No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ARTEMIO RAMIREZ-ARROYO,

Petitioner,

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

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INDEX TO APPENDIX

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ARTEMIO RAMIREZ-ARROYO, AKA Temo, Defendant-Appellant.	No. 19-30054 D.C. No. 3:08-cr-00228-MO-4 District of Oregon, Portland ORDER

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

A review of the record and the opening brief indicates that the questions raised in this appeal are obviously controlled by this court's opinion in *United States v. Hernandez-Martinez*, 933 F.3d 1126 (9th Cir. 2019), *cert. denied*, No. 19-6663, 2020 WL 129850 (U.S. Jan. 13, 2020), and are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard). Accordingly, we grant the government's motion (Docket Entry No. 12) for summary affirmance.

AFFIRMED.

2019 WL 1223309
Only the Westlaw citation is currently available.
United States District Court, D. Oregon,
Portland Division.

UNITED STATES of America,
v.
Artemio RAMIREZ-ARROYO
also known as Temo, Defendant.

No. 3:08-cr-00228-MO-4
|
Signed 03/15/2019

Attorneys and Law Firms

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OPINION AND ORDER

MICHAEL W. MOSMAN, Chief United States District Judge

***1** This case comes before me on Defendant's Motion to Reduce Sentence [530]. For the following reasons, Defendant's motion is DENIED.

BACKGROUND

On July 5, 2011, Defendant Artemio Ramirez-Arroyo entered a guilty plea to one count of conspiracy to distribute and possess with intent to distribute 500 grams more of methamphetamine and cocaine in violation of 21 U.S.C. §§ 841 (a)(1), 841 (b)(1)(A), 841 (b)(1)(C), and 846. The United States recommended a sentence below the United States Sentencing Guidelines (U.S.S.G.) range based on Ramirez-Arroyo's limited educational background and the desire to maintain sentencing consistency with his codefendants. The plea agreement did not restrict Ramirez-Arroyo's right to seek a variance under 18 U.S.C. § 3553(a) factors. I accepted the recommended variance under 3553(a) factors and sentenced Mr. Ramirez-Arroyo to 240 months, a downward variance from the guideline range of 360 months to life.

After Mr. Ramirez-Arroyo was sentenced, the guideline applied to him—U.S.S.G. § 2D1.1—was retroactively amended to reduce the Drug Quantity Table by two levels. Following U.S.S.G. Amendment 782, the guideline range that was applied to Mr. Ramirez-Arroyo was amended 292 to 365 months. Mr. Ramirez-Arroyo has since filed a motion seeking a two-level reduction pursuant to 18 U.S.C. § 3582(c)(2) based on Amendment 782 and a recent Supreme Court holding in *Hughes v. United States*, 138 S. Ct. 1765 (2018).

The parties agree about the guideline range used to sentence Mr. Ramirez-Arroyo and what his reduced range would be under Amendment 782. Mr. Ramirez-Arroyo believes *Hughes* allow his sentence to be reduced, but the United States argues that current Ninth Circuit precedent bars reduction. *See United States v. Padilla-Diaz*, 862 F. 3d 856, 858 (9th Cir. 2017). The question before me is whether *Hughes* overrated *Padilla-Diaz*, or whether the holdings are reconcilable and *Padilla-Diaz* remains binding precedent.

LEGAL STANDARD

Courts of Appeal are bound by "higher intervening authority" and should reject prior precedent as effectively overruled if the intervening holding is "clearly irreconcilable" with the previous holding. *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017). If a court can apply " 'prior circuit precedent without running afoul of the intervening authority' it must do so. "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening authority to cast doubt on the prior circuit precedent.' " *Id.* (quoting *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012)). The same principles outlines above apply a fortiori to district courts.

DISCUSSION

U.S.S.G. § 1B1.10(b), a 2011 Sentencing Commission Policy Statement, states that courts "shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines ... had been effect at the time the defendant was sentenced," but that a court "shall not reduce a defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) ... to a term that is less than

the minimum of the amended guideline range." U.S.S.G. § 1B1.10(b)(1); (2)(A).

***2** The Ninth Circuit upheld the validity and application of § 1B1.10(b) in *United States v. Padilla-Diaz*, 862 F.3d 856, 858 (9th Cir. 2017). Three prisoners challenged the validity of § 1B 1.10(b) preventing them from receiving retroactively reduced sentences based upon Amendment 782. *Padilla-Diaz*, 862 F. 3d at 859. Three district courts had denied the respective defendants' motions because their sentences were already at or below the low end of the amended guideline ranges. *Id.* The Ninth Circuit—affirming the district courts' decisions—held that § 1B1.10(b) did not violate equal protection or due process rights and did not conflict with statutes stating that the Sentencing Commission should avoid disparate sentences. *Id.* at 863.

Rule 11(c)(1)(C) allows the government to agree to a specific sentence or range in a defendant's plea, and if the court accepts the agreement the court is bound by the recommendation. Fed. R. Civ. P. 11(c)(1)(C). This is known as a Type–C agreement. *Hughes*, 138 S. Ct. at 1773. 18 U.S.C. § 3582(c)(2) allows a court to modify a defendant's sentence when that defendant was sentenced "based on a sentencing range that has subsequently been lowered ... if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Previously, the Supreme Court issued a plurality opinion on the question of whether sentences pursuant to plea agreements were "based on" the guidelines and therefore amendable under § 3582(c)(2). *See* *Freeman v. United States*, 564 U.S. 522 (2011).

In *Hughes*, the Supreme Court revisited *Freeman* and held that an inmate sentenced pursuant to a Type–C plea bargain was eligible for a sentence reduction if the sentencing guidelines changed subsequent to his sentencing. *Hughes*, 138 S. Ct. at 1778. The Government in *Hughes* argued that no guideline provisions are applied when a court accepts a Type–C plea because the court is immediately bound upon acceptance. Therefore, allowing amendment of Type–C pleas would be inconsistent with § 1B1.10(b). The Court disagreed and found that a sentence was "based on" a Guidelines range if the range was a basis for the court's exercise of discretion in imposing a sentence, and therefore that Mr. Hughes's sentence could be amended. *Id.* at 1775.

Mr. Ramirez-Arroyo argues that *Hughes* overturns *Padilla-Diaz*. The United States opposes any amendment to Mr. Ramirez-Arroyo's sentence, arguing that Mr. Ramirez-Arroyo is not eligible for a reduction because the original sentence of 240 months he received is already lower than the 292-month minimum for the amended Guideline range, and therefore barred by § 1B 1.10(b). The United States also claims *Hughes* is not clearly irreconcilable with *Padilla-Diaz* and thus remains binding precedent.

I find that *Padilla-Diaz* is still good law. *Hughes* centered around whether a Type-C plea was based on a guidelines range due to its binding nature, and whether a Type-C plea is eligible for reduction under § 3582(c)(2). *Padilla-Diaz* examined the validity of § 1B1.10(b) based on its conflict with the implementing sentencing statute. *Hughes* did not disturb the requirement that a reduction based on § 3582(c)(2) must be consistent with the Sentencing Commission's policy statements, including § 1B1.10(b). Mr. Ramirez-Arroyo has not demonstrated that *Hughes* is clearly irreconcilable with *Padilla-Diaz*, and without that I am required to apply *Padilla-Diaz*. 1B1.10(b) remains applicable to Mr. Ramirez-Arroyo, and because his original sentence falls below the minimum in the amended guidelines, § 1B1.10(b) prevents me from reducing it further.

CONCLUSION

***3** For the aforementioned reasons, I DENY Defendant's Motion to Reduce Sentence [530].

IT IS SO ORDERED.

All Citations

Slip Copy, 2019 WL 1223309

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933 F.3d 1126
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jose Luis HERNANDEZ-MARTINEZ, aka Efigenio Aispuro-Aispuro, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Efigenio Aispuro-Aispuro, aka Jose Luis Hernandez-Martinez, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Alejandro Renteria-Santana, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Bartolo Favela Gonzales, aka Bartolo, aka Gordo, aka Jose Everando Sanchez-Avendano, aka Jose Martin Verdugo, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Jose Garcia-Zambrano, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Edwin Magana-Solis, aka Manuel Cardenas-Landa, aka Roberto Lopez-Delgado, aka Meno, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Diego Bermudez-Ortiz, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Obdulio Alvarado-Ponce, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Kao Fey Saechao, aka Doughboy, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Angel Ramirez-Arroyo, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Franky Enrique Alvarado-Gomez, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Oscar Francisco Macias-Ovalle, aka Tijuana, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Luis Pulido-Aguilar, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Jose Carranza Gonzalez, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Aleksander Gorbatenko, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Omar Perez-Medina, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Eduardo Bocanegra-Mosqueda, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Roberto Cervantes-Esteva, aka Victor Antonio Cervantes, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Julian Alarcon Castaneda, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Sergio Aguilar-Sahagun, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Pablo Barajas Lopez, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Moises Lopez-Prado, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Francisco Javier Cardenas-Coronel, Defendant-Appellant.

No. 15-30309, No. 15-30310, No. 15-30315, No. 15-30347, No. 15-30351, No. 15-30352, No. 15-30353, No. 16-30000, No. 16-30170, No. 16-30199, No. 16-30294, No. 17-30013, No. 15-30354, No. 15-30377, No.

15-30385, No. 16-30004, No. 15-30383,
No. 15-30391, No. 16-30040, No. 16-30041,
No. 16-30090, No. 16-30089, No. 16-30162

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Argued and Submitted March
7, 2019 Portland, Oregon

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Filed August 13, 2019

Synopsis

Background: Defendants appealed from orders of the United States District Court for the District of Oregon, 181 F.Supp.3d 842, 2015 WL 13236726, 2015 WL 13236827, 2016 WL 520966, 2016 WL 520954, 2016 WL 1222244, 2016 WL 3509414, Michael W. Mosman, Chief Judge, Garr M. King, Senior District Judge, Ann Aiken, J., Anna J. Brown, Senior District Judge, Robert E. Jones, Senior District Judge, Marco A. Hernandez, J., denying their motions for sentence reductions based on retroactive Sentencing Guidelines amendment which revised Guidelines' drug quantity table by reducing base offense level for most drugs and quantities by two levels.

The Court of Appeals, Berzon, Circuit Judge, held that it was bound by prior three-panel decision of the Court of Appeals which determined that policy statements of the Sentencing Commission could limit reduction of sentences for otherwise statutorily eligible terms of imprisonment.

Affirmed.

Attorneys and Law Firms

***1129** Stephen R. Sady (argued), Chief Deputy Federal Public Defender; Elizabeth G. Daily, Assistant Federal Public Defender; Office of the Federal Public Defender, Portland, Oregon; Rosalind M. Lee, Rosalind Manson Lee LLC, Eugene, Oregon; for Defendants-Appellants.

Kelly A. Zusman (argued), Appellate Chief; Billy J. Williams, United States Attorney; United States Attorney's Office, Portland, Oregon; for Plaintiff-Appellee.

Appeal from the United States District Court for the District of Oregon, Michael W. Mosman, Chief Judge, Presiding, D.C. No. 3:98-cr-00572-MO-8, D.C. No. 3:06-cr-00274-MO-3, D.C. No. 3:10-cr-00250-MO-1, D.C. No. 3:06-cr-00233-MO-1, D.C. No. 3:11-cr-00467-MO-4, D.C. No. 3:11-cr-00467-MO-8, D.C. No. 3:11-cr-00467-MO-3, D.C. No. 3:12-cr-00442-MO-1, D.C. No. 3:11-cr-00096-MO-1, D.C. No. 3:08-cr-00228-MO-3, D.C. No. 3:08-cr-00294-MO-1, D.C. No. 3:08-cr-00228-MO-1.

Appeal from the United States District Court for the District of Oregon, Garr M. King, District Judge, Presiding, D.C. No. 3:10-cr-00142-KI-1.

Appeal from the United States District Court for the District of Oregon, Michael H. Simon, District Judge, Presiding, D.C. No. 3:12-cr-00154-SI-1, D.C. No. 3:10-cr-00396-SI-1, D.C. No. 3:12-cr-00660-SI-1.

Appeal from the United States District Court for the District of Oregon, Ann L. Aiken, District Judge, Presiding, D.C. No. 6:11-cr-60135-AA-1, D.C. No. 6:12-cr-00400-AA-1.

Appeal from the United States District Court for the District of Oregon, Anna J. Brown, District Judge, Presiding, D.C. No. 3:11-cr-00412-BR-1, D.C. No. 3:10-cr-00311-BR-1, D.C. No. 3:07-cr-00050-BR-5.

Appeal from the United States District Court for the District of Oregon, Robert E. Jones, District Judge, Presiding, D.C. No. 3:10-cr-00510-JO-3.

Appeals from the United States District Court for the District of Oregon, Marco A. Hernandez, District Judge, Presiding, D.C. No. 3:12-cr-00227-HZ-1.

Before: Susan P. Graber and Marsha S. Berzon, Circuit Judges, and Eduardo C. Robreno, [*] District Judge.

OPINION

BERZON, Circuit Judge:

These consolidated appeals were brought by defendants seeking to reduce their sentences for drug-related crimes. They invoke 18 U.S.C. § 3582(c)(2), which allows a court to reduce in certain circumstances a previously imposed sentence, and contend that the Supreme Court's recent interpretation of § 3582(c)(2) in *Hughes v. United States*, —— U.S. ——, 138 S. Ct. 1765, 201 L.Ed.2d 72 (2018), requires that their motions for resentencing be granted, Ninth Circuit precedent to the contrary notwithstanding. *See United States v. Padilla-Diaz*, 862 F.3d 856 (9th Cir. 2017).

***1130** We conclude that *Padilla-Diaz* and *Hughes* are fully compatible. As *Padilla-Diaz* remains binding precedent, we affirm the district courts' denials of defendants' motions to receive sentence reductions pursuant to 18 U.S.C. § 3582(c)(2).

I

A

We begin with a brief overview of the statutory framework governing sentence reduction proceedings. Ordinarily, a federal court "may not modify a term of imprisonment once it has been imposed." *See* 18 U.S.C. § 3582(c). Congress has provided narrow exceptions to this proscription, including one based on changes to the United States Sentencing Guidelines ("Guidelines"): "A court may modify a defendant's term of imprisonment if the defendant was 'sentenced ... based on a sentencing range that has subsequently been lowered' pursuant to a retroactive amendment to the U.S. Sentencing Guidelines." *United States v. Rodriguez*, 921 F.3d 1149, 1153 (9th Cir. 2019) (quoting 18 U.S.C. § 3582(c)).

Where the "based on" requirement is met, § 3582(c)(2) establishes a two-step inquiry for sentence reduction proceedings. [1] At the first step, the district court decides eligibility for sentence reduction by determining whether "a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.*; *see also Dillon v. United States*, 560 U.S. 817, 826, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010). The policy statement applicable to § 3582(c)(2), United States Sentencing Guidelines Manual ("U.S.S.G.") § 1B1.10, authorizes a sentence reduction if, but only if, the retroactive amendment has the "effect of lowering the defendant's applicable [G]uideline[s] range." U.S.S.G. § 1B1.10(a)(2)(B). Applying this policy statement, a district court determines whether the Guidelines range is lowered by calculating the "amended [G]uideline[s] range that would have been applicable to the defendant if the [relevant amendment] to the [G]uidelines ... had been in effect at the time the defendant was sentenced." *Id.* at § 1B1.10(b)(1).

But that determination may not be the end of a district court's inquiry into eligibility for sentence reduction. Another provision of the policy statement—the one of principal relevance here—generally prohibits sentence reduction if the original term of imprisonment is below the lower end of the amended Guidelines range. *See id.* § 1B1.10(b)(2)(A). [2] The only exception to this limitation is where the defendant's original term of imprisonment was below the Guidelines range because of a reduction ***1131** for substantial assistance to authorities and a § 3582(c)(2) sentence reduction would be comparably below the amended Guidelines range. *See id.* at § 1B1.10(b)(2)(B).

The second step of the § 3582(c)(2) inquiry applies to defendants determined eligible for sentence reduction. The court considers the 18 U.S.C. § 3553(a) factors and determines whether "the authorized reduction is warranted, either in whole or in part, according to the factors." *Dillon*, 560 U.S. at 826, 130 S.Ct. 2683; *see also* 18 U.S.C. § 3582(c)(2). But the "court's consideration of the § 3553(a) factors may not 'serve to transform the proceedings under § 3582(c)(2) into plenary resentencing proceedings.' " *Rodriguez*, 921 F.3d at 1154 (quoting *Dillon*, 560 U.S. at 827, 130 S.Ct. 2683). [3]

B

Each of the twenty-three defendants in these consolidated cases was convicted of one or more drug-related offenses. The defendants' original terms of imprisonment were therefore calculated according to the Guidelines' drug quantity table, which determines the base offense level for drug-related offenses according to drug type and weight. In 2014, the U.S. Sentencing Commission adopted Amendment 782, which revised the Guidelines' drug quantity table by reducing the base offense level for most drugs and quantities by two levels. *See* U.S.S.G. supp. app. C amend. 782 (Nov. 1, 2014); U.S.S.G. § 2D1.1(c). Amendment 782 was later made retroactive for defendants, including those in this consolidated proceeding, who had been sentenced before the adoption of the Amendment. U.S.S.G. supp. app. C amend. 788 (Nov. 1, 2014).

Invoking Amendment 782, each defendant filed a § 3582(c)(2) motion to reduce his sentence. The assigned district courts denied the sentence reduction motions, concluding that the defendants were categorically ineligible under § 1B1.10(b)(2)(A) because downward variances or departures at the time of sentencing had resulted in original terms of imprisonment below the amended Guidelines range. The district courts further concluded that the defendants were not eligible for § 1B1.10(b)(2)(B)'s limited exception, as their downward

variances or departures had not been based on substantial assistance to authorities. Defendants appealed.

We review for abuse of discretion a district court's decision on a § 3582(c)(2) sentence reduction motion. *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013). "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *United States v. Sprague*, 135 F.3d 1301, 1304 (9th Cir. 1998) (quoting *United States v. Plainbull*, 957 F.2d 724, 725 (9th Cir. 1992)).

II

A

Padilla-Diaz upheld § 1B1.10(b)(2), including its limited exception for substantial assistance departures, as consistent with both the governing statutes and constitutional requirements. 862 F.3d at 860–63. Defendants' principal argument is that we are not bound by *Padilla-Diaz* because the decision in that case is irreconcilable with the Supreme Court's later decision in *Hughes v. United States*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (holding that the "issues decided by the ***1132** higher court" are controlling when "the relevant court of last resort ... undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable").

To guide our inquiry as to whether *Padilla-Diaz* and *Hughes* are reconcilable we begin by examining an earlier Supreme Court decision, *Dillon*, 560 U.S. 817, 130 S.Ct. 2683. *Dillon* set forth the framework for reviewing motions for sentence reduction and explained the role policy statements serve in § 3582(c)(2) proceedings. We then examine *Padilla-Diaz* and *Hughes* in light of *Dillon*.

Dillon considered whether § 1B1.10, the policy statement that ordinarily includes the prohibition on reducing a sentence to a term below the amended Guidelines range, is advisory under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). In *Booker*, the Court held that the Guidelines are advisory in sentencing proceedings and so do not trigger the Sixth Amendment issues that arise under a mandatory sentencing regime. *Id.* at 243–44, 125 S.Ct. 738. The defendant in *Dillon* contended that *Booker*'s reasoning as to general sentencing proceedings applies with equal force to § 3582(c)(2) sentence reduction proceedings, such that § 1B1.10 is advisory only. 560 U.S. at 825, 130 S.Ct. 2683.

Dillon, rejecting that argument, held that § 1B1.10 is binding in § 3582(c)(2) proceedings. *Id.* at 825–31, 130 S.Ct. 2683. The Court reasoned that "sentence-modification proceedings authorized by § 3582(c)(2) are not constitutionally compelled," and so do not implicate the Sixth Amendment concerns present in *Booker*. *Id.* at 828, 130 S.Ct. 2683. In distinguishing § 3582(c)(2) proceedings from the sentencing proceedings in *Booker*, *Dillon* emphasized that "§ 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Id.*

The distinction *Dillon* drew between general sentencing proceedings and § 3582(c)(2) sentence reduction proceedings informed our holding in *Padilla-Diaz*. The *Padilla-Diaz* defendants each had been accorded downward departures or variances at their original sentencings, with the result that their terms of imprisonment were below the later-amended Guidelines range. 862 F.3d at 859. The departures or variances were not based on substantial assistance to authorities. *See id.* As the defendants' original sentences made them categorically ineligible for sentence reduction under § 1B1.10(b)(2)(A), the district courts refused to consider any reduction. The defendants in *Padilla-Diaz* raised two challenges relevant to our inquiry here.

First, the *Padilla-Diaz* defendants argued that U.S.S.G. § 1B1.10(b)(2)(A) conflicts with 28 U.S.C. § 991(b), the statute granting the U.S. Sentencing Commission broad authority over the promulgation of Guidelines amendments. They contended that § 991(b)(1)(B) granted the U.S. Sentencing Commission the authority to " 'establish sentencing policies and practices' that 'avoid[ ] unwarranted sentencing disparities among defendants,' " *id.* at 860 (quoting 28 U.S.C. § 991(b)), and that U.S.S.G. § 1B1.10(b)(2)(A) generated such disparities by "nullif[ying] departures and variances from the [G]uideline[s] range." *Id.* at 861. We acknowledged in *Padilla-Diaz* that § 1B1.10(b)(2)(A) occasionally does lead to anomalous results but held that § 1B1.10(b)(2)(A) and § 991(b) were not in conflict. *Id.* *Padilla-Diaz* reasoned that § 991(b) was a statement of the U.S. Sentencing Commission's overall purposes and goals, not a specific directive requiring strict conformance such that ***1133** § 1B1.10(b)(2)(A) could run afoul of it.[4] Relying on *Dillon*, *Padilla-Diaz* also noted that a § 3582(c)(2) sentence reduction, as an act of lenity, is "not constrained" by general sentencing policies, such as

maintaining uniformity and avoiding unwarranted disparities. *Id.* (citing *Dillon*, 560 U.S. at 828, 130 S.Ct. 2683).

Second, the defendants in *Padilla-Diaz* argued that § 1B1.10(b)(2)(A) violated the Fifth Amendment's guarantee of equal protection because it "irrationally den[ied] sentence reductions to offenders who received lower sentences while granting them to those who originally received higher sentences." *Id.* at 862. The government offered two justifications for the Guidelines policy statement's disparate treatment of the two groups of defendants: Making defendants' substantial assistance the only factor considered (1) simplifies sentence reduction proceedings, and (2) encourages defendants to cooperate with the government. *Id.* Acknowledging, once again, that § 1B1.10(b)(2)(A) "will sometimes produce unequal and arguably unfair results," *Padilla-Diaz* held that the sentence reduction limitation survived rational basis review on the basis of those two justifications. *Id.*

The following year, the Supreme Court decided *Hughes*. The question considered in *Hughes* was entirely different from those addressed in *Padilla-Diaz*.

Hughes considered for a second time an issue that had been before the Court several years earlier, in *Freeman v. United States*, 564 U.S. 522, 131 S.Ct. 2685, 180 L.Ed.2d 519 (2011): Is a defendant who enters into a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement ("Type-C agreement") eligible for § 3582(c)(2) sentence reduction upon the enactment of a retroactive amendment to the Guidelines?[5] Specifically, the issue in *Hughes* was whether a Type-C agreement is "*based on* a sentencing range that has subsequently been lowered," such that a defendant is eligible for sentence reduction under § 3582(c)(2). *See* 138 S. Ct. at 1773 (emphasis added).[6] *Hughes* held that a ***1134** "sentence imposed pursuant to a Type–C agreement is 'based on' the defendant's Guidelines range so long as that range was part of the framework the district court relied on in imposing the sentence or accepting the agreement." *Id.* at 1775. Hughes's original sentence was not below the amended Guidelines range, and *Hughes* did not consider at all the import of § 1B1.10(b)(2)(A), *id.* at 1774, the provision limiting sentence reductions to the lowest term recommended by the revised Guidelines range.

B

Our case law is clear as to the effect of intervening law on prior circuit precedent: "[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Gammie*, 335 F.3d at 893.

Defendants contend that *Padilla-Diaz* and *Hughes* are clearly irreconcilable in two respects. First, defendants argue that *Hughes* rejected *Padilla-Diaz*'s premise that general sentencing policies do not constrain § 3582(c)(2) sentence reduction proceedings. As support for this argument, defendants point to several passages in *Hughes* in which the Court discussed the central purpose of the Sentencing Reform Act and two of its key sentencing policies—uniformity and avoiding unwarranted sentencing disparities.

But *Hughes* did *not* conclude that general sentencing policies constrain § 3582(c)(2) proceedings. Although *Hughes* referenced the sentencing goals of uniformity and avoiding unwarranted disparities, it did so primarily to highlight the sentencing disparities among courts in different federal circuits stemming from the Court's fractured opinion in *Freeman*. *See Hughes*, 138 S. Ct. at 1774–75; *see also id.* at 1779 (Sotomayor, J., concurring). Additionally, in discussing the Sentencing Reform Act's uniformity goal, *Hughes* highlighted that the Act's purpose was furthered by interpreting § 3582(c)(2) as applying to *any* type of plea agreement "based on" the Guidelines, including Type-C agreements. *Id.* at 1776 (majority opinion). Nothing in *Hughes* addressed inter-defendant sentencing uniformity more generally, much less the sentence reduction limitation at issue here. Moreover, nothing in *Hughes* upended the Court's statement in *Dillon* that § 3582(c)(2) sentence reduction proceedings are acts of lenity, *see* 560 U.S. at 828, 130 S.Ct. 2683, or *Padilla-Diaz*'s reasoning, based on *Dillon*, that such proceedings are therefore not ordinarily constrained by general sentencing policies, *see* 862 F.3d at 861.

Second, defendants contend that the relevant policy statement, § 1B1.10(b)(2)(A), conflicts with § 3582(c)(2) as interpreted in *Hughes*, as well as in *Koons v. United States*, —— U.S. ——, 138 S. Ct. 1783, 201 L.Ed.2d 93 (2018), and that *Padilla-Diaz* misunderstood the scope of § 3582(c)(2). Specifically, defendants interpret *Hughes* and *Koons*, as *requiring* sentence reduction under § 3582(c)(2) for *every* term of imprisonment "based on" the Guidelines

and argue that policy statements, such as § 1B1.10(b)(2)(A), may not limit the reduction of sentences for otherwise statutorily eligible terms of imprisonment. That argument is unpersuasive.

For starters, the statute expressly permits the U.S. Sentencing Commission to ***1135** delineate sentence reduction eligibility through policy statements. Section 3582(c)(2) reads:

> [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 ..., the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) ..., *if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission*.

(emphasis added). Given that the statute's plain text requires consideration of applicable policy statements, 18 U.S.C. § 3582(c)(2) and the Guidelines policy statement, § 1B1.10(b)(2)(A), are not in conflict. Instead, pursuant to the statutory mandate, § 3582(c)(2) and applicable policy statements work in concert to determine eligibility for sentence reduction.[7] Nothing in *Hughes* suggests otherwise.

Defendants' invocation of *Koons* is as misplaced as its reliance on *Hughes*. The defendants in *Koons* did not satisfy § 3582(c)(2)'s "based on" requirement because their sentences were based on mandatory minimums and substantial assistance to authorities. They maintained that they were nonetheless eligible for sentence reduction because the applicable Guidelines policy statement, § 1B1.10(c), contemplated reductions for defendants in their position.[8] *Koons*, 138 S. Ct. at 1790. In rejecting that argument, *Koons* concluded that a "policy statement cannot alter § 3582(c)(2), which applies only when a sentence was 'based on' a subsequently lowered range." *Id.* *Koons* explained that "[t]he Sentencing Commission may limit the application of its retroactive Guidelines amendments through its 'applicable policy statements.' But policy statements cannot make a defendant eligible when § 3582(c)(2) makes him ineligible." *Id.* (internal citations omitted) (quoting *Dillon*, 560 U.S. at 824–26, 130 S.Ct. 2683).

Defendants argue here that the inverse of the reasoning in *Koons* is also true—that is, policy statements cannot render a defendant ineligible if they are otherwise eligible under § 3582(c)(2)'s "based on" requirement. As noted previously, § 3582(c)(2) commands otherwise; it permits policy statements to render a defendant ineligible for sentence reduction. In other words, the statute permits a sentence reduction when both of the following conditions are true—(A) the original term was "based on" a sentencing range that is later reduced; *and* (B) the reduction is consistent with the U.S. Sentencing Commission's policy statements. The problem in *Koons* was that (A) was not true; the problem here is that (B) is not true. Again, *Koons* explicitly recognized the second limitation, stating that "[t]he Sentencing Commission may limit the application of its retroactive Guidelines amendments through its 'applicable policy statements.' " *Id.*

In sum, the intervening decision in *Hughes* (as well as the opinion in *Koons*) is ***1136** not in conflict with *Padilla-Diaz*. We are therefore bound by *Padilla-Diaz*'s conclusion regarding the interplay between the Guidelines policy statement contained in § 1B1.10(b)(2) and § 3582(c)(2).

III

As *Padilla-Diaz* remains binding circuit precedent, defendants' various arguments on appeal are foreclosed.[9] We affirm the district courts' denials of the motions for sentence reduction under § 3582(c)(2).

AFFIRMED.

All Citations

933 F.3d 1126, 19 Cal. Daily Op. Serv. 7961, 2019 Daily Journal D.A.R. 7593

Footnotes

* The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

1 There is no dispute in this case that the original sentences were "based on a sentencing range that has subsequently been lowered by the U.S. Sentencing Commission," and so qualify for sentence reduction in that respect. 18 U.S.C. § 3582(c)(2).

2 Section 1B1.10(b)(2) reads in full:

> (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.

3 This second step of the § 3582(c)(2) inquiry is not pertinent here. The only question on appeal is whether the district courts correctly determined that the defendants were ineligible for sentence reduction under § 1B1.10(b)(2)(A).

4 *United States v. Tercero*, 734 F.3d 979 (9th Cir. 2013), addressed an issue similar to the statutory question posed in *Padilla-Diaz*. In *Tercero*, the district court reduced the defendant's sentence to a term at the lower end of the amended Guidelines range but denied the defendant's request for a further downward departure. *Id.* at 981. The district court concluded that § 1B1.10(b)(2)(A) prohibited any further reduction. *Id.* Among other matters, the defendant argued that § 1B1.10 conflicts with the Guidelines' purpose of instituting an "effective, fair sentencing system, with honest, uniform and proportionate sentences," because it prohibited the court from reducing her sentence further in light of her minor role in the offense. *Id.* at 983 (internal quotation marks omitted). We rejected the argument, concluding that the district court considered fairness in the original sentencing by considering the 18 U.S.C. § 3553(a) factors then. *Id.*

5 In *Freeman*, no opinion or rationale commanded a majority of the Court and the federal circuits split in their application of the divided disposition. Invoking *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), and its direction to adopt the "narrowest" opinion, eight circuits adopted the reasoning in Justice Sotomayor's concurrence, where she concurred only in the judgment and concluded that Type-C agreements are usually "based on" the agreements themselves, not the Guidelines. *See Freeman*, 564 U.S. at 535–36, 131 S.Ct. 2685 (Sotomayor, J., concurring); *Hughes*, 138 S. Ct. at 1771. Two circuits, including our court, adopted the plurality opinion, which concluded that a defendant who pleaded guilty under a Type-C agreement may be eligible for sentence reduction if the term is "based on" a later-amended Guidelines range. *See Freeman*, 564 U.S. at 526, 131 S.Ct. 2685; *Hughes*, 138 S. Ct. at 1771.

6 In a Type-C agreement, the government and defendant stipulate to a "specific sentence or sentencing range" or the applicability or inapplicability of "a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor." Fed. R. Crim. P. 11(c)(1)(C). The district court must approve a Type-C agreement. A court may accept such an agreement only if it is either "within the applicable [G]uideline[s] range" or outside the Guidelines range with "justifiable reasons ... set forth with specificity." U.S.S.G. § 6B1.2(c). Once the court accepts a Type-C agreement, it is binding on the court. *See* Fed. R. Crim. P. 11(c)(1)(C).

7 We are not suggesting that *any* eligibility restriction in a policy statement would be valid. There could, for example, be policy statements applicable to sentence reduction proceedings that are invalid because inconsistent with a statutory provision other than § 3582(c)(2).

8 Section 1B1.10(c) provides that, if the defendant provided substantial assistance to authorities and on that basis the court could impose a term of imprisonment below the mandatory minimum, the term of imprisonment should be determined without regard to U.S.S.G. § 5G1.1 (Sentencing on a Single Count of Conviction) or U.S.S.G. § 5G1.2 (Sentencing on Multiple Counts of Conviction).

9 Defendants also argue for reconsideration of the equal protection argument raised in *Padilla-Diaz*. Because *Padilla-Diaz* already rejected the argument, *see* 862 F.3d at 862, and remains binding circuit precedent, defendants' equal protection argument is also foreclosed.

862 F.3d 856
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Armando PADILLA-DIAZ, aka Gordo, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Jeffrey Allen Heckman, Jr., Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Bernardo Contreras Guzman, aka Chapparito, aka Chapparo, aka Huerro, Defendant-Appellant.

No. 15-30279, No. 15-30294, No. 15-30375
|
Argued and Submitted November 7, 2016, Portland, Oregon
|
Filed July 5, 2017

Synopsis

Background: Defendants convicted of conspiracy to distribute heroin and methamphetamine and to use communication devices moved for sentence reduction based on a retroactive amendment to the Sentencing Guidelines that reduced base offense levels for certain drug crimes. The United States District Court for the District of Oregon, Nos. 3:08-cr-00126-MO-2, 3:10-cr-00143-MO-1, 3:12-cr-00291-SI-1, Michael W. Mosman, Chief Judge, 176 F.Supp.3d 1012, denied motions. Defendants appealed.

Holdings: The Court of Appeals, W. Fletcher, Circuit Judge, held that:

Guidelines provision prohibiting district court from reducing sentences below minimum of amended guideline range did not conflict with statute providing that one of the purposes of the Sentencing Commission was to establish sentencing policies and practices that avoided unwarranted sentencing disparities among defendants while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors;

Guidelines provision barring imposition of variances and departures at resentencing based on retroactive amendment to Guidelines did not violate Equal Protection Clause; and

Guidelines provision barring imposition of variances and departures at resentencing based on retroactive amendment to Guidelines did not violate Due Process Clause.

Affirmed.

***858** Appeal from the United States District Court for the District of Oregon, Michael W. Mosman, Chief Judge, Presiding, D.C. Nos. 3:08-cr-00126-MO-2, 3:10-cr-00143-MO-1, 3:12-cr-00291-SI-1

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Kelly A. Zusman (argued), Appellate Chief; Jeffrey S. Sweet, Assistant United States Attorney; Billy J. Williams, United States Attorney; United States Attorney's Office, Portland, Oregon; for Plaintiff-Appellee.

Before: M. Margaret McKeown, William A. Fletcher, and Raymond C. Fisher, Circuit Judges.

OPINION

W. FLETCHER, Circuit Judge:

Armando Padilla-Diaz, Jeffrey Heckman, and Bernardo Contreras Guzman ("Defendants") in these consolidated cases appeal the district courts' denials of their motions for sentence reductions under United States Sentencing Guidelines ("U.S.S.G.") Amendment 782 and 18 U.S.C. § 3582(c)(2). Each defendant was denied a reduction based on an application of the Sentencing Commission's Policy Statement § 1B1.10(b)(2)(A), which prohibits courts from reducing a defendant's "term of imprisonment" to "less than the minimum of the amended guideline range," absent circumstances not present here. All three defendants contend that § 1B1.10(b)(2)(A) is invalid because it conflicts with 28 U.S.C. § 991(b) and violates the equal protection component of the Fifth Amendment. Defendants Padilla-Diaz and Heckman, who entered their pleas before the current version of § 1B1.10(b)(2)(A) was promulgated, further contend that the retroactive application of § 1B1.10(b)(2)(A) violates their right to due process. We have jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and we affirm.

I. Statutory Overview

Congress has given the Sentencing Commission broad authority, set forth in 28 U.S.C. § 994, to promulgate guidelines, propose amendments, and prescribe the limits of possible sentence reductions. Section 994(a) authorizes the Commission to promulgate guidelines and general policy statements regarding application of the guidelines. Section 994(o) provides that the Commission "periodically shall review and revise ... the guidelines promulgated pursuant to the provisions of this section," and § 994(p) permits the Commission to "submit to Congress amendments to the guidelines," which "shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission." When the Commission exercises its power to reduce a particular guideline ***859** range, "it shall specify in what circumstances and by what amount" sentences may be reduced. 28 U.S.C. § 994(u).

On November 1, 2014, the Sentencing Commission promulgated Amendment 782 pursuant to its authority under § 994(o). Amendment 782 revised the Drug Quantity Table in U.S.S.G. § 2D1.1, effectively lowering the base offense level by two levels for most federal drug offenses. U.S.S.G. app. C, amend. 782 (2014). Under Amendment 788, Amendment 782 applies retroactively. U.S.S.G. app. C, amend. 788 (2014).

A defendant may seek the benefit of Amendment 782 by moving for a sentence reduction under 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) provides that a defendant may seek a sentence reduction if he "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)." A district court may "reduce the term of imprisonment" only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

The "applicable policy statement" at issue in this case is § 1B1.10(b). Section 1B1.10(b)(1) 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 [relevant] amendment(s) ... had been in effect at the time the defendant was sentenced." Section 1B1.10(b)(2) further provides that "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," unless the defendant received a downward departure for substantial assistance at his original sentencing. This version of § 1B1.10(b)(2) became effective November 1, 2011. Prior to that time, § 1B1.10(b)(2) had generally permitted courts to reduce sentences to below the amended guideline range if the defendant received a below-guidelines sentence at his original sentencing. *See* U.S.S.G. § 1B1.10(b)(2) (2010).

II. Factual and Procedural Background

In January 2010, Padilla-Diaz pleaded guilty to one count of conspiracy to distribute and possess with intent to distribute methamphetamine. In February 2011, Heckman pleaded guilty to one count of distribution of methamphetamine. In May 2013, Contreras Guzman pleaded guilty to one count of conspiracy to distribute heroin and methamphetamine and to use communication devices. In their original sentences, each defendant received downward departures or variances that lowered their sentences below the initial guideline range generated by their total offense levels and criminal history categories.

After Amendment 782 was promulgated, Defendants each moved for sentence reductions under § 3582(c)(2). In accordance with § 1B1.10(b)(2)(A), the district courts denied the motions because Defendants' sentences were already at or below the low end of their amended guideline ranges.

Defendants appeal, challenging the validity and application of § 1B1.10(b)(2)(A). The parties agree that, absent the limitation in § 1B1.10(b)(2)(A), each Defendant would have been eligible to receive a lower sentence.

III. Standard of Review

We review for abuse of discretion a district court's denial of a sentence reduction motion under 18 U.S.C. § 3582(c)(2). ***860** *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010). A district court abuses its discretion "if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Id.* (internal quotation marks omitted). We review de novo the proper construction of a statute, *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012), and the constitutionality of the Sentencing Guidelines, *United States v. Kuchinski*, 469 F.3d 853, 857 (9th Cir. 2006).

IV. Discussion

Defendants make three arguments on appeal. First, they contend that § 1B1.10(b)(2)(A) is invalid because it conflicts with 28 U.S.C. § 991(b). Second, they contend that § 1B1.10(b)(2)(A) violates the equal protection component of the Fifth Amendment. Third, two of the three defendants contend that even if § 1B1.10(b)(2)(A) is valid, its retroactive application violates due process. We address each argument in turn.

A. Conflict with 28 U.S.C. § 991(b)

Defendants contend that § 1B1.10(b)(2)(A) conflicts with 28 U.S.C. § 991(b). Section 991(b) provides that one of the "purposes" of the Commission is to "establish sentencing policies and practices" that "avoid[ ] unwarranted sentencing disparities among defendants ... while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or

aggravating factors." 28 U.S.C. § 991(b)(1)(B). The government contends that the Ninth Circuit has already rejected an equivalent argument in *United States v. Tercero*, 734 F.3d 979 (9th Cir. 2013).

Like this case, *Tercero* involved an appeal from the denial of a sentence reduction motion under 18 U.S.C. § 3582(c)(2). Tercero received a downward departure at her original sentencing hearing, resulting in a 72-month sentence. *Tercero*, 734 F.3d at 980. When she applied for a sentence reduction based on a retroactive amendment to the crack cocaine guidelines, the district court found that she qualified for a reduction but reduced her sentence by only two months. The district court concluded that it could not depart below 70 months, the low end of Tercero's amended guideline range, because § 1B1.10(b)(2)(A) prohibits reductions "below the low end of the adjusted Guidelines range." *Id.* at 981. We affirmed.

Tercero challenged § 1B1.10(b)(2)(A) on a variety of grounds. *Inter alia*, she contended that § 1B1.10(b)(2)(A) conflicts with "the purpose of the Guidelines ... to bring about an effective, fair sentencing system, with honest, uniform and proportionate sentences." *Id.* at 983 (internal quotation marks omitted). Tercero contended that because § 1B1.10(b)(2)(A) "prevent [ed] the district court from revising [Tercero's] sentence to reflect the very minor role she played in the drug conspiracy," it conflicted with the Guidelines' goal of proportionality. *Id.* We rejected this argument, noting that the original sentencing court had considered proportionality when it evaluated the factors set forth in 18 U.S.C. § 3553(a). Because a motion for a sentence reduction under § 3582(c)(2) "does not authorize a sentencing or resentencing proceeding," no further consideration of Tercero's particular circumstances was required. *Id.* (quoting *Dillon v. United States*, 560 U.S. 817, 825, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010)).

Defendants contend that *Tercero* does not foreclose their argument because we did not specifically discuss § 991(b). While their argument is not, strictly speaking, foreclosed, the argument advanced and rejected in *Tercero* was equivalent in material respects to the argument made here. Section 991(b) refers to the ***861** goal of "avoiding unwarranted sentencing disparities" among similar offenders while "maintaining sufficient flexibility to permit individualized sentences." This is, in effect, the same as the goal of achieving "honest, uniform and proportionate sentences." *Tercero*, 734 F.3d at 983.

We would reach the same conclusion even without the benefit of *Tercero*. While the Commission's commentary "must give way" if it is at odds with the plain language of a federal statute, *United States v. LaBonte*, 520 U.S. 751, 757, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997), that is not the case here. Section 991(b) provides that one of the "purposes" of the Commission is to "establish sentencing policies and practices" that "assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. § 3553(a)(2)]" and "avoid [ ] unwarranted sentencing disparities among defendants ... while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." 28 U.S.C. § 991(b)(1)(A), (B). Defendants argue that § 1B1.10(b)(2)(A) is inconsistent with § 991(b) because it "nullifies departures and variances from the guideline range that were necessary to meet the statutory mandates of achieving a sentence sufficient but not greater than necessary under § 3553(a)."

Defendants' argument has some appeal. Under § 1B1.10(b)(2)(A), defendants who originally had lower sentences may be awarded the same sentences in § 3582(c)(2) proceedings as offenders who originally had higher sentences. That is, sentences that were initially tailored to avoid unwarranted disparities and to account for individualized circumstances will now converge at the low end of the amended guideline range. However, this anomalous result does not create an irreconcilable conflict with § 991(b).

First, § 991(b) is a general statement of the Commission's goals. It is not a specific directive to which all sentencing policies must conform. In contrast to § 991(b), the statutory text that led the Supreme Court to invalidate a Sentencing Commission amendment in *LaBonte* specifically provided that the Commission "shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized" for certain categories of defendants. *LaBonte*, 520 U.S. at 753, 117 S.Ct. 1673 (quoting 28 U.S.C. § 994(h)); *see also Tercero*, 734 F.3d at 982 (distinguishing between broad instructions and "the kind of specific language that required invalidation" in *LaBonte*). There is no such specific directive in § 991(b).

Second, Defendants' argument does not take into account the nature of resentencing proceedings under § 3582(c)(2). Section 3582(c)(2) "authorize[s] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding."

Dillon, 560 U.S. at 826, 130 S.Ct. 2683. Section 3582(c)(2) "represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Id.* at 828, 130 S.Ct. 2683. As acts of lenity, such sentence reductions are not constrained by the general policies underlying initial sentencing or even plenary resentencing proceedings. *See United States v. Navarro*, 800 F.3d 1104, 1112 (9th Cir. 2015) ("Simply put, the restrictions and rules associated with sentencing do not carry over to sentence reduction proceedings[.]"); *see also Dillon*, 560 U.S. at 828, 130 S.Ct. 2683 (holding that proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt).

***862** B. Equal Protection

Defendants further contend that § 1B1.10(b)(2)(A) violates the equal protection component of the Fifth Amendment by irrationally denying sentence reductions to offenders who received lower sentences while granting them to those who originally received higher sentences. While § 1B1.10(b)(2)(A) will sometimes produce unequal and arguably unfair results, Defendants have not shown that it fails rational basis review.

Classifications that do not implicate fundamental rights or a suspect class are permissible so long as they are "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Under rational basis review, a classification is valid "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). However, the government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249. The challenger of a classification bears the burden of "negativ[ing] every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (internal quotation marks omitted).

The government advances at least two rational bases for § 1B1.10(b)(2). First, it contends that § 1B1.10(b)(2) makes determining sentence reductions relatively simple. When confronted with a request to reduce a "term of imprisonment" to "less than the minimum of the amended guideline range," the district judge need only ask if the request is based on "substantial assistance to authorities." U.S.S.G. § 1B1.10(b)(2)(A), (B). If the request is based on substantial assistance, the judge may grant the request. If the request is not so based, the judge may not grant it. *See United States v. Davis*, 739 F.3d 1222, 1225 (9th Cir. 2014) ("[T]he Commission sought to avoid undue complexity[.]").

Second, § 1B1.10(b)(2) provides encouragement to defendants to cooperate with the government, given that substantial assistance is the only basis on which a district court may reduce the term of imprisonment below the low end of the amended guideline range. *See* U.S.S.G. § 1B1.10(b)(2)(B).

C. Due Process

Finally, defendants Padilla-Diaz and Heckman contend that applying the current version of § 1B1.10(b) violates due process because they entered into their plea agreements prior to its amendment. The current version of § 1B1.10(b) applies to Padilla-Diaz and Heckman's motions pursuant to an application note explaining that "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)." U.S.S.G. § 1B1.10, cmt. n.8; *see also* U.S.S.G. app. C, amend. 759 (2011) (originally adding current application note 8 as application note 6).

Padilla-Diaz and Heckman emphasize that their plea agreements expressly reserved the right to seek sentence reductions under § 3582(c)(2) for any future retroactive amendments. At the time of their pleas, their right to seek reductions in their sentences

included a right to seek reductions below the low end of the amended guideline range. They argue that retroactive application of the current version of § 1B1.10 upsets their settled expectations ***863** and therefore violates their right to due process.

To determine whether a law has retroactive effect, we consider "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Products*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). In conducting this inquiry, "familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* Defendants rely primarily on *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), in which St. Cyr, a citizen of Haiti, pleaded guilty to a deportable offense. At the time St. Cyr pleaded guilty, he was eligible to apply for discretionary relief from deportation under § 212(c) of the Immigration and Nationality Act of 1952. *Id.* at 294–95, 121 S.Ct. 2271. After his plea, Congress amended the statute and abolished this form of discretionary relief. As a result, St. Cyr faced "certain deportation." *Id.* at 325, 121 S.Ct. 2271. St. Cyr's habeas petition alleged that retroactive application of the repeal impermissibly undercut his settled expectation, at the time of his plea, that he would be eligible for relief under § 212(c). The Supreme Court agreed, concluding that application of the new statute "impose[d] an impermissible retroactive effect on aliens who, in reliance on the possibility of § 212(c) relief, pleaded guilty to aggravated felonies." *Id.* at 315, 121 S.Ct. 2271.

The reasoning of *St. Cyr* does not apply here. The discretionary waiver under § 212(c), upon which St. Cyr relied, already existed when he pleaded guilty. By contrast, Amendment 782, which provides the basis for Defendants' motions, was promulgated after their pleas. Amendment 782 provides a basis for sentence reductions, but is governed by limitations on such reductions. Because of the limitations, Defendants receive no benefit from Amendment 782. But their failure to receive such benefit is not, as in *St. Cyr*, the result of a retroactive deprivation of a pre-existing benefit. Rather, it is the result of a prospective grant of a limited benefit. *See Tercero*, 734 F.3d at 980–81; *see also United States v. Erskine*, 717 F.3d 131, 134 (2d Cir. 2013) (granting a limited reduction).

Conclusion

Because § 1B1.10(b)(2)(A) does not impermissibly conflict with § 991(b) and Defendants have not shown that § 1B1.10(b)(2)(A) violates equal protection or due process, we affirm the district courts' denials of Defendants' motions for sentence reductions.

AFFIRMED.

All Citations

862 F.3d 856, 17 Cal. Daily Op. Serv. 6618, 2017 Daily Journal D.A.R. 6596

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: May 27, 2010
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons,

together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. No subpar. (B) has been enacted.

3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter D. Imprisonment (Refs & Annos)

18 U.S.C.A. § 3582

§ 3582. Imposition of a sentence of imprisonment

Effective: November 2, 2002
Currentness

(a) Factors to be considered in imposing a term of imprisonment.--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.--Notwithstanding the fact that a sentence to imprisonment can subsequently be--

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission 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.

(d) Inclusion of an order to limit criminal association of organized crime and drug offenders.--The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1998; amended Pub.L. 100-690, Title VII, § 7107, Nov. 18, 1988, 102 Stat. 4418; Pub.L. 101-647, Title XXXV, § 3588, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 103-322, Title VII, § 70002, Sept. 13, 1994, 108 Stat. 1984; Pub.L. 104-294, Title VI, § 604(b)(3), Oct. 11, 1996, 110 Stat. 3506; Pub.L. 107-273, Div. B, Title III, § 3006, Nov. 2, 2002, 116 Stat. 1806.)

18 U.S.C.A. § 3582, 18 USCA § 3582
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part III. Court Officers and Employees (Refs & Annos)
Chapter 58. United States Sentencing Commission (Refs & Annos)

28 U.S.C.A. § 991

§ 991. United States Sentencing Commission; establishment and purposes

Effective: October 13, 2008
Currentness

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the President as Vice Chairs. At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party, and of the three Vice Chairs, no more than two shall be members of the same political party. The Attorney General, or the Attorney General's designee, shall be an ex officio, nonvoting member of the Commission. The Chair, Vice Chairs, and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to--

(1) establish sentencing policies and practices for the Federal criminal justice system that--

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2017; amended Pub.L. 99-22, § 1(1), Apr. 15, 1985, 99 Stat. 46; Pub.L. 103-322, Title XXVIII, § 280005(a), (c)(1), (2), Sept. 13, 1994, 108 Stat. 2096, 2097; Pub.L. 104-294, Title VI, § 604(b)(11), Oct. 11, 1996, 110 Stat. 3507; Pub.L. 108-21, Title IV, § 401(n)(1), Apr. 30, 2003, 117 Stat. 676; Pub.L. 110-406, § 16, Oct. 13, 2008, 122 Stat. 4295.)

28 U.S.C.A. § 991, 28 USCA § 991
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part III. Court Officers and Employees (Refs & Annos)
Chapter 58. United States Sentencing Commission (Refs & Annos)

28 U.S.C.A. § 994

§ 994. Duties of the Commission

Effective: October 6, 2006
Currentness

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System--

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including--

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of--

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583(e) of title 18.

(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents [1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents [1] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(1) has been convicted of a felony that is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant--

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect--

(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of--

(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such

categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including--

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in--

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) 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.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include--

(A) the judgment and commitment order;

(B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission itself may assemble or maintain in electronic form as a result of the information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2019; amended Pub.L. 99-217, § 3, Dec. 26, 1985, 99 Stat. 1728; Pub.L. 99-363, § 2, July 11, 1986, 100 Stat. 770; Pub.L. 99-570, Title I, §§ 1006(b), 1008, Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 6(b), 56, Nov. 10, 1986, 100 Stat. 3592, 3611; Pub.L. 100-182, §§ 16(b), 23, Dec. 7, 1987, 101 Stat. 1269, 1271; Pub.L. 100-690, Title VII, §§ 7083, 7103(b), 7109, Nov. 18, 1988, 102 Stat. 4408, 4417, 4419; Pub.L. 103-322, Title II, § 20403(b), Title XXVIII, § 280005(c)(4), Title XXXIII, § 330003(f)(1), Sept. 13, 1994, 108 Stat. 1825, 2097, 2141; Pub.L. 108-21, Title IV, § 401(h), (k), Apr. 30, 2003, 117 Stat. 672, 674; Pub.L. 109-177, Title VII, § 735, Mar. 9, 2006, 120 Stat. 271; Pub.L. 109-304, § 17(f)(1), Oct. 6, 2006, 120 Stat. 1708.)

Footnotes

1 So in original. Probably should be “incidence”.

28 U.S.C.A. § 994, 28 USCA § 994

Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

§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

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. § 35829(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 determine 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 §5G.1.1 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 ranged 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

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)).

U.S.S.G. Supp. to App. C, Amend. 788 (Nov. 1, 2014) at 86-87.

Reason for Amendment 789

This amendment makes certain technical changes to the Introduction and Commentary in the Guidelines Manual.

First, the amendment makes clerical changes to provide United States Reports citations for certain Supreme Court cases. The changes are made to—

(1) Subpart 2 of Part A of Chapter One (Introduction, Authority, and General Application Principles);

(2) the Background Commentary to §1B1.1 (Application Instructions); and

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

Second, the amendment makes a clerical change to Application Note 1 to §2M3.1 (Gathering or Transmitting National Defense Information to Aid a Foreign Government) to reflect the editorial reclassification of a section in the United States Code.

Finally, the amendment makes a technical and conforming change to Application Note 2(A) to §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) to reflect that subsection (c) was predesignated as subsection (d) by Amendment 787.

U.S.S.G. Supp. to App. C, Amend. 788 (Nov. 1, 2014) at 88.

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

ARTEMIO RAMIREZ-ARROYO,

Petitioner,

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 on the counsel for the respondent via email and first-class mail, postage prepaid, on July 6, 2020, an exact and full copy thereof addressed to:

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Further, the original was mailed to the Honorable Scott S. Harris, Clerk of the United States Supreme Court, by depositing it in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on this 6th day of July, 2020, with first-class postage prepaid.

Additionally, I electronically filed the foregoing Appendix to Petition for Writ of Certiorari by the using the Supreme Court's Electronic filing system on July 6, 2020.

Dated this 6th day of July, 2020.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Petitioners