

Retroactivity of the “Drugs Minus 2” Guideline Amendment

Amendments to the Guidelines
& Policy Statement
Effective November 1, 2014

Discussion Outline

- Overview of “Drugs Minus 2” guideline amendment and retroactivity
- Understanding the retroactivity of a guideline amendment
- Process of reducing a sentence pursuant to a retroactive guideline amendment

The “Drugs Minus 2” Guideline Amendment

Process: “Drugs Minus 2” Amendment

- August 2013 – Commission priority: review drug guidelines, including consideration of amending the drug quantity table across drug types
- April 10, 2014 – Commission voted unanimously to promulgate amendment
- July 18, 2014 – Commission voted unanimously to make “drugs minus 2” retroactive

Impact: “Drugs Minus 2” Retroactivity

- Approximately 46,000 offenders will be *eligible* for a sentence reduction
- Average sentence reduction will be 18%
 - Average reduction will be 25 months
 - Current average sentence: 11 years, 1 month
 - New average sentence: 9 years

The “Drugs Minus 2” Guideline Amendment

Amendment 782 Effective November 1, 2014

- Reduces by two-levels the base offense levels applicable to *most* quantities on the Drug Quantity Table at §2D1.1 (Drugs) and on the quantity tables for chemicals at §2D1.11 (Listed Chemicals)

Example: §2D1.1 Drug Quantity Table Cocaine BOLS Pre & Post “Drugs Minus 2”

Pre

11/1/2014

150 KG ↑

50 KG ↑

15 KG ↑

5 KG ↑

3.5 KG ↑

2 KG ↑

500 G ↑

Level 38

Level 36

Level 34

Level 32

Level 30

Level 28

Level 26

Post

11/1/2014

450 KG ↑

150 KG ↑

50 KG ↑

15 KG ↑

5 KG ↑

3.5 KG ↑

2 KG ↑

Example: §2D1.1 Drug Quantity Table

Cocaine BOLS Pre & Post “Drugs Minus 2” (cont.)

Pre				Post		
<u>11/1/2014</u>				<u>11/1/2014</u>		
400	G	↑	Level 24	500	G	↑
300	G	↑	Level 22	400	G	↑
200	G	↑	Level 20	300	G	↑
100	G	↑	Level 18	200	G	↑
50	G	↑	Level 16	100	G	↑
25	G	↑	Level 14	50	G	↑
< 25	G	↑	Level 12	< 50	G	↑

“Drugs Minus 2” Amendment Made Retroactive

Amendment to §1B1.10 (Policy Statement)

- Unanimous vote by Commission on July 18, 2014
- Amendment 782 will be included on the retroactive list at §1B1.10(d) as of November 1, 2014
- Adds a new Special Instruction at §1B1.10(e)(1) and a new Application Note 6

New §1B1.10(e)(1) & App. Note 6 Special Instruction

Amendment to §1B1.10 (Policy Statement)

- 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*

New §1B1.10(e)(1) & App. Note 6 Special Instruction (cont.)

Amendment to §1B1.10 (Policy Statement)

- This does not preclude the court from conducting sentence reduction proceedings and entering reduction orders before November 1, 2015, *provided* that the effective date of the sentence reduction order is November 1, 2015, or later

Understanding Guideline Amendment Retroactivity

Guideline Amendment Retroactivity

- “Retroactivity” of a *guideline amendment* allows the sentencing court to consider a possible reduction of imprisonment for inmates meeting certain criteria set by statute and the policy statement
 - “Retroactivity” of a *guideline amendment* does not affect the retroactivity of a statutory penalty

Understanding Guideline Amendment Retroactivity

- 28 U.S.C. § 994(u) & 18 U.S.C. § 3582(c)(2)
- §1B1.10 (Policy Statement)
- *Dillon v. U.S.*
- Rule 43(b)(4) Fed. Rules of Crim. Procedure

28 U.S.C. § 994(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.”

18 U.S.C. § 3582(c)(2)

“In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently 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 . . .”

continued....

18 U.S.C. § 3582(c)(2) (cont.)

....continued

“ . . .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.**”

- emphasis added

§1B1.10 (Policy Statement)

Reduction in Term of Imprisonment as a Result of Amended Guideline Range

- Implements 28 U.S.C. § 994(u) and provides guidance and limitations regarding sentencing reductions under 18 U.S.C. § 3582(c)(2)

§1B1.10(a)(3) (Policy Statement)

The Nature of 18 U.S.C. § 3582(c)(2)

Proceedings in the reduction of a sentence under 18 U.S.C. § 3582(c)(2) and §1B1.10 **DO NOT** constitute a full resentencing of the defendant

Dillon v. U.S.
560 U.S. 817 (2010)

The Nature of 18 U.S.C. § 3582(c)(2)

- Given the limited scope and purpose of hearings under § 3582(c)(2), the interests identified in *Booker* are not implicated
- Courts are bound by policy statement §1B1.10
 - “18 U.S.C. § 3582(c)(2) does not authorize a resentencing. Instead it permits a sentence reduction within the narrow bounds established by the U.S. Sentencing Commission.”

Rule 43(b)(4)

Federal Rules of Criminal Procedure

Defendant's Presence

- “A defendant need not be present under any of the following circumstances: . . .
 - **Sentence Correction.** The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c)”

Process

Process

- Determine if defendant is eligible for a reduction
- Determine extent of reduction allowable
- Consider factors to determine if, and to what extent, a reduction is warranted

Use §1B1.10 (Policy Statement) in Effect on the *Date of the Proceeding*

§1B1.10, Application Note 8

- Use the version of §1B1.10 in effect on the date of the proceeding at which the judge issues the order of reduction

General Eligibility for a Sentence Reduction Under 18 U.S.C. § 3582(c)(2)

§1B1.10(a)(1) & App. Note 1(A)

1. The defendant is serving the term of imprisonment
2. The amendment is listed in §1B1.10(c)
and
3. Guideline range applicable to the defendant subsequently has been lowered as a result of the listed amendment

The Process for Determining Eligibility: Establishing the Amended Guideline Range

§1B1.10(b)(1) & App. Note 2

- The amended guideline range is determined by **substituting only the amendment listed at §1B1.10(c)** for the corresponding guideline provisions applied at the previous sentencing
- All other guideline application decisions for the previous sentencing remain unaffected

A Listed Amendment NOT Resulting in a Lower Guideline Range

§1B1.10(a)(1) & (a)(2)(B) & App. Note 1(A)

- An amendment listed in §1B1.10(c) may not always lower the defendant's applicable guideline range, *e.g.*,
 - The operation of another guideline
 - A statutory provision

Examples of “Drugs Minus 2” Amendment *Not* Resulting in a Lower Guideline Range

- Quantity of drugs keeps the BOL at 38
- BOL unchanged from having been at the lowest BOL for the drug type
- Defendant’s offense level was determined by Career Offender (§4B1.1)
- Defendant subject to mandatory minimum in excess of applicable guideline range (§5G1.1(b))

Extent of Reduction Allowable

Prohibition on the Extent of Reduction

§1B1.10(b)(2)(C)

The reduced term of imprisonment cannot be less than the term of imprisonment the defendant has already served

General Limitation on Extent of Possible Reduction

§1B1.10(b)(2)(A)

- The term of imprisonment for the previous sentence cannot be reduced to less than the minimum of the amended guideline range
- An exception applies in the case of substantial assistance

Example of *General* Limitation: Previous Sentence Within Range

§1B1.10(b)(1) & (2)(A) & App. Note 3

- Previous guideline range: 41 - 51 months
(OL 21, CHC II)
- Previous term imposed: 46 months
- Amended guideline range: **33** - 41 months
(OL 19, CHC II)

Court shall not reduce defendant's term of imprisonment to less than **33** months

General Limitation on Extent of Possible Reduction (cont.)

§1B1.10(b)(2)(A)

- If the previous sentence was a departure or a variance from the previous guideline range, the term of imprisonment cannot be reduced to less than the minimum of the amended guideline range
 - NOTE: There is an exception for “substantial assistance”

Example of *General* Limitation: Previous Sentence Outside Range

§1B1.10(b)(1) & (2)(A) & App. Note 3

- Previous guideline range: 41 - 51 months
(OL 21, CHC II)
- Previous term imposed: 35 months
- Amended guideline range: **33** - 41 months
(OL 19, CHC II)

Court shall not reduce defendant's term of imprisonment to less than **33** months

A Retroactive Amendment and the Mechanics of Guideline Application

- While the previous *application decisions* will be unaffected in the determination of the amended guideline range, the *mechanics of application* can impact the offense level and resulting amended guideline range

Example 1

- At the original sentencing the Drug Quantity Table was OL 38, but because the defendant received an adjustment for mitigating role (§3B1.2), the base offense level was also decreased at §2D1.1(a)(5)(iii) by 4 levels to **BOL 34**
- Substituting only the retroactive amendment the Drug Quantity Table is now OL 36, for which the mitigating role reduction at §2D1.1(a)(5)(ii) becomes a 3-level decrease to **BOL 33**

Example 2

- At the original sentencing the Drug Quantity Table was BOL 16, and the only other offense level adjustment was the Acceptance of Responsibility maximum 3-level reduction (§3E1.1), resulting in a final **OL 13**
- Substituting only the retroactive amendment, the Drug Quantity Table is now OL 14, at which Acceptance has a maximum 2-level reduction, resulting in a final **OL 12**

Exception to *General* Limitation on the Extent of Reduction: “Substantial Assistance”

§1B1.10(b)(2)(B)

- If the previous sentence was pursuant to a government motion for “Substantial Assistance” under §5K1.1, § 3553(e), or Rule 35(b), a reduction comparably less than the minimum of the amended guideline range may be appropriate

Example of Original Sentence Below Range for a Substantial Assistance Departure

§1B1.10(b)(2)(B)

- Previous guideline range: 70 - 87 months
- Previous term imposed: 56 months
 - Court imposed downward departure of 20% below minimum of the guideline range
- Amended guideline range: 57 - 71 months
- A comparable 20% reduction below the amended guideline range minimum is **46 months, the lowest sentence that would be allowed**

Mandatory Minimums and Substantial Assistance

**Amendment to §1B1.10
Effective November 1, 2014**

§1B1.10 (Policy Statement) Amendment

Amendment 780 Effective November 1, 2014

- Addresses a circuit split on retroactivity when the previous sentence was below a mandatory minimum based on substantial assistance

Mandatory Minimums and Substantial Assistance

§1B1.10(c) & App. Note 4

- If the defendant:
 - is subject to a mandatory minimum
- AND**
- received a government motion under § 3553(e) or Rule 35(b) to reflect substantial assistance to authorities

continued....

Mandatory Minimums and Substantial Assistance (cont.)

§1B1.10(c) & App. Note 4

....continued

- 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)

Example 1: Below Mandatory Minimum Sentence Based on Government Motion

§1B1.10(c) & App. Note 4

- Mandatory Minimum: 120 months
- Original guideline range: 135 – 168 months
- Original term imposed: 101 months
 - Court imposed downward departure of 25% below minimum of the guideline range
- Amended guideline range: 108 – 135 months

A reduction of 25% from the amended guideline range minimum of 108 months would result in a comparable reduction, *i.e.*, **81** months

Example 2: Below Mandatory Minimum Sentence Based on Government Motion

§1B1.10(c) & App. Note 4

- Mandatory Minimum: 120 months
- Original guideline range: 120 – 135 months
 - Minimum of guideline range is the mandatory minimum (increased from 108 months based upon §5G1.1)
- Original term imposed: 90 months
 - Court imposed downward departure of 25% below mandatory minimum (**120 months**) of the guideline range
- Amended guideline range: 87 – 108 months

A reduction of 25% from the amended guideline range minimum of 87 months would result in a comparable reduction, *i.e.*, **65 mos.**⁴⁵

Factors to Consider in Determining If and to What Extent a Reduction Is Warranted

§1B1.10, App. Note 1(B)

- Within the limits established by §1B1.10(b) as to the **extent** of reduction *allowable*, the following shall be considered:
 - **§ 3553(a) factors**, as consistent with § 3582(c)(2)
 - **Public safety**: The nature and seriousness of the danger to any person or the community

Factors to Consider in Determining If and to What Extent a Reduction Is Warranted (cont.)

§1B1.10, App. Note 1(B)

- The court **may also consider**:
 - Post-sentencing conduct (conduct since the imposition of the previous term of imprisonment)

§1B1.10 Reductions Do Not Apply to Probation or Supervised Release

§1B1.10, App. Note 7

- Only a term of imprisonment imposed as part of the previous sentence can be reduced under §1B1.10
 - *i.e.*, no other component of a sentence, such as a term of supervised release, a fine, or restitution, can be reduced under this provision
- A reduction in a term of imprisonment imposed upon a revocation of supervision is not authorized

**Cases Where the Sentence Was
Established Pursuant to a
Binding Plea Agreement Under
Rule 11(c)(1)(C)**

Freeman v. U.S.
131 S. Ct. 2685 (2011)

§ 3582(c)(2) Reduction for a Sentence that
Was Pursuant to a Rule 11(c)(1)(C)
Binding Plea Agreement

- A sentence resulting from a binding plea agreement is not categorically disqualified from a retroactive reduction pursuant to 18 U.S.C. § 3582(c)(2)

Freeman v. U.S.
131 S. Ct. 2685 (2011) (cont.)

§ 3582(c)(2) Reduction for a Sentence that
Was Pursuant to a Rule 11(c)(1)(C)
Binding Plea Agreement

- An agreed-upon sentence established by reference to the applicable guideline range may be among those not categorically disqualified from retroactive consideration
 - *e.g.*, where the binding agreement established that the sentence would be that determined by the minimum of the range following a four-level reduction from the otherwise applicable guideline range

**Cases Where the Defendant
Waived a Future Sentence
Reduction Under § 3582(c)(2)**

Waiver of a § 3582(c)(2) Sentence Reduction

- Some defendants agreed to waive a future reduction under § 3582(c)(2) in plea agreements
- Pursuant to § 3582(c)(2), the judge has independent authority to reduce the term of imprisonment consistent with §1B1.10

Cases Where the Defendant Received a Previous § 3582(c)(2) Reduction

Cases Where the Defendant Received a Previous § 3582(c)(2) Reduction

- The current retroactive amendment (*e.g.*, “Drugs Minus 2”) will be substituted for the corresponding §2D1.1 calculation *done at the time of the previous reduction*
 - *e.g.*, the calculations at the time of a previous imprisonment reduction pursuant to retroactive Amendment 750 (Part A) – Fair Sentencing Act *guideline* amendment of Nov. 1, 2011

Example: Previous § 3582(c)(2) Reduction for Retroactive 2011 Crack Amendment

- Original guideline range (2009): 168 - 210 mos.
(OL 31 (BOL 34 (500 G) -3 AOR); CHC V)
- Original term imposed: 168 mos.
- Previous amended range (2011): **140** - 175 mos.
(OL 29 (BOL 32 (500 G) -3 AOR); CHC V)
- Sentence Previously Reduced To: 140 mos.
- NEW Amended guideline range: **120** - 150 mos.
(OL 27 (BOL 30 (500 G) -3 AOR); CHC V)

END