

ADDENDUM

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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 17 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 15-30243

Plaintiff-Appellee,

D.C. No. 9:05-cr-00041-DWM

v.

MEMORANDUM*

CHAD ALAN CREWS, a.k.a. Chedda,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding

Submitted August 9, 2017**

Before: SCHROEDER, TASHIMA, and M. SMITH, Circuit Judges.

Chad Alan Crews appeals from the district court's order denying his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Crews contends that he is entitled to a sentence reduction under Amendment

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

782 to the Sentencing Guidelines. We review de novo whether a district court had authority to modify a sentence under section 3582(c)(2). *See United States v. Leniear*, 574 F.3d 668, 672 (9th Cir. 2009). The record makes clear that the district court imposed Crews's sentence, and later reduced Crews's sentence under Federal Rule of Criminal Procedure 35(b), for reasons unrelated to the guideline range lowered by Amendment 782. Crews is, therefore, ineligible for a sentence reduction because his sentence was not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); *United States v. Rodriguez-Soriano*, 855 F.3d 1040, 1045-46 (9th Cir. 2017).

Crews's motion to file the briefs and excerpts of record under seal is granted. The Clerk shall maintain the opening and answering briefs, both volumes of the excerpts of record, and the motion to seal itself under seal.

AFFIRMED.

FILED

AUG 19 2015

Clerk, U.S. District Court
District Of Montana
Missoula

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHAD ALAN CREWS,

Defendant.

CR 05-41-M-DWM-2

ORDER

On July 31, 2015, Defendant Chad Alan Crews moved for sentence reduction pursuant to 18 U.S.C. § 3582(c)(2) and Amendment 782. (Doc. 145.) Because the defendant is not eligible for the reduction, his request is denied.

On June 16, 2006, the defendant was sentenced to the applicable mandatory minimum sentence of 240 months for conspiracy to possess methamphetamine with intent to distribute. (Judg., Doc. 83.) After sentencing, the government filed a Rule 35 motion requesting the defendant receive a reduction of 12 months for the substantial assistance he provided. (Doc. 135.) The Court granted the government's motion. (Doc. 138.) On January 7, 2011, an Amended Judgment form was entered sentencing the defendant to 228 months, 12 months below the

original sentence of 240 months. (Doc. 140.)

To be eligible for a reduction under Amendment 782, the imposed term of imprisonment must be “based on” a sentencing range that has been subsequently lowered. 18 U.S.C. § 3582(c)(2). The controlling authority on whether a sentence is “based on” a sentencing range that has been subsequently lowered is *Freeman v. United States*, ___ U.S. ___, 131 S. Ct. 2685 (2011), a case addressing Rule 11(c)(1)(C) plea agreements decided by a four-justice plurality and Justice Sotomayor, concurring in the judgment. Because the Ninth Circuit follows Justice Sotomayor’s concurring opinion, *United States v. Davis*, 776 F.3d 1088, 1091 (9th Cir. 2015); *United States v. Austin*, 676 F.3d 924, 927-28 (9th Cir. 2012), the defendant’s reliance on the plurality’s reasoning is not persuasive. According to Justice Sotomayor, “in applying § 3582(c)(2) a court must discern the foundation for the term of imprisonment imposed by the sentencing judge” in order to determine whether the sentence was “based on” a sentencing range. *Freeman*, 131 S. Ct. at 2695 (Sotomayor, J., concurring). Where the sentencing range did not “serve[] as the basis or foundation for the term of imprisonment,” the threshold requirement of § 3582(c)(2) is not met. *Id.*

Contrary to the defendant’s argument, Justice Sotomayor’s reasoning is consistent with the earlier and on-point Ninth Circuit case, *United States v.*

Jackson, 577 F.3d 1032, 1035 (9th Cir. 2009).¹ In *Jackson*, the defendant was subject to a statutory mandatory minimum, but the district court granted the government's motion to depart from the guidelines and imposed a sentence less than the mandatory minimum pursuant to USSG §5K1.1 and 18 U.S.C. § 3553(e). 577 F.3d at 1033. The defendant received a sentence that was below the mandatory minimum but above the guidelines sentencing range. *Id.* At the sentencing hearing, the court began its determination at the mandatory minimum, not the guidelines sentencing range. *Id.* at 1035. Accordingly, the Ninth Circuit held that "a defendant in this circumstance is ineligible for a sentence reduction under § 3582(c)(2), despite any subsequent reductions in the guideline ranges." *Id.* at 1034. The situation here is similar.

Here, the drug guideline range did not serve as a foundation for either the defendant's original sentence or the sentence imposed following the government's Rule 35 motion. At sentencing, the Court repeatedly stated a sentence of 240 months was required by statute. (Sntg. Tr., Doc. 103-1 at 17, 19, 20, 21.) Despite the Court's statements that it would have given a lower sentence if it had the

¹ The defendant attempts to rely on the reasoning of *In re Sealed Case*, 722 F.3d 361, 369 (D.C. Cir. 2013), to argue that *Jackson* has been overruled by *Freeman*. However, that reasoning provides little guidance here as the D.C. Circuit follows the plurality opinion from *Freeman*, *United States v. Epps*, 707 F.3d 337, 351 (D.C. Cir. 2013), while the Ninth Circuit follows Justice Sotomayor's concurrence, *Austin*, 676 F.3d at 927-28. *Jackson* has not been overruled. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

discretion, (*id.* at 18.), the defendant was sentenced based on the statutorily-required 240 months. Similar to the Rule 11(c)(1)(C) agreement addressed in *Freeman*, that mandatory minimum sentence was binding on the Court. The sentence imposed was not “based on” the drug guidelines.

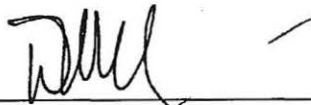
A second opportunity for the sentence to be “based on” the guideline range potentially arose when the government filed its Rule 35 motion. However, other than to note the defendant’s advisory guideline range, that motion makes no reference to the drug guideline range and bases its 12-month recommendation solely on the assistance provided. (Doc. 135.) In granting the motion, the Court provided no further reflection on the applicable drug guideline range. (Doc. 138.) That amended sentence was therefore purely based on the substantial assistance provided, not the defendant’s drug guideline range. Accordingly, the defendant is not eligible for reduction because neither sentence imposed was “based on” the subsequently amended drug guideline range.² *See Freeman*, 131 S. Ct. at 2695 (Sotomayor, J., concurring).

Accordingly, IT IS ORDERED that the defendant’s motion (Doc. 145) is

² The Chief Judge of this District advised the undersigned that in four similar cases the Montana United States Attorney’s Office “conceded error” in the pending appeals. This issue needs to be resolved by the Circuit. *See United States v. Davis*, ___ F.3d ___, 2015 WL 4663640 (9th Cir. Aug. 6, 2015) (ordering the case be reheard en banc). It is mistaken to simplistically concede a legal issue involving this complex question.

DENIED. That denial is reflected in the judgment entered contemporaneously with this Order.

Dated this 19th day of August, 2015.



Donald W. Molloy, District Judge
United States District Court


21 U.S.C. §841(a)(1)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. §841(b)(1)(A)

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

....

If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.

18 U.S.C. §3582(c)(1)(B) and (2):

- (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–

....

- (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.

18 U.S.C. §3553(e)

- (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.

28 U.S.C. §994(a)(2)(C), (o) and (u)

- (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—

....

- (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—

....

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

- (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.

....

- (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.

(1) USSG 1B1.10 (Effective 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.—

(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.

USSG §5G1.1

§ 5G1.1. Sentencing on a Single Count of Conviction

- (a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.
- (b) Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.

- (c) In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—
 - (1) is not greater than the statutorily authorized maximum sentence, and
 - (2) is not less than any statutorily required minimum sentence.

USSG §5G1.2

§ 5G1.2. Sentencing on Multiple Counts of Conviction

- (a) Except as provided in subsection (e), the sentence to be imposed on a count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment, shall be determined by that statute and imposed independently.
- (b) For all counts not covered by subsection (a), the court shall determine the total punishment and shall impose that total punishment on each such count, except to the extent otherwise required by law.
- (c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.
- (d) If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law.

- (e) In a case in which subsection (c) of § 4B1.1 (Career Offender) applies, to the extent possible, the total punishment is to be apportioned among the counts of conviction, except that (1) the sentence to be imposed on a count requiring a minimum term of imprisonment shall be at least the minimum required by statute; and (2) the sentence to be imposed on the 18 U.S.C. § 924(c) or § 929(a) count shall be imposed to run consecutively to any other count.

USSG §5K1.1

§ 5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

- (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
 - (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
 - (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
 - (3) the nature and extent of the defendant's assistance;
 - (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
 - (5) the timeliness of the defendant's assistance.

USSG AMENDMENT 780

780. Amendment: Section 1B1.10 is amended in each of subsections (a)(1), (a)(2)(A), (A)(2)(B), and (b)(1) by striking “subsection (c)” each place such term appears and inserting “subsection (d)”; by redesignating subsection (c) as subsection (d); and by inserting after subsection (b) the following new subsection (c):

“(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).”.

The Commentary to §1B1.10 captioned “Application Notes” is amended in Notes 1(A), 2, and 4 by striking “subsection (c)” each place such term appears and inserting “subsection (d)”; by redesignating Notes 4 through 6 as Notes 5 through 7, respectively; and by inserting after Note 3 the following new Note 4:

“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."

The Commentary to §1B1.10 captioned "Background" is amended by striking "subsection (c)" both places such term appears and inserting "subsection (d)".

Reason for Amendment: 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 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 750, the amended guideline range as determined on the Sentencing Table is 168 to 210 months, but after application of the "trumping" mechanism in §5G1.1 (Sentencing on a Single Count of Conviction), the mandatory minimum sentence of 240 months is the guideline sentence. See §5G1.1(b). Section 1B1.10(b)(2)(B) provides that such a defendant may

receive a comparable 39 percent reduction from the bottom of the amended guideline range, but circuits are split over what to use as the bottom of the range.

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

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

The Eleventh Circuit, the Sixth Circuit, and the Second Circuit have taken the view that the bottom of the amended range in such a case would remain 240 months, i.e., the guideline sentence that results after application of the “trumping” mechanism in §5G1.1. See *United States v. Glover*, 686 F.3d 1203, 1208 (11th Cir. 2012); *United States v. Joiner*, 727 F.3d 601 (6th Cir. 2013); *United States v. Johnson*, 732 F.3d 109 (2d Cir. 2013). Under these decisions, the defendant in the example would have an original range of 240 months and an amended range of 240 months, and would not be eligible for any reduction because the range has not been lowered. In contrast, the Third Circuit and the District of Columbia Circuit have taken the view that the bottom of the amended range in such a case would be 110 months, i.e., the bottom of the Sentencing Table guideline range. See *United States v. Savani*, 733 F.3d 56, 66-7 (3d Cir. 2013); *In re Sealed Case*, 722 F.3d 361, 369-70 (D.C. Cir. 2013).

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

This clarification ensures that defendants who provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for that assistance. See USSG App. C. Amend 759 (Reason for Amendment). As the Commission noted in the reason for that 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 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.” Id.

Effective Date: The effective date of this amendment is November 1, 2014.

USSG AMENDMENT 782

782. Amendment: Section 2D1.1(c) is amended by striking paragraph (17); by redesignating paragraphs (1) through (16) as paragraphs (2) through (17), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

- “(1) ● 90 KG or more of Heroin; Level 38
● 450 KG or more of Cocaine;
● 25.2 KG or more of Cocaine Base;
● 90 KG or more of PCP, or 9 KG or more of PCP (actual);
● 45 KG or more of Methamphetamine, or
4.5 KG or more of Methamphetamine (actual), or
4.5 KG or more of ‘Ice’;
● 45 KG or more of Amphetamine, or
4.5 KG or more of Amphetamine (actual);
● 900 G or more of LSD;
● 36 KG or more of Fentanyl;
● 9 KG or more of a Fentanyl Analogue;
● 90,000 KG or more of Marihuana;
● 18,000 KG or more of Hashish;
● 1,800 KG or more of Hashish Oil;
● 90,000,000 units or more of Ketamine;
● 90,000,000 units or more of Schedule I or II Depressants;
● 5,625,000 units or more of Flunitrazepam.”.

Section 2D1.1(c)(3) (as so redesignated) is amended by striking “Level 36” and inserting “Level 34”.

Section 2D1.1(c)(4) (as so redesignated) is amended by striking “Level 34” and inserting “Level 32”.

Section 2D1.1(c)(5) (as so redesignated) is amended by striking “Level 32” and inserting “Level 30”; and by inserting before the line referenced to Flunitrazepam the following:

- “ ● 1,000,000 units or more of Schedule III Hydrocodone;”.

Section 2D1.1(c)(6) (as so redesignated) is amended by striking “Level 30” and inserting “Level 28”; and in the line referenced to Schedule III Hydrocode by striking “700,000 or more” and inserting “At least 700,000 but less than 1,000,000”.

Section 2D1.1(c)(7) (as so redesignated) is amended by striking “Level 28” and inserting “Level 26”.

Section 2D1.1(c)(8) (as so redesignated) is amended by striking “Level 26” and inserting “Level 24”.

Section 2D1.1(c)(9) (as so redesignated) is amended by striking “Level 24” and inserting “Level 22”.

Section 2D1.1(c)(10) (as so redesignated) is amended by striking “Level 22” and inserting “Level 20”; and by inserting before the line referenced to Flunitrazepam the following:

- “ ● 60,000 units or more of Schedule III substances (except Ketamine or Hydrocodone);”.

Section 2D1.1(c)(11) (as so redesignated) is amended by striking “Level 20” and inserting “Level 18”; and in the line referenced to Schedule III substances (except Ketamine or Hydrocodone) by striking “40,000 or more” and inserting “At least 40,000 but less than 60,000”.

Section 2D1.1(c)(12) (as so redesignated) is amended by striking “Level 18” and inserting “Level 16”.

Section 2D1.1(c)(13) (as so redesignated) is amended by striking “Level 16” and inserting “Level 14”.

Section 2D1.1(c)(14) (as so redesignated) is amended by striking “Level 14” and inserting “Level 12”; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue and inserting the following:

- “(14) ● Less than 10 G of Heroin; Level 12
- Less than 50 G of Cocaine;
 - Less than 2.8 G of Cocaine Base;
 - Less than 10 G of PCP, or
less than 1 G of PCP (actual);
 - Less than 5 G of Methamphetamine, or
less than 500 MG of Methamphetamine (actual),
or less than 500 MG of ‘Ice’;
 - Less than 5 G of Amphetamine, or
less than 500 MG of Amphetamine (actual);
 - Less than 100 MG of LSD;
 - Less than 4 G of Fentanyl;
 - Less than 1 G of a Fentanyl Analogue;”;

by striking the period at the end of the line referenced to Flunitrazepam and inserting a semicolon; and by adding at the end the following:

- “ ● 80,000 units or more of Schedule IV substances (except Flunitrazepam).”.

Section 2D1.1(c)(15) (as so redesignated) is amended by striking “Level 12” and inserting “Level 10”; by striking the line referenced to Heroin and all that follows through the line referenced to Fentanyl Analogue; and in the line referenced to Schedule IV substances (except Flunitrazepam) by striking “40,000 or more” and inserting “At least 40,000 but less than 80,000”.

Section 2D1.1(c)(16) (as so redesignated) is amended by striking “Level 10” and inserting “Level 8”; in the line referenced to Flunitrazepam by striking “At least 62 but less” and inserting “Less”; by striking the period at the end of the line referenced to Schedule IV substances (except Flunitrazepam) and inserting a semicolon; and by adding at the end the following:

“ ● 160,000 units or more of Schedule V substances.”.

Section 2D1.1(c)(17) (as so redesignated) is amended to read as follows:

“(17) ● Less than 1 KG of Marihuana; Level 6
● Less than 200 G of Hashish;
● Less than 20 G of Hashish Oil;
● Less than 1,000 units of Ketamine;
● Less than 1,000 units of Schedule I or II Depressants;
● Less than 1,000 units of Schedule III Hydrocodone;
● Less than 1,000 units of Schedule III substances
(except Ketamine or Hydrocodone);
● Less than 16,000 units of Schedule IV substances
(except Flunitrazepam);
● Less than 160,000 units of Schedule V substances.”.

The annotation to §2D1.1(c) captioned “Notes to Drug Quantity Table” is amended in Note (E) by striking “100 G” and inserting “100 grams”; in Note (F) by striking “0.5 ml” and “25 mg” and inserting “0.5 milliliters” and “25 milligrams”, respectively; and in Note (G) by striking “0.4 mg” and inserting “0.4 milligrams”.

The Commentary to §2D1.1 captioned “Application Notes” is amended in Note 8(A) by striking “1 gm”, “5 kg”, “100 gm”, and “500 kg” and inserting “1 gram”, “5 kilograms”, “100 grams”, and “500 kilograms”, respectively, and by striking “28” and inserting “26”; in Note 8(B) by striking “999 grams” and inserting “2.49 kilograms”;

in Note 8(C)(i) by striking “22” and inserting “20”, by striking “18” and inserting “16”, and by striking “24” and inserting “22”;

in Note 8(C)(ii) by striking “8” both places such term appears and inserting “6”, by striking “five kilograms” and inserting “10,000 units”, and by striking “10” and inserting “8”;

in Note 8(C)(iii) by striking “16” and inserting “14”, by striking “14” and inserting “12”, and by striking “18” and inserting “16”;

in Note 8(C)(iv) by striking “56,000” and inserting “76,000”, by striking “100,000” and inserting “200,000”, by striking “200,000” and inserting “600,000”, by striking “56” and inserting “76”, by striking “59.99” and inserting “79.99”, by striking “4.99” and inserting “9.99”, by striking “6.25” and inserting “12.5”, by striking “999 grams” and inserting “2.49 kilograms”, by striking “1.25” and inserting “3.75”, by striking “59.99” and inserting “79.99”, and by striking “61.99 (56 + 4.99 + .999)” and inserting “88.48 (76 + 9.99 + 2.49)”;

in Note 8(D), under the heading relating to Schedule III Substances (except ketamine and hydrocodone), by striking “59.99” and inserting “79.99”; under the heading relating to Schedule III Hydrocodone, by striking “999.99” and inserting “2,999.99”; under the heading relating to Schedule IV Substances (except flunitrazepam) by striking “4.99” and inserting “9.99”; and under the heading relating to Schedule V Substances by striking “999 grams” and inserting “2.49 kilograms”;

and in Note 9 by striking “500 mg” and “50 gms” and inserting “500 milligrams” and “50 grams”, respectively.

The Commentary to §2D1.1 captioned “Background” is amended in the paragraph that begins “The base offense levels in §2D1.1” by striking “32 and 26” and inserting “30 and 24”; and by striking the paragraph that begins “The base offense levels at levels 26 and 32” as follows:

“ The base offense levels at levels 26 and 32 establish guideline ranges with a lower limit as close to the statutory minimum as possible; e.g., level 32 ranges from 121 to 151 months, where the statutory minimum is ten years or 120 months.”,

and inserting the following new paragraph:

“ The base offense levels at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; e.g., level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.”.

The Commentary to §2D1.2 captioned “Application Note” is amended in Note 1 by striking “16” and inserting “14”; and by striking “17” and inserting “15”.

Section 2D1.11(d) is amended by striking paragraph (14); by redesignating paragraphs (1) through (13) as paragraphs (2) through (14), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

“(1) 9 KG or more of Ephedrine; Level 38
9 KG or more of Phenylpropanolamine;
9 KG or more of Pseudoephedrine.”.

Section 2D1.11(d)(2) (as so redesignated) is amended by striking “Level 38” and inserting “Level 36”; and by striking “3 KG or more” each place such term appears and inserting “At least 3 KG but less than 9 KG”.

Section 2D1.11(d)(3) (as so redesignated) is amended by striking “Level 36” and inserting “Level 34”.

Section 2D1.11(d)(4) (as so redesignated) is amended by striking “Level 34” and inserting “Level 32”.

Section 2D1.11(d)(5) (as so redesignated) is amended by striking “Level 32” and inserting “Level 30”.

Section 2D1.11(d)(6) (as so redesignated) is amended by striking “Level 30” and inserting “Level 28”.

Section 2D1.11(d)(7) (as so redesignated) is amended by striking “Level 28” and inserting “Level 26”.

Section 2D1.11(d)(8) (as so redesignated) is amended by striking “Level 26” and inserting “Level 24”.

Section 2D1.11(d)(9) (as so redesignated) is amended by striking “Level 24” and inserting “Level 22”.

Section 2D1.11(d)(10) (as so redesignated) is amended by striking “Level 22” and inserting “Level 20”.

Section 2D1.11(d)(11) (as so redesignated) is amended by striking “Level 20” and inserting “Level 18”.

Section 2D1.11(d)(12) (as so redesignated) is amended by striking “Level 18” and inserting “Level 16”.

Section 2D1.11(d)(13) (as so redesignated) is amended by striking “Level 16” and inserting “Level 14”.

Section 2D1.11(d)(14) (as so redesignated) is amended by striking “Level 14” and inserting “Level 12”; and by striking “At least 500 MG but less” each place such term appears and inserting “Less”.

Section 2D1.11(e) is amended by striking paragraph (10); by redesignating paragraphs (1) through (9) as paragraphs (2) through (10), respectively; and by inserting before paragraph (2) (as so redesignated) the following new paragraph (1):

List II Chemicals

33 KG or more of Acetic Anhydride;
3525 KG or more of Acetone;
60 KG or more of Benzyl Chloride;
3225 KG or more of Ethyl Ether;
3600 KG or more of Methyl Ethyl Ketone;
30 KG or more of Potassium Permanganate;
3900 KG or more of Toluene.”.

Section 2D1.11(e)(3) (as so redesignated) is amended by striking “Level 28” and inserting “Level 26”; and, under the heading relating to List II Chemicals, by striking the line referenced to Acetic Anhydride and all that follows through the line referenced to Toluene and inserting the following:

“ At least 11 KG but less than 33 KG of Acetic Anhydride;
At least 1175 KG but less than 3525 KG of Acetone;
At least 20 KG but less than 60 KG of Benzyl Chloride;
At least 1075 KG but less than 3225 KG of Ethyl Ether;
At least 1200 KG but less than 3600 KG of Methyl Ethyl Ketone;
At least 10 KG but less than 30 KG of Potassium Permanganate;
At least 1300 KG but less than 3900 KG of Toluene.”.

Section 2D1.11(e)(4) (as so redesignated) is amended by striking “Level 26” and inserting “Level 24”.

Section 2D1.11(e)(5) (as so redesignated) is amended by striking “Level 24” and inserting “Level 22”.

Section 2D1.11(e)(6) (as so redesignated) is amended by striking “Level 22” and inserting “Level 20”.

Section 2D1.11(e)(7) (as so redesignated) is amended by striking “Level 20” and inserting “Level 18”.

Section 2D1.11(e)(8) (as so redesignated) is amended by striking “Level 18” and inserting “Level 16”.

Section 2D1.11(e)(9) (as so redesignated) is amended by striking “Level 16” and inserting “Level 14”.

Section 2D1.11(e)(10) (as so redesignated) is amended by striking “Level 14” and inserting “Level 12”; and in each line by striking “At least” and all that follows through “but less” and inserting “Less”.

The Commentary to §2D1.11 captioned “Application Notes” is amended in Note 1(A) by striking “38” both places such term appears and inserting “36”, and by striking “26” and inserting “24”; and in Note 1(B) by striking “32” and inserting “30”.

The Commentary to §3B1.2 captioned “Application Notes” is amended in Note 3(B) by striking “14” and inserting “12”.

The Commentary following §3D1.5 captioned “Illustrations of the Operation of the Multiple-Count Rules” is amended in Example 2 by striking “26” and inserting “24”; and by striking “28” each place such term appears and inserting “26”.

The Commentary to §5G1.3 captioned “Application Notes” is amended in Note 2(D) by striking “40” and inserting “90”; by striking “15” and inserting “25”; and by striking “55” and inserting “115”.

Reason for Amendment: This amendment revises the guidelines applicable to drug trafficking offenses by changing how the base offense levels in the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) incorporate the statutory mandatory minimum penalties for such offenses.

When Congress passed the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. The quantity thresholds in the Drug Quantity Table were set so as to provide base offense levels corresponding to guideline ranges that were slightly above the statutory mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum were assigned a base offense level (level 26) corresponding to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I (a guideline range that exceeds the five-year statutory minimum for such offenses by at least three months). Similarly, offenses that trigger a ten-year statutory minimum were assigned a base offense level (level 32) corresponding to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I (a guideline range that exceeds the ten-year statutory minimum for such offenses by at least one month). The base offense levels for drug quantities above and below the mandatory minimum threshold quantities were extrapolated upward and downward to set guideline sentencing ranges for all drug quantities, see §2D1.1, comment. (backg’d.), with a minimum base offense level of 6 and a maximum base offense level of 38 for most drug types.

This amendment changes how the applicable statutory mandatory minimum penalties are incorporated into the Drug Quantity Table while maintaining consistency with such penalties. See 28 U.S.C. § 994(b)(1) (providing that each sentencing range must be “consistent with all pertinent provisions of title 18, United States Code”); see also 28 U.S.C. § 994(a) (providing that the Commission shall promulgate guidelines and policy statements “consistent with all pertinent provisions of any Federal statute”).

Specifically, the amendment reduces by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties, resulting in corresponding guideline ranges that include the mandatory minimum penalties. Accordingly, offenses involving drug quantities that trigger a five-year statutory minimum are assigned a base offense level of 24 (51 to 63 months at Criminal History Category I, which includes the five-year (60 month) statutory minimum for such offenses), and offenses involving drug quantities that trigger a ten-year statutory minimum are assigned a base offense level of 30 (97 to 121 months at Criminal History Category I, which includes the ten-year (120 month) statutory minimum for such offenses). Offense levels for quantities above and below the mandatory minimum threshold quantities similarly are adjusted downward by two levels, except that the minimum base offense level of 6 and the maximum base offense level of 38 for most drug types is retained, as are previously existing minimum and maximum base offense levels for particular drug types.

The amendment also makes parallel changes to the quantity tables in §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy), which apply to offenses involving chemical precursors of controlled substances. Section 2D1.11 is generally structured to provide offense levels that are tied to, but less severe than, the base offense levels in §2D1.1 for offenses involving the final product.

In considering this amendment, the Commission held a hearing on March 13, 2014, and heard expert testimony from the Executive Branch, including the Attorney General and the Director of the Federal Bureau of Prisons, defense practitioners, state and local law enforcement, and interested community representatives. The Commission also received substantial written public comment, including from the Federal judiciary, members of Congress, academicians, community organizations, law enforcement groups, and individual members of the public.

The Commission determined that setting the base offense levels slightly above the mandatory minimum penalties is no longer necessary to achieve its stated purpose. Previously, the Commission has stated that “[t]he base offense levels are set at guideline ranges slightly higher than the mandatory minimum levels [levels 26 and 32] to permit some downward adjustment for defendants who plead guilty or otherwise cooperate with authorities.” However, changes in the law and recent experience with similar reductions in base offense levels for crack cocaine offenses indicate that setting the base offense levels above the mandatory minimum penalties is no longer necessary to provide adequate incentives to plead guilty or otherwise cooperate with authorities.

In 1994, after the initial selection of levels 26 and 32, Congress enacted the “safety valve” provision, which applies to certain non-violent drug defendants and allows the court, without a government motion, to impose a sentence below a statutory mandatory minimum penalty if the court finds, among other things, that 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.” See 18 U.S.C. § 3553(f). The guidelines incorporate the “safety valve” at §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and, furthermore, provide a 2-level reduction if the defendant meets the “safety valve” criteria. See §2D1.1(b)(16).

These statutory and guideline provisions, which are unrelated to the guideline range's relationship to the mandatory minimum, provide adequate incentive to plead guilty. Commission data indicate that defendants charged with a mandatory minimum penalty in fact are more likely to plead guilty if they qualify for the "safety valve" than if they do not. In fiscal year 2012, drug trafficking defendants charged with a mandatory minimum penalty had a plea rate of 99.6 percent if they qualified for the "safety valve" and a plea rate of 93.9 percent if they did not.

Recent experience with similar reductions in the base offense levels for crack cocaine offenses indicates that the amendment should not negatively affect the rates at which offenders plead guilty or otherwise cooperate with authorities. Similar to this amendment, the Commission in 2007 amended the Drug Quantity Table for cocaine base ("crack" cocaine) so that the quantities that trigger mandatory minimum penalties were assigned base offense levels 24 and 30, rather than 26 and 32. See USSG App. C, Amendment 706 (effective November 1, 2007). In 2010, in implementing the emergency directive in section 8 of the Fair Sentencing Act of 2010, Pub. L. 111-220, the Commission moved crack cocaine offenses back to a guideline penalty structure based on levels 26 and 32.

During the period when crack cocaine offenses had a guideline penalty structure based on levels 24 and 30, the overall rates at which crack cocaine defendants pled guilty remained stable. Specifically, in the fiscal year before the 2007 amendment took effect, the plea rate for crack cocaine defendants was 93.1 percent. In the two fiscal years after the 2007 amendment took effect, the plea rates for such defendants were 95.2 percent and 94.0 percent, respectively. For those same fiscal years, the overall rates at which crack cocaine defendants received substantial assistance departures under §5K1.1 (Substantial Assistance to Authorities) were 27.8 percent in the fiscal year before the 2007 amendment took effect and 25.3 percent and 25.6 percent in the two fiscal years after the 2007 amendment took effect. This recent experience indicates that this amendment, which is similar in nature to the 2007 crack cocaine amendment, should not negatively affect the willingness of defendants to plead guilty or otherwise cooperate with authorities. See 28 U.S.C. § 991(b) (specifying that sentencing policies

are to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”).

The amendment also reflects the fact that the guidelines now more adequately differentiate among drug trafficking offenders than when the Drug Quantity Table was initially established. Since the initial selection of offense levels 26 and 32, the guidelines have been amended many times — often in response to congressional directives — to provide a greater emphasis on the defendant’s conduct and role in the offense rather than on drug quantity. The version of §2D1.1 in the original 1987 Guidelines Manual contained a single specific offense characteristic: a 2-level enhancement if a firearm or other dangerous weapon was possessed. Section 2D1.1 in effect at the time of this amendment contains fourteen enhancements and three downward adjustments (including the “mitigating role cap” provided in subsection (a)(5)). These numerous adjustments, both increasing and decreasing offense levels based on specific conduct, reduce the need to rely on drug quantity in setting the guideline penalties for drug trafficking offenders as a proxy for culpability, and the amendment permits these adjustments to differentiate among offenders more effectively.

The amendment was also motivated by the significant overcapacity and costs of the Federal Bureau of Prisons. The Sentencing Reform Act directs the Commission to ensure that the sentencing guidelines are “formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons.” See 28 U.S.C. § 994(g). Reducing the federal prison population and the costs of incarceration has become an urgent consideration. The Commission observed that the federal prisons are now 32 percent overcapacity, and drug trafficking offenders account for approximately 50 percent of the federal prison population (100,114 of 199,810 inmates as of October 26, 2013, for whom the Commission could determine the offense of conviction). Spending on federal prisons exceeds \$6 billion a year, or more than 25 percent of the entire budget for the Department of Justice. The Commission received testimony from the Department of Justice and others that spending on federal prisons is now crowding out resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs, all of which promote public safety.

In response to these concerns, the Commission considered the amendment an appropriate step toward alleviating the overcapacity of the federal prisons. Based on an analysis of the 24,968 offenders sentenced under §2D1.1 in fiscal year 2012, the Commission estimates the amendment will affect the sentences of 17,457 — or 69.9 percent — of drug trafficking offenders sentenced under §2D1.1, and their average sentence will be reduced by 11 months — or 17.7 percent — from 62 months to 51 months. The Commission estimates these sentence reductions will correspond to a reduction in the federal prison population of approximately 6,500 inmates within five years after its effective date.

The Commission carefully weighed public safety concerns and, based on past experience, existing statutory and guideline enhancements, and expert testimony, concluded that the amendment should not jeopardize public safety. In particular, the Commission was informed by its studies that compared the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 crack cocaine amendment with a control group of offenders who served their full terms of imprisonment. See USSG App. C, Amendment 713 (effective March 3, 2008). The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that modest reductions in drug penalties such as those provided by the amendment will not increase the risk of recidivism.

Furthermore, 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. In addition, the Drug Quantity Table as amended still provides a base offense level of 38 for offenders who traffic the greatest quantities of most drug types and, therefore, sentences for these offenders will not be reduced. Similarly, the Drug Quantity Table as amended maintains minimum base offense levels that preclude sentences of straight probation for drug trafficking offenders with small quantities of most drug types.

Finally, the Commission relied on testimony from the Department of Justice that the amendment would not undermine public safety or law enforcement initiatives. To the contrary, the Commission received testimony from several stakeholders that the amendment would permit resources otherwise dedicated to housing prisoners to be used to reduce overcrowding, enhance programming designed to reduce the risk of recidivism, and to increase law enforcement and crime prevention efforts, thereby enhancing public safety.

Effective Date: The effective date of this amendment is November 1, 2014.



U.S. Department of Justice

***United States Attorney
District of Montana***

Joseph E. Thaggard
Assistant United States Attorney

105 East Pine, Second Floor
Missoula, Montana 59802

406-549-8851

November 28, 2016

Molly C. Dwyer
Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, California 94119-3939

RE: *United States v. Rodriguez-Soriano*, No. 15-30039

Dear Ms. Dwyer:

Pursuant to Rule 28(j), Fed. R. App. P., the United States calls the Court's attention to:

United States v. Williams, 808 F.3d 253 (4th Cir. 2015).

Appellant Rodriguez-Soriano moved for a sentencing reduction under 18 U.S.C. § 3582. Relying on *United States v. Jackson*, 577 F.3d 1032 (9th Cir. 2009), the district court found Rodriguez-Soriano ineligible for sentencing relief and denied the motion. In its brief on appeal, however, the United States conceded eligibility because USSG Amendment 780 renders *Jackson* inapplicable to Rodriguez-Soriano's case. Resp. Br. at 7. *Williams* is supportive of the rationale underlying the government's concession in this matter in light of Amendment 780.

Sincerely,

MICHAEL W. COTTER
United States Attorney

/s/ Joseph E. Thaggard
JOSEPH E. THAGGARD
Assistant U.S. Attorney