

APPENDIX A

United States v. Quintanilla, et al.,
868 F.3d 315 (5th Cir. 2017)

868 F.3d 315

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellant

v.

Melissa QUINTANILLA, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Dustin Ray Nichols, also known as
Dustin Nichols, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Jane Cervantez, also known as Jane
Cervantes, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Justin Anderson, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Marti Gail McPherson, Defendant-Appellee
United States of America, Plaintiff-
Appellant Cross-Appellee

v.

Michael Scott Cooksey, Defendant-
Appellee Cross-Appellant
United States of America, Plaintiff-Appellant

v.

Taviche Marquise Grimes, also known as
Tavichie Mequise Grimes, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

James Walter Lee, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Tray Williams, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Elizabeth Ann Parada, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Dodionne Gay Watson, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Kenneth Morrison, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Lee Edward Williams, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Jose Aron Sotelo, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Latoya Latrice Golden, also known
as Toya, Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

David Wayne Frazier, Jr., also known as
David Frazier, Jr., Defendant-Appellee
United States of America, Plaintiff-Appellant

v.

Charles Earl Thomas, Defendant-Appellee

No. 16-50677 Cons w/ Nos. 16-50682, 16-50683,
16-50687, 16-50688, 16-50689, 16-50690,
16-50691, 16-50694, 16-50700, 16-50704, 16-50705,
16-50706, 16-50707, 16-50709, 16-50715, 16-50716

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Filed August 16, 2017

Synopsis

Background: In separate cases, narcotics offenders moved for sentence reduction based on retroactive change in drug quantity Guidelines range. The United States District Court for the Western District of Texas, 2016 WL 9087361 and 2016 WL 7107898, granted motions, and government appealed.

[Holding:] The Court of Appeals held that narcotics offenders who were subject to a higher Guidelines range, as career offenders, than the Guidelines ranges to which they were subject based on quantity of drugs involved in their offenses, and whose sentences were calculated starting with the career offender Guidelines range, were not sentenced “based on” the drug quantity Guidelines range, so as not to be eligible for sentence reductions.

Reversed; sentences reinstated.

West Headnotes (3)

[1] **Criminal Law**

Review De Novo

Criminal Law

Sentencing

Criminal Law

Sentencing

On appeal from district court's ruling on motion for reduction in sentence based on retroactive change in the Sentencing Guidelines, the Court of Appeals reviews decision whether to reduce sentence for abuse of discretion, district court's interpretation of the Guidelines de novo, and its findings of fact for clear error. 18 U.S.C.A. § 3582(c)(2); U.S.S.G. § 1B1.1 et seq.

Cases that cite this headnote

[2] **Criminal Law**

Discretion of Lower Court

District court abuses its discretion if it bases its decision on error of law or on clearly erroneous assessment of the evidence.

Cases that cite this headnote

[3] **Sentencing and Punishment**

Change in law

Narcotics offenders who were subject to a higher Guidelines range, as career offenders, than the Guidelines ranges to which they were subject based on quantity of drugs involved in their offenses, and whose sentences were calculated starting with the career offender Guidelines range, were not sentenced "based on" the drug quantity Guidelines range, so as not to be eligible for sentence reductions when retroactive amendment of the Sentencing Guidelines lowered that drug quantity Guidelines range. 18 U.S.C.A. § 3582(c)(2); U.S.S.G. §§ 2D1.1, 4B1.1.

1 Cases that cite this headnote

*317 Appeals from the United States District Court for the Western District of Texas

Attorneys and Law Firms

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Before DAVIS, GRAVES, and COSTA, Circuit Judges.

Opinion

PER CURIAM:

Before the Court are seventeen consolidated criminal appeals presenting essentially the same question of law: whether each defendant is entitled to a two-level reduction to offense level under Amendment 782 to the United States Sentencing Guidelines, which permits such a reduction for sentences based on the drug quantity under U.S.S.G. § 2D1.1, when the original sentence in each case was calculated starting from the higher guideline range for career offenders under U.S.S.G. § 4B1.1. As explained further below, 18 U.S.C. § 3582(c)(2) authorizes a district court to modify a sentence "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...." Because we hold that the sentences in these appeals were not "based on" § 2D1.1's drug quantity range but rather on § 4B1.1's higher career offender guideline range, the district court was without authority as a matter of law to modify the sentences, and the judgments of the district court must be REVERSED.

I. Background

Not only do all seventeen appeals present *318 the same issue of law,¹ but the relevant facts and applicable law are the same in all material respects. The relevant facts are as follows: Each defendant was convicted of a drug crime, which resulted in a guideline range under § 2D1.1

based on the drug quantity. Each defendant also qualified as a career offender, resulting in a guideline range under § 4B1.1 based on that status. In each case, the § 4B1.1 career offender guideline range was higher than the § 2D1.1 drug quantity range.

Under § 4B1.1(b), “if the offense level for a career offender from the table in this [career offender] subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply.” Thus, the higher § 4B1.1 guideline range was the required starting range for each defendant. The district court at each original sentencing in fact applied the higher § 4B1.1 guideline range. From that range, the district court applied various reductions that are not at issue in these cases. The final sentence was typically somewhere between the starting § 4B1.1 range and the lower § 2D1.1 range, though in some cases the final sentence, after all appropriate reductions, was within or even lower than the original § 2D1.1 range.² Of course, if the court had started at the § 2D1.1 range and applied all of those reductions, the sentence would have been lower still.

After the original sentencings, the Sentencing Commission enacted Amendment 782, effective November 1, 2014 and retroactive to earlier sentences, which amended § 2D1.1 to allow a two-level reduction to offense level based on the drug quantity.³ The amendment affects § 2D1.1 and a few other minor sections tied to § 2D1.1, but it does not change § 4B1.1 in any way. In Amendment 782’s “Reason for Amendment” section, the Sentencing Commission stated that “existing statutory enhancements, such as those available under 18 U.S.C. § 924(c), and guideline enhancements for offenders who possess firearms, use violence, have an aggravating role in the offense, *or are repeat or career offenders*, ensure that the most dangerous or serious offenders will continue to receive appropriately severe sentences.”⁴

Under 18 U.S.C. § 3582(c)(2), a district court has authority to modify a sentence “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....” Under U.S.S.G. § 1B1.10(a)(1):

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 [NB: subsection (d) includes Amendment 782], 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 *319 shall be consistent with this policy statement.⁵

Each of the defendants applied for and received a two-level reduction under Amendment 782. In its virtually identical orders granting the defendants’ motions to reduce the sentence, the district court:

[found] that Movant [was] eligible for a reduction of his sentence under 18 U.S.C. § 3582(c)(2) because his original sentence was “based on” the amended guideline § 2D1.1.... See § 3582(c)(2); see also [*Freeman v. United States*, 564 U.S. 522, 131 S.Ct. 2685, 2695, 180 L.Ed.2d 519 (2011)] (allowing a § 3582(c)(2) reduction with a Rule 11(c)(1)(C) plea agreement if agreed sentence was based on the guidelines)....

In the instant case, Movant’s sentence was “based on” the drug guideline range.... Just like when the parties to an 11(c)(1)(C) binding plea agreement may choose a downward departure tied to a drug guideline range, a judge may depart to a sentence otherwise tied to the initial drug guideline range. The sentence would still be “based on” the drug guideline range under *Freeman*.

The district court also cited *United States v. Jackson*, 678 F.3d 442, 445 (6th Cir. 2012), for the proposition that a sentence is “based on” § 2D1.1 if the district court clearly considered the lower drug quantity guidelines in downwardly departing from a higher applicable guideline range. Using this definition, the district court not only found that each defendant’s sentence was “based on” the § 2D1.1 drug quantity range, but that each defendant was in fact entitled to a two-level reduction.

The government timely appealed each case on the ground that each defendant’s original sentence was based on the

career offender guideline range in § 4B1.1, not the lower drug quantity guideline range in § 2D1.1.

II. Jurisdiction and Standard of Review

[1] [2] We have appellate jurisdiction to review the district court's sentence modification under 18 U.S.C. § 3731. "[W]e review the decision whether to reduce a sentence under § 3582(c)(2) for abuse of discretion, its interpretation of the guidelines *de novo*, and its findings of fact for clear error."⁶ "A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence."⁷

III. Analysis

[3] The crux of the issue is whether each defendant's original sentence was "based on" the drug quantity guideline range under § 2D1.1 or "based on" the career offender guideline range under § 4B1.1. Stated differently, the question under § 1B1.10(a)(1) in each case is whether the "guideline range applicable to that defendant has subsequently been lowered." Amendment 782 lowered only the § 2D1.1 drug quantity guideline range, so if the § 2D1.1 guideline range was not "applicable to [a] defendant," then that defendant cannot receive a reduction under § 1B1.10 or § 3582(c)(2).

The government argues that the district court based its decision on inapposite legal authorities. Specifically, it argues that the Supreme Court's decision in *Freeman* is *320 irrelevant because *Freeman* concerned a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), which is not at issue in any of these sentences. The government also correctly observes that the Fifth Circuit's decision in *Henderson*, *supra*, and the Sixth Circuit's decision in *Jackson*, *supra*, cited by the district court, are factually inapposite to the cases before us and do not provide authority for finding that the defendants' original sentences here were "based on" § 2D1.1's drug quantity guideline range when they were subject to a higher § 4B1.1 career offender guideline range.

Furthermore, the government points out that the Fifth Circuit has already held, in *United States v. Valdez*, 615 Fed.Appx. 191, 192 (5th Cir. 2015), that a defendant may not obtain a reduction under Amendment 782 if his or her sentence was calculated from the higher career offender guideline range under § 4B1.1. The government notes

that the unpublished opinion in *Valdez* is consistent with the Fifth Circuit's treatment of a previous amendment concerning the crack cocaine guidelines in *United States v. Anderson*, 591 F.3d 789 (5th Cir. 2009). The *Anderson* rule is consistent with the result reached by other circuits on both Amendment 782⁸ and similar previous amendments.⁹ Indeed, there is even more authority than the government cited. At least four more unpublished Fifth Circuit opinions have concluded that a defendant is not entitled to a sentence reduction under Amendment 782 if that defendant was sentenced as a career offender under § 4B1.1.¹⁰ There are no cases reaching the district court's contrary result.

Indeed, the Fifth Circuit strengthened the *Anderson* rule even further in *321 *United States v. Banks*, 770 F.3d 346 (5th Cir. 2014), making it clear now that to determine under § 1B1.10 what is the "guideline range applicable to that defendant," we look only to the highest guideline range applicable at the time he or she seeks resentencing, even if another range was higher at the time of the original sentencing.

In *Banks*, the defendant's drug quantity guideline range under § 2D1.1 (38/VI) was higher than his career offender guideline range under § 4B1.1 (37/VI), so he was originally sentenced under § 2D1.1.¹¹ A few years later, in 2008, he sought a two-level reduction based on the crack cocaine guidelines amendments under § 2D1.1.¹² The district court granted the reduction under § 2D1.1, but because his § 2D1.1 range was now lower than his § 4B1.1 range, the court recalculated his sentence starting with the § 4B1.1 range as his base guideline range, still in effect giving him a one-level reduction.¹³

The defendant later sought another reduction under Amendment 750, which had once again changed the drug quantity calculation under § 2D1.1, but the Fifth Circuit rejected the reduction on the ground that the sentence he was currently serving, i.e., the one in effect after the 2008 resentencing, was not "based on" § 2D1.1 but was "based on" § 4B1.1—even though the defendant's *original* sentence had been based on the then-higher § 2D1.1 drug quantity guideline range.¹⁴ A recent unpublished Fifth Circuit opinion applied the *Banks* rule to preclude an Amendment 782 reduction under similar facts.¹⁵

The consolidated appeals here are far simpler. There is no question that the career offender guideline range under § 4B1.1 was higher than the drug quantity guideline range under § 2D1.1, so under the *Anderson/Banks* rule, we must conclude that all 17 sentences were “based on” § 4B1.1 and not on § 2D1.1, i.e., that under § 1B1.10(a)(1) the “guideline range applicable to that defendant” was the career offender range under § 4B1.1. Because Amendment 782 did not lower the guideline range under § 4B1.1, none of the defendants is entitled to a sentence reduction under § 1B1.10(a)(1) or § 3582(c)(2). Consequently, the district court lacked the authority as a matter of law to modify the defendants’ sentences under § 3582(c)(2), and it therefore abused its discretion by granting the reductions.

For their part, the defendants attempt to sidestep the outcome required by the above cases by claiming Congress intended sentence reductions to be broader under § 3582(c)(2) than the Sentencing Commission suggested under § 1B1.10(a)(1), i.e., that § 3582(c)(2)’s language (“based on a sentencing range that has subsequently been lowered by the Sentencing Commission”) is broader than § 1B1.10(a)(1)’s language (“guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual”). The defendants argue that § 3582(c)(2)’s use of “based on” is broad enough to include the district court’s reasoning *322 that a sentence is “based on” § 2D1.1 even if the § 2D1.1 drug quantity guideline range was lower than the § 4B1.1 career offender guideline range. This argument is foreclosed by the *Anderson/Banks* rule, however.

The only remaining question is the cross-appeal of defendant Michael Scott Cooksey in *United States v. Cooksey*, No. 16-50689. Cooksey pleaded guilty to two counts: (1) conspiring to possess five grams or more of methamphetamine with the intent to distribute it, and

(2) possessing and concealing counterfeit U.S. currency. His offense level was calculated by breaking the counts down into two separate groups: the drug count and the counterfeit-obligations count. Because of the grouping rules, § 2D1.1’s drug quantity range provided the base offense level for both counts. The drug count resulted in an offense level of 26, while the counterfeit-obligations count, resulting in an offense level of 9, was disregarded. However, these were dwarfed by the career offender guideline range under § 4B1.1, which established a base offense level of 34.

The district court reduced Cooksey’s drug count sentence as it did with all the other defendants, but it did not reduce his sentence on the counterfeit-obligations count and did not explain why. Cooksey has filed a cross-appeal arguing that he is entitled to a reduction on his counterfeit-obligations sentence under § 2D1.1 as well. Cooksey is not entitled to relief on his cross-claim for the same reason his sentence reduction should be reversed under the above analysis. Cooksey’s sentence was “based on” his career offender status under § 4B1.1, so he was not entitled to a reduction on either count under Amendment 782.

IV. Conclusion

The district court’s judgments in all seventeen consolidated cases are REVERSED, and the sentences in effect before the district court’s reduction are hereby reinstated. As a matter of law, the district court was without authority to modify any of the sentences under Amendment 782.

All Citations

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Footnotes

- 1 One of them, *United States v. Cooksey*, No. 16-50689, also presents one small additional issue, discussed at the end of this opinion.
- 2 In *United States v. Grimes*, No. 16-50690, the defendant’s § 2D1.1 range was 130-162 months, and the § 4B1.1 range was 262-327 months, but the final sentence after substantial reductions was 151 months, within the original § 2D1.1 range. In *United States v. Parada*, No. 16-50700, *United States v. Morrison*, No. 16-50705, *United States v. Sotelo*, No. 16-50707, and *United States v. Golden*, No. 15-50709, the final sentence, after all reductions, was lower than the § 2D1.1 range.
- 3 U.S.S.G. App. C, Amendment 782 (2014).
- 4 *Id.* (emphasis added).
- 5 U.S.S.G. § 1B1.10(a)(1) (emphasis added).
- 6 *United States v. Evans*, 587 F.3d 667, 672 (5th Cir. 2009) (citations omitted).

- 7 *United States v. Henderson*, 636 F.3d 713, 717 (5th Cir. 2011) (quoting *United States v. Smith*, 417 F.3d 483, 486–87 (5th Cir. 2005)).
- 8 See *United States v. Thomas*, 775 F.3d 982, 983 (8th Cir. 2014) (per curiam), *United States v. Hall*, 628 Fed.Appx. 681, 683 (11th Cir. 2015) (unpublished), *United States v. Banyai*, 637 Fed.Appx. 532 (10th Cir. 2016) (unpublished), *United States v. Fritz*, 621 Fed.Appx. 196 (4th Cir. 2015) (per curiam), *United States v. Steel*, 609 Fed.Appx. 851, 856 (6th Cir. 2015) (unpublished).
- 9 See *United States v. Caraballo*, 552 F.3d 6, 10 (1st Cir. 2008); *United States v. Mock*, 612 F.3d 133, 138 (2d Cir. 2010); *United States v. Mateo*, 560 F.3d 152, 154–55 (3d Cir. 2009); *United States v. Munn*, 595 F.3d 183, 187 (4th Cir. 2010); *United States v. Webb*, 760 F.3d 513, 519 (6th Cir. 2014); *United States v. Forman*, 553 F.3d 585, 589 (7th Cir. 2009); *United States v. Tingle*, 524 F.3d 839 (8th Cir. 2008); *United States v. Wesson*, 583 F.3d 728, 731 (9th Cir. 2009); *United States v. Sharkey*, 543 F.3d 1236, 1239 (10th Cir. 2008); *United States v. Moore*, 541 F.3d 1323, 1327–30 (11th Cir. 2008); and *United States v. Berry*, 618 F.3d 13, 17–18 (D.C. Cir. 2010).
- 10 See *United States v. Estrada*, 672 Fed.Appx. 476, 477 (5th Cir. 2017) (“The district court correctly determined that Estrada was not eligible for relief under § 3582(c)(2) because he was sentenced under the career offender provision in U.S.S.G. § 4B1.1, and Amendment 782 to § 2D1.1(c) did not have the effect of lowering his offense level or guidelines range.”), *United States v. Ruiz*, 669 Fed.Appx. 222 (5th Cir. 2016) (“The record confirms that Ruiz was not eligible for a § 3582(c)(2) sentence reduction under Amendment 782 because, as a career offender pursuant to § 4B1.1, he was not sentenced based on a guidelines range that was subsequently lowered by Amendment 782.” (citing *Anderson, supra*)), *United States v. Saldivar*, 633 Fed.Appx. 242 (5th Cir. 2016) (“The record reflects that Saldivar was not eligible for a § 3582(c)(2) sentence reduction under Amendment 782 because, as a career offender pursuant to U.S.S.G. § 4B1.1, she was not sentenced based on a guidelines range that was subsequently lowered by the Sentencing Commission.”), and *United States v. Yett*, 669 Fed.Appx. 273 (5th Cir. 2016) (“Thus, the record confirms that Yett was not eligible for a § 3582(c)(2) sentence reduction under Amendment 782 because, as he was sentenced as a career offender pursuant to § 4B1.1, his sentence is not based on a guidelines range that was subsequently lowered by Amendment 782.”).
- 11 770 F.3d at 347.
- 12 *Id.* at 347–48.
- 13 *Id.*
- 14 *Id.* at 348–49.
- 15 See *United States v. Jackson*, 667 Fed.Appx. 869 (5th Cir. 2016) (“Nevertheless, that Jackson’s offense level has been reduced, alone, does not entitle him to a sentence reduction under § 3582(c)(2). Although Amendment 782 would reduce Jackson’s § 2D1.1 offense level, the court’s determining it would use Jackson’s career-offender offense level of 34, under § 4B1.1(b), because it is higher than that produced by § 2D1.1 following the amendment, was proper.” (citation to *Banks* omitted)).

APPENDIX B

18 U.S.C. § 3582(c)(2)

KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Validity Called into Doubt by U.S. v. Ragland, D.D.C., July 31, 2008

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

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.)

Notes of Decisions (595)

18 U.S.C.A. § 3582, 18 USCA § 3582

Current through P.L. 115-75. Also includes P.L. 115-78 to 115-82. Title 26 current through 115-82.

APPENDIX C

U.S.S.G. §1B1.10, p.s.

 KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Unconstitutional by U.S. v. Horn, M.D.Tenn., Dec. 16, 2008

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter One. Introduction, Authority, and General Application Principles (Refs & Annos)

Part B. General Application Principles

USSG, § 1B1.10, 18 U.S.C.A.

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

Currentness

(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.--

(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.

CREDIT(S)

(Effective November 1, 1989; amended effective November 1, 1990; November 1, 1991; November 1, 1992; November 1, 1993; November 1, 1994; November 1, 1995; November 1, 1997; November 1, 2000; November 5, 2003; November 1, 2007; March 3, 2008; May 1, 2008; November 1, 2011; November 1, 2012; November 1, 2014.)

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 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).>

Notes of Decisions (154)

Footnotes

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

Federal Sentencing Guidelines, § 1B1.10, 18 U.S.C.A., FSG § 1B1.10

As amended to 9-5-2017