

The “Drugs Minus 2” Guideline Amendment

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
11/1/2014

400 G ↑
300 G ↑
200 G ↑
100 G ↑
50 G ↑
25 G ↑
< 25 G ↑

Level 24
Level 22
Level 20
Level 18
Level 16
Level 14
Level 12

Post
11/1/2014

500 G ↑
400 G ↑
300 G ↑
200 G ↑
100 G ↑
50 G ↑
< 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

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

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

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.”

Process

1. Determine if defendant is eligible for a reduction
2. Determine extent of reduction allowable
3. 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

§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

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

§1B1.10(a)(1) & App. Note 1(A)

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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))

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

Process

1. Determine if defendant is eligible for a reduction
2. Determine extent of reduction allowable
3. Consider factors to determine if, and to what extent, a reduction is warranted

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

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: 31 months
- Amended guideline range: **33** - 41 months
(OL 19, CHC II)

The defendant is not eligible for a
reduction in sentence

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**

§1B1.10 (Policy Statement) Amendment

Amendment 788 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.

Process

1. Determine if defendant is eligible for a reduction
2. Determine extent of reduction allowable
3. Consider factors to determine if, and to what extent, a reduction is warranted

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)

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 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)

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**

UNITED STATES DISTRICT COURT
for the

United States of America
v.

)
)
)
)
)

Case No: _____

USM No: _____

Date of Original Judgment: _____

Date of Previous Amended Judgment: _____

(Use Date of Last Amended Judgment if Any)

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 USSG §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 _____ months is reduced to _____.

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

Except as otherwise provided, all provisions of the judgment dated _____ shall remain in effect.

IT IS SO ORDERED.

Order Date: _____

Judge's signature

Effective Date: _____
(if different from order date)

Printed name and title

Except as otherwise provided, all provisions of the judgment dated _____ shall remain in effect.

IT IS SO ORDERED.

Order Date: _____

Judge's signature

Effective Date: _____
(if different from order date)

Printed name and title

§2D1.1 - New Specific Offense Characteristic (SOC)

- If the offense involved marijuana cultivation on state or federal land or while trespassing on tribal or private land
- **AND**
- the defendant gets Aggravating Role (§3B1.1)
- Increase by 2 levels
- The new SOC is at (b)(14) which will reorder the remaining SOCs

Amendments in Response to the Violence Against Women Act

- Various guidelines amended to address new statutory sections and penalty increases for crimes pertaining to domestic violence, assault, sexual abuse, stalking, and human trafficking

Felon in Possession - §2K2.1

- Clarifies the operation of Relevant Conduct at §2K2.1 regarding possession of a firearm(s) in connection with another offense (SOC (b)(6)(B) and cross reference (c)(1))
 - The circuits have had a range of approaches
- The cross reference at §2K2.1(c)(1) will be limited to the firearm(s) listed in the *offense of conviction*

Supervised Release - §5D1.2

- New App. Note 6 explains §5D1.2(c) and the impact of a mandatory minimum term of supervised release on the guideline called-for range
- The amendment resolves a circuit split

Supervised Release - §5D1.2

- Failure to Register as a Sex Offender (18 U.S.C. § 2250) is **not** a “sex offense” and **not** subject to §5D1.2(b) (which would increase the maximum of the guideline called-for range at §5D1.2(a) to life, and recommend that the life maximum term be imposed)
- The amendment resolves circuit distinctions in application

Other Terms of Imprisonment - §5G1.3

- To qualify under §5G1.3(b) (concurrent sentence and credit for time served), the offense for which the defendant is serving an undischarged term of imprisonment only has to be relevant conduct, and ***does not*** have to also increase the offense level in the instant federal sentencing

Other Terms of Imprisonment - §5G1.3

- If the defendant is facing an anticipated but not yet imposed **state** sentence, then the federal sentence should be imposed concurrently if the state offense is relevant conduct in the instant federal sentencing

Illegal Reentry – §2L1.2 Departure Provision

- §2L1.2, new App. Note 8 provides a departure provision for certain cases in which the defendant is located by immigration authorities while the defendant is serving time in ***state*** custody

Alien Smuggling - §2L1.1

- Guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements is “reckless endangerment” under §2L1.1(b)(6) (2-level increase, with floor of OL 18)