

APPENDIX

16-2851-cr
United States v. James

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

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of August, two thousand seventeen.

PRESENT: PIERRE N. LEVAL,
REENA RAGGI,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

No. 16-2851-cr

FIRKON JAMES, AKA "Rock," AKA "Maurice
Patterson," AKA "Mark James," AKA "John Atkins"
(Federal Prisoner: 20372-055),
Defendant-Appellant.

FOR APPELLANT:

Edward S. Zas, Of Counsel, Federal Defenders
of New York, Inc., Appeals Bureau, New York,
New York.

FOR APPELLEE:

Joseph J. Karaszewski, Assistant United States
Attorney, *for* James P. Kennedy, Jr., Acting
United States Attorney for the Western District
of New York, Buffalo, New York.

Appeal from a final order of the United States District Court for the Western District of New York (David G. Larimer, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the final order entered on July 18, 2016, is AFFIRMED.

Defendant Firkon James stands convicted of conspiracy to traffic in crack cocaine. *See* 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), 846. Originally sentenced to a below-Guidelines 300-month prison term, he here appeals from the order reducing that sentence to 292 months pursuant to 18 U.S.C. § 3582(c)(2), arguing that the district court incorrectly determined that it could not reduce his sentence further. Because the district court's decision rested upon its interpretation of § 3582(c)(2) and a related Sentencing Guidelines policy statement, *see* U.S.S.G. § 1B1.10, we review its determination *de novo*, *see United States v. Leonard*, 844 F.3d 102, 106–07 (2d Cir. 2016). In so doing, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.¹

A convicted defendant is eligible for a sentence reduction if (1) he “has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered,” and (2) “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2). One such policy statement conditions reduction eligibility on “the guideline range applicable to that

¹ The government suggests that James's notice of appeal was untimely but does “not object” to our review of the merits. Appellee's Br. 2 n.2. Because the government has thus waived any timeliness argument, and Fed. R. App. P. 4(b) is not jurisdictional, *see United States v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008), we proceed to the merits.

defendant ha[ving] subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d).” U.S.S.G. § 1B1.10(a)(1).

The parties do not here dispute that James was eligible for a sentence reduction, but they disagree as to the available extent of that reduction. In *United States v. Leonard*, we held that a defendant’s “applicable” Guidelines range was “that determined by the court as set forth in the Guidelines, without regard to the parties’ agreement [under Fed. R. Crim. P. 11(c)(1)(C)] to a different calculation, and before the exercise of any departure or variance discretion.” 844 F.3d at 113. The district court determined James’s applicable Guidelines range to be 324 to 405 months’ imprisonment based on a total offense level of 36 and a criminal history category of VI, the latter dictated by James’s classification as a career offender pursuant to U.S.S.G. § 4B1.1. James’s career-offender status did not inform his offense level because the then-applicable base offense level of 34, *see* U.S.S.G. § 2D1.1(c)(3) (Nov. 2009), with two-level enhancements for both weapon possession, *see id.* § 2D1.1(b)(1), and aggravating role, *see id.* § 3B1.1(c), yielded an adjusted offense level of 38, which was higher than the level 37 provided for a career offender, *see id.* § 4B1.1(b).²

Amendments lowering drug quantity base offense levels would have lowered James’s adjusted offense level from 38 to at least 36. *See* U.S.S.G., Supp. to App. C., Amends. 782, 788 (Nov. 2014).³ But the career-offender classification precluded the

² A two-level credit for acceptance of responsibility then reduced James’s total offense level to 36. *See* U.S.S.G. § 3E1.1(a).

³ In the 2009 Guidelines under which James was initially sentenced, the quantity of

district court from applying a base offense level lower than 37. *See* U.S.S.G. § 4B1.1(b)(1) (stating that offense level of 37 applies for offense with statutory maximum of life such as 21 U.S.C. § 841(b)(1)(A)(iii) where non-career-offender offense level would be less than 37). Thus, with application of acceptance credit, the net effect of the offense level reduction amendments in James's case was a total offense level of 35 rather than the initially calculated 36. That level, with a criminal history category of VI, yielded a 292-to-365-month Guidelines range. Because U.S.S.G. § 1B1.10(b)(2) instructs that sentence reduction under § 3582(c)(2) cannot be to a term less than the low end of the amended Guidelines range, the district court correctly concluded that it could not reduce James's sentence below 292 months.

In urging otherwise, James argues that his applicable Guidelines range was that agreed to by the parties in his plea agreement: 262 to 327 months, derived from a total offense level of 36 and a criminal history category of IV. With the relevant reduction in that offense level, James maintains that granting his § 3582(c)(2) motion would result in, at most, a 210-to-262-month range, allowing the district court to sentence him to as low as the mandatory minimum term of 240 months. *See* U.S.S.G. § 5G1.1(c)(2). Again,

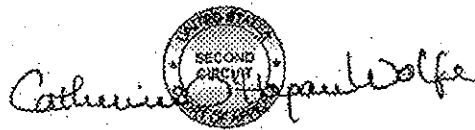
drugs that he agreed in his plea agreement were involved in his criminal conduct, 500 grams to 1.5 kilograms of crack, was coterminous with the drug quantity necessary for a base offense level of 34. *See* U.S.S.G. § 2D1.1(c)(3) (Nov. 2009). In the 2014 Guidelines under which James moved for reduction in sentence, however, that drug-quantity range had been separated into two different ranges: 280 to 840 grams of crack produced a base offense level of 30, *see id.* § 2D1.1(c)(5) (Nov. 2014), while 840 grams to 2.8 kilograms of crack produced a base offense level of 32, *see id.* § 2D1.1(c)(4). Accordingly, it is not clear whether James's offense level would have decreased by 2 or 4 levels. We need not here choose between these base levels, however, because the career-offender classification automatically anchored that level at 37. *See id.* § 4B1.1(b).

this argument is foreclosed by *United States v. Leonard*, 844 F.3d at 116 (identifying as “applicable” Guidelines range the one “calculated by the district court . . . before it accepted an 11(c)(1)(C) agreement” (emphasis in original)).⁴ James recognizes as much, but argues that *Leonard* erred in so concluding. This panel, however, is bound by the *Leonard* decision, which has not been overruled either by the Supreme Court or by the Second Circuit sitting *en banc*. See *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016). Accordingly, James’s challenge fails on the merits.

We have considered James’s remaining arguments and conclude that they are without merit. Accordingly, the order of the district court is AFFIRMED.

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court



⁴ To the extent James contends that *Freeman v. United States*, 564 U.S. 522 (2011), and *United States v. Smith*, 658 F.3d 608 (6th Cir. 2011), compel a contrary conclusion, those arguments were considered and rejected in *Leonard*, see 844 F.3d at 109, 114–16.

UNITED STATES DISTRICT COURT

for the

Western District of New York

United States of America

v.

FIRKON JAMES

Date of Original Judgment: 08/29/2013

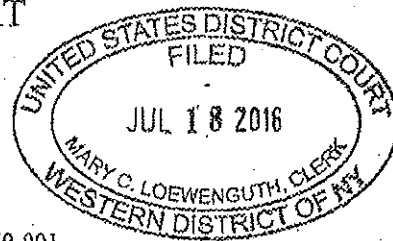
Date of Previous Amended Judgment: _____

(Use Date of Last Amended Judgment if Any)

Case No: 6:11-CR-06160-001USM No: 20372-055

Pro Se

Defendant's Attorney



ORDER REGARDING MOTION FOR SENTENCE REDUCTION PURSUANT TO 18 U.S.C. § 3582(c)(2)

Upon motion of ☒ the defendant ☐ the Director of the Bureau of Prisons ☐ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion, and taking into account the policy statement set forth at USSQ §1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable,

IT IS ORDERED that the motion is:

☐ DENIED. ☒ GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of 300 months is reduced to 292 months

(Complete Parts I and II of Page 2 when motion is granted)

Except as otherwise provided, all provisions of the judgment dated 08/29/2013 shall remain in effect.

IT IS SO ORDERED.

Order Date: July 18, 2016

David G. Larimer
Judge's signature

Effective Date: _____

(if different from order date)

David G. Larimer, United States District Judge

Printed name and title

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

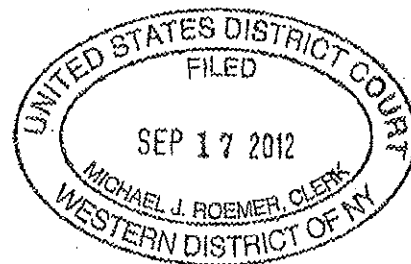
UNITED STATES OF AMERICA,

-v-

11-CR-6160L

FIRKON JAMES
a/k/a Roc
a/k/a Maurice Patterson
a/k/a Mark James
a/k/a John Atkins,

Defendant.



PLEA AGREEMENT

The defendant, FIRKON JAMES, and the United States Attorney for the Western District of New York (hereinafter "the government") hereby enter into a plea agreement with the terms and conditions as set out below.

I. THE PLEA AND POSSIBLE SENTENCE

1. The defendant agrees to plead guilty to Count 1 of the Indictment which charges a violation of Title 21, United States Code, Section 846 (conspiracy to possess with intent to distribute, and to distribute, 280 grams or more of cocaine base) for which the minimum sentence is a term of imprisonment of 20 years, and the maximum possible sentence is a term of imprisonment of life, a fine of \$20,000,000, a mandatory \$100 special assessment and a term of

supervised release of at least 10 years and up to life. The defendant understands that the penalties set forth in this paragraph are the minimum and maximum penalties that can be imposed by the Court at sentencing.

2. The defendant will also admit the Forfeiture Allegation of the Indictment which alleges that a firearm and ammunition are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 924(d) and 3665, and Title 28, United States Code, Section 2461(c).

3. The defendant understands that, prior to the entry of the guilty plea, the government will file an information pursuant to Title 21, United States Code, Section 851 alleging one of the defendant's prior drug felony convictions as the basis for the imposition of the enhanced penalties provided for in Title 21, United States Code, Section 841(b)(1)(A). The defendant admits that the defendant has a prior drug felony conviction which subjects the defendant to the enhanced penalties provided for in Title 21, United States Code, Section 841(b)(1)(A).

4. The defendant understands that, if it is determined that the defendant has violated any of the terms or conditions of supervised release, the defendant may be required to serve in

prison all or part of the term of supervised release, up to five (5) years, without credit for time previously served on supervised release.

II. ELEMENTS AND FACTUAL BASIS

5. The defendant understands the nature of the offense set forth in Paragraph 1 of this agreement and understands that if this case proceeded to trial, the government would be required to prove beyond a reasonable doubt the following elements of the crime:

Count 1 - 21 U.S.C. § 846

First, that an agreement existed between two or more persons to commit a controlled substance felony offense, to wit, to possess with intent to distribute, and to distribute, cocaine base;

Second, that the defendant knew of the existence of the agreement;

Third, that the defendant intended to participate in the unlawful agreement; and

Fourth, that at least 280 grams or more of a mixture or substance containing cocaine base was reasonably foreseeable to the defendant as being within the scope of the agreement.

FACTUAL BASIS

6. The defendant and the government agree to the following facts, which form the basis for the entry of the plea of guilty including relevant conduct:

- a. That between, in or about, January 2008, and in or about September 10, 2010, the exact dates being unknown, in Monroe County, Western District of New York, and elsewhere, the defendant, FIRKON JAMES, did knowingly, willfully and unlawfully conspire and agree with others, known and unknown, to possess with intent to distribute, and to distribute, 280 grams or more of cocaine base, a Schedule II controlled substance. The defendant's involvement included, among other things, the manufacturing of cocaine base from cocaine, the breakdown and packaging of smaller quantities of cocaine base for resale, and the direct distribution of cocaine base to others. The defendant understood that the goal or aim of the conspiracy he was involved in was to unlawfully sell cocaine base for profit. During the course of the conspiracy, the defendant possessed a firearm.
- b. For purposes of this plea agreement only, at least 500 grams but less than 1.5 kilograms of a mixture and substance containing cocaine base is the amount involved in the defendant's relevant conduct encompassed in Count 1 of the Indictment which could be readily proven by the government against the defendant.

III. SENTENCING GUIDELINES

7. The defendant understands that the Court must consider but is not bound by the Sentencing Guidelines (Sentencing Reform

Act of 1984) (2009 Guidelines Manual).

BASE OFFENSE LEVEL

8. The government and the defendant agree that Guidelines §§ 2D1.1(a)(5) and 2D1.1(c)(3) apply to the offense of conviction and provides for a base offense level of 34.

SPECIFIC OFFENSE CHARACTERISTICS

U.S.S.G. CHAPTER 2 ADJUSTMENTS

9. The government and the defendant agree that the following specific offense characteristic does apply:

- a. the two level increase pursuant to Guidelines § 2D1.1(b)(1) (possession of dangerous weapon).

U.S.S.G. CHAPTER 3 ADJUSTMENTS

10. The government and the defendant agree that the following adjustment to the base offense level does apply:

- a. The two (2) level upward adjustment of Guidelines § 3B1.1(c) (aggravating role in offense).

ADJUSTED OFFENSE LEVEL

11. Based on the foregoing, it is the understanding of the government and the defendant that the adjusted offense level for the offense of conviction is 38.

ACCEPTANCE OF RESPONSIBILITY

12. At sentencing, the government agrees not to oppose the recommendation that the Court apply the two (2) level downward adjustment of Guidelines § 3E1.1(a) (acceptance of responsibility).

CRIMINAL HISTORY CATEGORY

13. It is the understanding of the government and the defendant that the defendant's criminal history category is IV. The defendant understands that if the defendant is sentenced for, or convicted of, any other charges prior to sentencing in this action the defendant's criminal history category may increase. The defendant understands that the defendant has no right to withdraw the plea of guilty based on the Court's determination of the defendant's criminal history category.

GUIDELINES' APPLICATION, CALCULATIONS AND IMPACT

14. It is the understanding of the government and the defendant that, with a total offense level of 36 and a criminal history category of IV, the defendant's sentencing range would be a term of imprisonment of 262 to 327 months, a fine of \$20,000 to \$20,000,000 and a period of supervised release of 10 years. Notwithstanding this, the defendant understands that at sentencing the defendant is subject to the minimum and maximum penalties set forth in Paragraph 1 of this agreement.

15. Notwithstanding the above calculations, it is the agreement of the parties pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure that the Court at the time of sentence impose a 300 month term of imprisonment as part of the appropriate sentence in this case. If, after reviewing the presentence report, the Court rejects this agreement, the parties will be relieved of their other obligations under the agreement, the defendant shall then be afforded the opportunity to withdraw the plea of guilty, and the government may move to vacate the agreement. If the government moves to vacate the agreement, the defendant's plea shall be deemed withdrawn. This agreement does not affect the amount of a fine or the length and conditions of a term of supervised release that may be imposed by the Court at

sentencing.

16. The government and the defendant agree to the Sentencing Guidelines calculations set forth in this agreement and neither party will advocate or recommend the application of any other Guideline, or move for any Guidelines departure, or move for or recommend a sentence outside the Guidelines, except as specifically set forth in this agreement. A breach of this paragraph by one party will relieve the other party of any agreements made in this plea agreement with respect to sentencing motions and recommendations. A breach of this paragraph by the defendant shall also relieve the government from any agreements to dismiss or not pursue additional charges.

17. The defendant understands that, except as set forth in Paragraph 15 above, the Court is not bound to accept any Sentencing Guidelines calculations and the defendant will not be entitled to withdraw the plea of guilty based on the sentence imposed by the Court.

IV. STATUTE OF LIMITATIONS

18. In the event the defendant's plea of guilty is withdrawn, or conviction vacated, either pre- or post-sentence, by way of

appeal, motion, post-conviction proceeding, collateral attack or otherwise, the defendant agrees that any charges dismissed pursuant to this agreement shall be automatically reinstated upon motion of the government and further agrees not to assert the statute of limitations as a defense to any other criminal offense involving or in any way related to the unlawful possession, manufacture or distribution of controlled substances, or possession of firearms, which is not time barred as of the date of this agreement. This waiver shall be effective for a period of six months following the date upon which the withdrawal of the guilty plea or the vacating of the conviction becomes final.

V. GOVERNMENT RIGHTS AND RESERVATIONS

19. The defendant understands that the government has reserved the right to:

- a. provide to the Probation Office and the Court all the information and evidence in its possession that the government deems relevant concerning the defendant's background, character and involvement in the offense charged, the circumstances surrounding the charge and the defendant's criminal history;
- b. respond at sentencing to any statements made by the defendant or on the defendant's behalf that are inconsistent with the information and evidence available to the government;
- c. modify its position with respect to any sentencing recommendation or sentencing factor under the Guidelines including criminal history category, in

the event that subsequent to this agreement the government receives previously unknown information, including conduct and statements by the defendant subsequent to the agreement, regarding the recommendation or factor; and

- d. advocate for a specific sentence including the amount of a fine and the method of payment.

20. The defendant agrees that any financial records and information provided by the defendant to the Probation Office, before or after sentencing, may be disclosed to the United States Attorney's Office for use in the collection of any unpaid financial obligation.

21. At sentencing, the government will move to dismiss the open counts of the Indictment in this action.

VI. APPEAL RIGHTS

22. The defendant understands that Title 18, United States Code, Section 3742 affords a defendant a limited right to appeal the sentence imposed. The defendant, however, knowingly waives the right to appeal and collaterally attack any component of a sentence imposed by the Court which falls within or is less than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, Paragraph 14, above, notwithstanding the manner in which the Court determines the sentence. In the event of

an appeal of the defendant's sentence by the government, the defendant reserves the right to argue the correctness of the defendant's sentence.

23. The defendant understands that by agreeing to not collaterally attack the sentence, the defendant is waiving the right to challenge the sentence in the event that in the future the defendant becomes aware of previously unknown facts or a change in the law which the defendant believes would justify a decrease in the defendant's sentence.

24. The government waives its right to appeal any component of a sentence imposed by the Court which falls within or is greater than the sentencing range for imprisonment, a fine and supervised release set forth in Section III, Paragraph 14, above, notwithstanding the manner in which the Court determines the sentence. However, in the event of an appeal from the defendant's sentence by the defendant, the government reserves its right to argue the correctness of the defendant's sentence.

VII. FORFEITURE PROVISIONS

25. As a condition of the plea, the defendant agrees not to contest any forfeiture or abandonment proceeding that may be brought by the United States and agrees to immediately forfeit all

of the defendant's right, title and interest to any and all property which are subject to forfeiture pursuant to Title 21, United States Code, Section 881 which are in the possession and control of defendant or the defendant's nominees. That property includes:

a. **MOTOR VEHICLES:**

- i. One 2005 Jeep Grand Cherokee bearing VIN 1J4HR58215C595887 seized on or about September 10, 2010 and administratively forfeited by the DEA on January 31, 2011. The defendant further agrees that this vehicle was properly forfeited pursuant to Title 21, United States Code, Section 881.
- ii. One 2003 BMW 330CI bearing VIN WBABN53433PH02945 seized on or about September 10, 2010 and administratively forfeited by DEA on January 31, 2011. The defendant further agrees that this vehicle was property forfeited pursuant to Title 21, United States Code, Section 881.
- iii. One 2005 Nissan 350Z bearing VIN JN1AZ34E15M655272 seized on or about September 15, 2010 and administratively forfeited by the DEA on January 31, 2011. The defendant further agrees that this vehicle was properly forfeited pursuant to Title 21, United States Code, Section 881.
- iv. One 2003 Chevrolet Tahoe bearing VIN 1GNER13Z93R121617 seized on or about September 10, 2010 and administratively forfeited by the DEA on February 22, 2011. The defendant further agrees that this vehicle was properly forfeited pursuant to Title 21, United States Code, Section 881.

26. The defendant also agrees that the properties listed above are properly forfeitable to the United States pursuant to Title 21, United States Code, Section 881, as the listed properties represent proceeds or were derived from, proceeds obtained, directly or indirectly, as a result of the offense of conviction or facilitated the offense of conviction. The defendant further agrees to fully assist the government in the forfeiture of the aforementioned property and to take whatever steps are necessary to pass clear title to the United States, including, but not limited to surrender of title and execution of any documents necessary to transfer the defendant's interest in any of the above property to the United States, as deemed necessary by the government.

27. The defendant agrees that forfeiture of the aforementioned property as set forth in this agreement shall not be deemed an alteration of the defendant's sentence. Forfeiture of the defendant's property shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon the defendant in addition to forfeiture.

FIREARM AND AMMUNITION FORFEITURE

28. The defendant acknowledges that the defendant is the owner of the firearm and ammunition described below and agrees to criminally forfeit pursuant to Title 18, United States Code,

Sections 924(d) and 3665, and Title 28, United States Code, Section 2461(c), all of his right, title and interest in the firearm and ammunition described as follows:

- a. one (1) Hi-Point 9mm pistol, bearing serial number 502110 seized on or about September 10, 2010 at 3230 Winton Road, Apartment A24, Rochester, New York.
- b. nine (9) rounds of 9mm ammunition seized on or about September 10, 2010 at 3230 Winton Road, Apartment A24, Rochester, New York.
- c. six (6) rounds of 45 caliber ammunition seized on or about September 10, 2010 at 353 Wellington Avenue, Rochester, New York.
- d. twelve (12) rounds of .357 caliber ammunition seized on or about September 10, 2010 at 353 Wellington Avenue, Rochester, New York.
- e. eighteen (18) rounds of 9mm ammunition seized on or about September 10, 2010 at 353 Wellington Avenue, Rochester, New York.

29. After the acceptance of this Plea of Guilty, and pursuant to Rule 32.2(b) (2) of the Federal Rules of Criminal Procedure, the government will request a Preliminary Order of Forfeiture for the firearm and ammunition listed in paragraph 28. The defendant hereby waives any right to notice of such Preliminary Order of Forfeiture. The defendant further consents and agrees that the Order of Forfeiture shall become final as to the defendant prior to sentencing and agrees that it shall be made part of the defendant's sentence and included in the Judgment pursuant to Rule 32.2(b) (4)

of the Federal Rules of Criminal Procedure.

30. The defendant further agrees to the entry of orders of forfeiture for the aforementioned property and waives the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. Defendant acknowledges that he understands that the forfeiture of property is part of the sentence that may be imposed in this case and waives any failure by the court to advise him of this, pursuant to Rule 11(b)(1)(J), at the time his guilty plea is accepted.

31. The defendant agrees that the above-described property is also subject to forfeiture and waives any and all statutory and constitutional rights, including but not limited to time restrictions and notice provisions with respect to the final disposition or forfeiture of the above property. The defendant further agrees to the destruction of the firearm and ammunition described above.

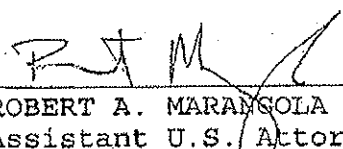
VIII. TOTAL AGREEMENT AND AFFIRMATIONS

32. This plea agreement represents the total agreement between the defendant, FIRKON JAMES, and the government. There are

no promises made by anyone other than those contained in this agreement. This agreement supersedes any other prior agreements, written or oral, entered into between the government and the defendant.

WILLIAM J. HOCHUL, JR.
United States Attorney
Western District of New York

BY:


ROBERT A. MARANGOLA
Assistant U.S. Attorney

Dated: September 17, 2012

ACKNOWLEDGMENT

I have read this agreement, which consists of 17 pages. I have had a full opportunity to discuss this agreement with my attorney, Avik K. Ganguly, Esq. I agree that it represents the total agreement reached between myself and the government. No promises or representations have been made to me other than what is contained in this agreement. I understand all of the consequences of my plea of guilty. I fully agree with the contents of this

agreement. I am signing this agreement voluntarily and of my own free will.



FIRKON JAMES a/k/a Roc
Defendant

Dated: September 17, 2012



AVIK K. GANGULY, ESQ.
Attorney for the Defendant

Dated: September 17, 2012

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3
4 ----- X
5 UNITED STATES OF AMERICA) 11-CR-6160 (L)
6 vs.)
7 FIRKON JAMES,) Rochester, New York
8 Defendant.) August 29, 2013
9 ----- X
10 2:08 p.m.

11
12 TRANSCRIPT OF PROCEEDINGS
13 BEFORE THE HONORABLE DAVID G. LARIMER
14 UNITED STATES DISTRICT JUDGE

15
16 WILLIAM J. HOCHUL, JR., ESQ.
17 United States Attorney
18 BY: ROBERT A. MARANGOLA, ESQ.
19 Assistant United States Attorney
20 6200 Federal Building
21 Rochester, New York 14614

22
23 BRYAN S. OATHOUT, ESQ.
24 30 West Broad Street
25 Suite 400
Rochester, New York 14614
Appearing on behalf of the Defendant

ALSO PRESENT: Kevin Lyons, U.S. Probation Office

AUDIO RECORDER: Paula Rand

21
22 TRANSCRIBER: Christi A. Macri, FAPR, RMR, CRR, CRI
23 Kenneth B. Keating Federal Building
24 100 State Street, Room 4240
25 Rochester, New York 14614

(Proceedings recorded by electronic sound recording, transcript
produced by computer).

P R O C E E D I N G S

* * *

(WHEREUPON, the defendant is present).

MR. MARANGOLA: Good morning, Your Honor.

THE COURT: Good morning, all, Mr. Oathout.

All right, the matter is on for sentencing today, a sentencing the Court scheduled several months ago.

Mr. James pleaded guilty here almost a year ago, on September 17th to Count 1 of the indictment, conspiracy to possess with intent to distribute and to distribute 280 grams or more of cocaine base.

Because an 851 notice was filed alleging only one of Mr. James' prior drug convictions, that increased the minimum sentence to 20 years to life.

The facts set forth in the plea agreement and in the presentence report indicate that during a several year period, January 2008 to September 2010, Mr. James conspired with others to distribute quantities of cocaine base in excess of 280 grams.

The plea was submitted to me pursuant to Rule of Evidence (c) (1) (C) and although the 20-year sentence was the minimum, the parties in the agreement agreed on a 300 month sentence, that is, 25 years.

The Court has reviewed the presentence report and the plea agreement. And I have received filings from you, Mr. Oathout, objections to the presentence report and your

1 statement with respect to sentencing factors. This was filed on
2 August 26th, which we'll get to in a minute.

3 Looking at the presentence report, the -- based on the
4 drug quantity and two adjustments -- actually, three adjustments
5 that were agreed to by the parties, there was a two point
6 adjustment adversely affecting Mr. James because a weapon was
7 involved. That was agreed to in the plea agreement.

8 There was a two point adjustment adverse to Mr. James
9 because of his aggravating role. That was agreed to in the plea
10 agreement.

11 And there was also a two point reduction favoring
12 Mr. James for acceptance of responsibility.

13 That resulted in a net offense level of 36 and -- well,
14 under the -- were it not for Mr. James being deemed a career
15 offender, he would have a criminal history of IV and the offense
16 level 36, and this was reflected in the plea agreement that, with
17 a criminal history category IV and an offense level 36, the range
18 of sentence under the guidelines would be 262 to 327.

19 Of course, the agreed upon 11(c)(1)(C) sentence is
20 within that guideline range.

21 Probation determined that based on Mr. James'
22 significant prior record and specifically the fact he has two
23 prior countable drug convictions, one in 2003 and one in October
24 of 2010, both New York State felony drug convictions, that based
25 on that, under the Guideline Section 4B1.1(b) his criminal history

1 jumps from IV to VI, which makes the guideline range jump to from
2 324 to 405 months.

3 So the 300 month agreement under Rule 11(c)(1)(C), of
4 course, is well less than that guideline range of 324 to 405, and
5 is in about the mid-range of the guideline range anticipated in
6 the presentence report, 262 to 327. So I point that out.

7 And, of course, the underlying issue here -- not the
8 underlying issue, but one of the reasons why I think Mr. James
9 pleaded is that if he were convicted of this case -- on this
10 indictment after trial, and the Government established his two
11 prior drug convictions, as we've discussed many times, Mr. James
12 would be facing a sentence of life without parole.

13 So, although the 300 month sentence, of course, is
14 substantial, it is actually below the guideline range found by
15 Probation, and it is at the mid-range of what the guideline range
16 was deemed to be in the plea agreement.

17 So that's for the purpose of our record here.

18 Mr. Oathout, you did file a statement here, which I've
19 referenced, indicating certain things that you and Mr. James wish
20 to raise.

21 The Court understands when we last met Mr. James wanted
22 you replaced, but the Court denied that request and the Court
23 certainly appreciates your continuing to adhere to your
24 obligations and to file what you believe is necessary on behalf of
25 Mr. James.

1 So I have your statement, and we will go through it to a
2 degree. The first objection you raise was to paragraph 74, which
3 I believe has been changed. There was a revised presentence
4 report that was submitted August 27th, 2013, which didn't change
5 much, but did make that change from a -- making a three point
6 calculation to a two point. So I think that's been resolved.

7 The second objection related to paragraph 75 where
8 Mr. James objects to being deemed a career offender, which
9 increased his criminal history from IV to VI.

10 It is what it is. I see no basis to change that
11 paragraph. I think Mr. James is a career offender, and actually
12 as I pointed out a minute ago, the guidelines under the career
13 offender really have not affected Mr. James.

14 The Court is accepting -- intends to accept the Rule
15 11(c) (1) (C) commitment of 300 months, which is like two years at
16 the low end, below -- less than the guideline range called for by
17 the career offender denomination.

18 So Mr. James has benefitted from that. The Court has
19 essentially sentenced Mr. James within the range found by the plea
20 agreement. So I make no change, but I note Rule 32 of the rules
21 also provide the Court doesn't have to make rulings on anything
22 that's not going to affect the sentence.

23 This could be deemed to be one of those things. It's
24 not going to affect the sentence whether I determine he's a career
25 offender or not. He is a career offender, I make that finding,

1 but it has little effect on Mr. James here.

2 Well, I mean, the same thing, there's an objection to
3 paragraph 85, which talks about just what we've been talking
4 about, that is, the guideline range. Mr. James wants to be
5 sentenced pursuant to the plea agreement. In essence, he is.

6 As I pointed out here a couple times, the sentencing
7 range is 300 months, not in the range of 324 to 405, which it
8 could have been because that's consistent with being a career
9 offender.

10 I think those are the only objections.

11 Mr. James requested that the Court not impose a fine,
12 and also requested that he be sentenced to a facility as close to
13 New York City as possible. I don't have any objection to
14 recommending that.

15 So I think, Mr. Oathout, I think I have covered the
16 objections that you raised in your filing. If there's something I
17 missed, let me know.

18 MR. OATHOUT: There's no other objections with respect to
19 that. I did want to note, my client's family had sent three
20 letters in. I was hoping to have copies of those so I could
21 attach them to this. I did not receive copies.

22 My understanding is the Court may have a few letters;
23 one may be from a Geneva Mohammad, my client's mother; another may
24 be from a Shamon James, which is my client's sister; a third may
25 be from a Karen Murray, in the courtroom today, who my client has

1 a child with.

2 If the Court has those, I'm only asking the Court, which
3 I'm sure you already have, has reviewed those.

4 Beyond that, Your Honor, I don't have any other
5 objections to the PSR.

6 THE COURT: When were those sent? Because I don't think
7 I do have them.

8 MR. OATHOUT: They were before I was on this matter,
9 Judge. I had spoken with Ms. Murray. I don't have the exact
10 dates or times that any of these letters may have been sent, but I
11 think they were just letters, obviously on my client's behalf,
12 attempting to enlighten the Court as to the positive aspects of
13 Mr. James.

14 If the Court does have them I would ask that you
15 (inaudible).

16 THE COURT: Well, there were letters received in the
17 course of the proceedings over the past year. I didn't receive
18 any recently within the last week. But if it's the letters that
19 had been received previously, then yes.

20 MR. OATHOUT: Thank you, Your Honor.

21 THE COURT: I always appreciate letters from family and
22 friends. In this case, there is an agreed upon sentence and I
23 think if I accept the plea, I'm bound to impose the sentence that
24 was agreed to. So I will acknowledge that.

25 But any other objections then that we haven't covered?

1 MR. OATHOUT: No other objections.

2 THE COURT: None from the Government?

3 MR. MARANGOLA: No, Your Honor.

4 THE COURT: All right. Then I will find that the
5 guidelines under the plea agreement are criminal history IV,
6 offense level 36, guideline range 262 to 327.

7 I agree with Probation that determined that Mr. James
8 was a career offender, which increased both his criminal history
9 and the guideline range.

10 So even though this sentence is lower than that
11 guideline range, I think a 300 month sentence is sufficient here
12 and would not object -- would not reject the plea agreement
13 because I think the sentence should be higher consistent with the
14 new guideline range and the career offender determination.

15 So I am prepared then, as I say, to accept the Rule
16 11(c)(1)(C) commitment and impose the 300 month sentence, which as
17 I say again, is lesser than what Probation believed the guideline
18 range called for, and will follow the arrangement, the plan and
19 determination that the parties reached where the guideline range
20 provided for a 262 to 327 sentence, and this one of 300 is within
21 that range.

22 Before I formally announce, pronounce sentence,
23 Mr. Oathout, I would give you the chance if you have anything
24 further to say. Your client also has the right to speak if he
25 wishes to do so. And the Government as well.

1 So anything further, Mr. Oathout?

2 MR. OATHOUT: Just briefly, thank you for the
3 opportunity. I did again want to note that my client does have
4 Karen Murray in the courtroom today. He does have a child with
5 her. As I indicated in the objections, Your Honor, to the PSR
6 statement, my client does have six children. He is very concerned
7 for their well-being. He did accept responsibility for his
8 actions, obviously, through the plea agreement.

9 He is very concerned with the health and well-being of
10 his children. Certainly, Judge, it's unfortunate my client will
11 be sentenced to 25 years, but I am thankful that he will have an
12 opportunity to be released, have an opportunity to take care of
13 his children, his loved ones as well.

14 As I did indicate, Judge, my client has asked that he be
15 sentenced to a facility closest to New York City. He does have
16 two children down there; his mother lives there as well. That's
17 certainly our request.

18 And to the extent that it is available, Judge, and my
19 client would qualify for it, I would ask that the Court consider
20 allowing him to participate in any drug or alcohol programs.
21 Again, hopefully, my client would be eligible for such programs.

22 Beyond that, Your Honor, I have nothing further. Thank
23 you.

24 THE COURT: Thank you. Mr. James, anything you wish to
25 say before the Court pronounces sentence?

1 THE DEFENDANT: Yeah. I was represented by ineffective
2 assistance of counsel from November 30th, 2010 to August 22nd,
3 2012.

4 And I was represented by ineffective assistance of
5 counsel while entering this plea. I mean, come on, we have to
6 follow rules in society and laws on the outside. Rules and laws
7 and procedures have to be followed inside the courtroom.

8 And it wasn't. I wasn't indicted on time. It just
9 doesn't make sense to me to get all of this time and I didn't kill
10 anybody. I mean, nobody -- only motion that was filed in my case
11 was to get my discovery. I wasn't represented right by no lawyer,
12 no lawyer that represented me whatsoever.

13 One motion within three years. Come on, man. It
14 doesn't make any sense. I've had 146 days non-excludable time on
15 my case and no one stepped up to honor that in the court.

16 My complaint was never dismissed within 30 -- before my
17 indictment was filed. I keep saying the same thing over and over
18 again, but it's not being acknowledged.

19 The D.A. doesn't have no reason why those days were
20 never counted toward the speedy trial clock, which he never
21 answered before when I challenged him the last time.

22 But now it's just, you know, I guess I have no wins
23 here. I mean, no lawyer wanted to represent me and I accepted the
24 plea out of duress because he made it seem like -- Ganguly made it
25 seem like oh, yeah, your son's mother is gonna get arrested and

1 you don't want that to happen. And think about your child, think
2 about your child, this and that. He's not gonna grow up with any
3 parents and this, this, that and the third. Come on, he literally
4 coerced me into taking that plea. Come on.

5 And I can't challenge any new changes in the law with
6 that plea? Come on, man. It doesn't make any sense, man. Yet
7 somebody could escape Monroe County Jail and get caught with
8 co-defendants and everything and get the same amount of time that
9 I get? People rape children and get six months and 12 years, 10
10 years probation. Come on, man. It doesn't make no sense.

11 I did not kill anybody and I didn't hurt anybody. And
12 I'm one man and nobody else got arrested with me and I'm being
13 charged with conspiracy and 280 grams. That's not even a part of
14 my case.

15 The day they arrested me I didn't have anything on me.
16 So they add a extra 100 grams to my case is -- come on, it doesn't
17 make any sense. Yet I get time like I'm a killer and I get
18 charges that's been dismissed added onto my indictment.

19 THE COURT: Are you through?

20 THE DEFENDANT: Yeah, I'm done.

21 THE COURT: Thank you. Mr. Marangola, anything from the
22 Government's side?

23 MR. MARANGOLA: No, thank you, Judge.

24 THE COURT: All right. The Court indicated it would
25 accept the Rule 11(c) (1) (C) and impose the sentence of 300 months.

1 It is a substantial sentence, to be sure.

2 We've discussed issues about speedy trial and issues
3 relating to attorneys before. We're not going to go over all of
4 that except to note, once again, that Mr. James was represented by
5 five, six attorneys, many of them very experienced in this court,
6 who took different views as to the wisdom and the propriety of
7 motions that Mr. James felt should be filed. We've talked about
8 all of that.

9 This Court gave Mr. James the opportunity months ago if
10 he wanted to move to withdraw his plea, he could do that. No
11 motion was made. No application was made.

12 The consequences, of course, could be significant. If
13 the Court granted a motion to withdraw and the case went to trial,
14 as I pointed out numerous times, the risk faced to Mr. James if
15 convicted not 25 years, but life.

16 So for whatever reason no application was made by
17 Mr. James pro se or by counsel to withdraw the plea.

18 I know Mr. James felt there were speedy trial
19 violations, but several lawyers who reviewed it thought otherwise.

20 This case makes no sense in many respects. I mean, what
21 doesn't make sense is here's someone who has actually four prior
22 felony drug convictions, two of them aren't countable under the
23 rules because they occurred years ago.

24 But what doesn't make sense is this pattern of selling
25 drugs back in '93, '97, 2003, 2010.

1 So what's happened here, Mr. James, is no one's fault
2 but your own. You're here because you sold drugs repeatedly, you
3 were given chances. You had relatively modest sentences before
4 and it didn't do any good.

5 So now you end up in federal court where the rules are
6 different than state court, and that's the fact. So the sentence
7 is as agreed to.

8 When you pleaded we talked about at that time and since
9 then that part of the basis of the plea was not to take the risk
10 that should you be convicted, you faced the rest of your life
11 sitting in jail.

12 It is the sentence of this Court after accepting the
13 Rule 11(c)(1)(C) plea, I will commit the defendant Firkon James to
14 the Bureau of Prisons for 300 months.

15 You will get credit by law for any time he has been in
16 custody pending this sentence.

17 I will place him on supervised release once he is
18 released for a period of 10 years.

19 While on that release, sir, you're not to commit any new
20 crime, state or local.

21 You can't possess a firearm.

22 You can't possess ammunition.

23 You can't possess, use or distribute illegal drugs.

24 You must submit to random drug testing while on
25 supervised release.

1 You must cooperate in the collection of a DNA sample.

2 If the drug tests indicate positive tests, you must
3 engage in counseling and treatment and not leave that program
4 unless approved by the Court.

5 You must also submit to a search of your person, your
6 body or your vehicle by probation officers to make sure you're
7 complying with the conditions of supervised release.

8 I don't know if -- I will recommend that Mr. James serve
9 his sentence as close to the metropolitan New York City area as
10 possible. That's up to the Bureau of Prisons, of course.

11 I direct that Mr. James pay a fine of \$500. It's to be
12 paid out of any monies he earns or receives while incarcerated and
13 thereafter at the rate of at least 10% of his monthly income.

14 I must impose a \$100 special assessment, which I impose
15 at this time.

16 I think there were counts to dismiss.

17 MR. MARANGOLA: There were, Your Honor. The Government
18 would move to dismiss the remaining counts of the indictment and
19 would also ask that the forfeiture provisions as set forth in the
20 plea agreement are incorporated into the judgment.

21 THE COURT: All right, I'll grant both those requests.

22 That is the sentence.

23 The Court is required to advise defendants at this point
24 of their limited right to appeal. In this case by virtue of the
25 plea agreement, as is the case in most plea agreements, the

1 defendant has given up or waived the right to appeal directly the
2 sentence and judgment here based on that paragraph of the plea
3 agreement.

4 Mr. Oathout, if it does not appear by contract here, by
5 plea agreement that your client has the right to appeal, you
6 discuss that with him and protect whatever interests you believe
7 he has.

8 Mr. James, if your lawyer neglects or refuses to file
9 the Notice of Appeal, the Court is obligated to direct the Clerk
10 of Court to file that notice, which I will do.

11 I think the contract here, the plea agreement prohibits
12 any appeal, but there are certain time restrictions and I leave it
13 to you and Mr. Oathout. And if I receive word that you wish the
14 Court to file a notice of appeal, I'll do it.

15 Anything else?

16 MR. MARANGOLA: No, thank you, Judge.

17 THE COURT: That is the sentence of the Court. Thank
18 you.

19 (WHEREUPON, the proceedings adjourned at 2:34 p.m.)

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CERTIFICATE OF TRANSCRIBER

In accordance with 28, U.S.C., 753(b), I certify that this is a true and correct record of proceedings from the official electronic sound recording of the proceedings in the United States District Court for the Western District of New York before the Honorable David G. Larimer on august 29th, 2013.

S/ Christi A. Macri

Christi A. Macri, FAPR-RMR-CRR-CRI
Official Court Reporter

**United States Sentencing Guidelines § 1B1.10 and
commentary (Nov. 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.

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).*

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

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 306). Amended effective November 1, 1990 (see Appendix C, amendment 360); November 1, 1991 (see Appendix C, amendment 423); November 1, 1992 (see Appendix C, amendment 469); November 1, 1993 (see Appendix C, amendment 502); November 1, 1994 (see Appendix C, amendment 504); November 1, 1995 (see Appendix C, amendment 536); November 1, 1997 (see Appendix C, amendment 548); November 1, 2000 (see Appendix C, amendment 607); November 5, 2003 (see Appendix C, amendment 662); November 1, 2007 (see Appendix C, amendment 710); March 3, 2008 (see Appendix C, amendments 712 and 713); May 1, 2008 (see Appendix C, amendment 716); November 1, 2011

(see Appendix C, amendment 759); November 1, 2012 (see Appendix C, amendment 770); November 1, 2014 (see Appendix C, amendments 780, 788, and 789).