subject to the limitation in §1B1.10€, and the average sentence reduction would be approximately 18 percent.

(3) The administrative burdens of applying Amendment 782 retroactively are significant but manageable given the one-year delay in the effective date, which allows courts and agencies more time to prepare. The determination was informed by testimony at the Commission's June 10, 2014 public hearing on retroactivity and by other public comment received by the Commission.

The Commission determined that public safety, among other factors, requires a limitation on retroactive application of Amendment 782. In light of the large number of cases potentially involved, the Commission determined that the agencies of the federal criminal justice system responsible for the offenders' reentry into society need time to prepare, and to help the offenders prepare, for that reentry. For example, the Bureau of Prisons has the responsibility under 18 U.S.C. § 3624(c) to ensure, to the extent practicable, that the defendant will spend a portion of his or her term of imprisonment under conditions that will afford the defendant a reasonable opportunity to adjust to and prepare for his or her reentry into the community. The Commission received testimony indicating that some offenders released pursuant to earlier retroactive guideline amendments had been released without having had this opportunity. In addition, for many of the defendants potentially involved, their sentence includes a term of supervised release after imprisonment. The judiciary and its probation officers will have the responsibility under 18 U.S.C. § 3624€ to supervise those defendants when they are released by the Bureau of Prisons. The Commission received testimony from the Criminal Law Committee of the Judicial Conference of the United States that a delay would permit courts and probation offices to prepare to effectively supervise this increased number of defendants.

The Commission concluded that a one-year delay in the effective date of any orders granting sentence reductions under Amendment 782 is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all offenders who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit those agencies that will be responsible for offenders after their release to prepare for the increased responsibility. Therefore, the Commission added a Special Instruction at subsection (e) providing that reduced term of imprisonment based on retroactive application of Amendment 782 shall not be ordered unless the effective date of the court's order is November 1, 2015, or later. An application note clarifies that this special instruction does not preclude the court from conducting sentence reduction proceedings before November 1, 2015, as long as any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later. As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.

In addition, public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

JOSE HERNANDEZ-MARTINEZ, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

CERTIFICATE OF SERVICE AND MAILING

I, Stephen R. Sady, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.3, service has been made of the within APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 3 on the counsel for the respondent by depositing in the United States Post Office, in Portland, Oregon, on November 12, 2019, first class postage prepaid, an exact and full copy thereof addressed to:

Noel Francisco
Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave., N. W.
Washington, DC 20530-0001

Scott Kerin
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

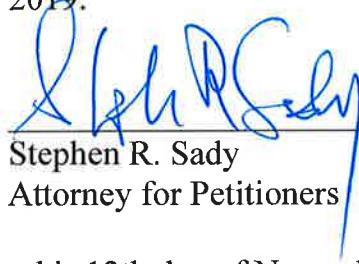
Jeffrey S. Sweet
Assistant U.S. Attorney
405 E. Eighth Avenue, Suite 2400
Eugene, OR 97401

Kelly A. Zusman
Assistant U.S. Attorney
1000 SW Third, Suite 600
Portland, Oregon 97204

Further, the original and ten copies were mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 12th day of November, 2019, with first-class postage prepaid.

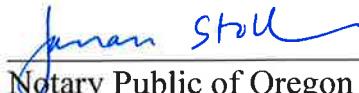
Additionally, I electronically filed the foregoing APPENDIX TO PETITION FOR WRIT OF CERTIORARI, VOLUME 3 by the using the Supreme Court's Electronic filing system on November 12, 2019.

Dated this 12th day of November, 2019.



Stephen R. Sady
Attorney for Petitioners

Subscribed and sworn to before me this 12th day of November, 2019.



Janan Stoll
Notary Public of Oregon

