

DRUG OFFENSES



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§2D1.1 - Drugs

Unlawful Manufacturing, Importing,
Exporting, or Trafficking
(Including Possession with Intent
to Commit These Offenses);
Attempt or Conspiracy

Figure I

DISTRIBUTION OF GUIDELINE DRUG OFFENSES¹
Fiscal Year 2013

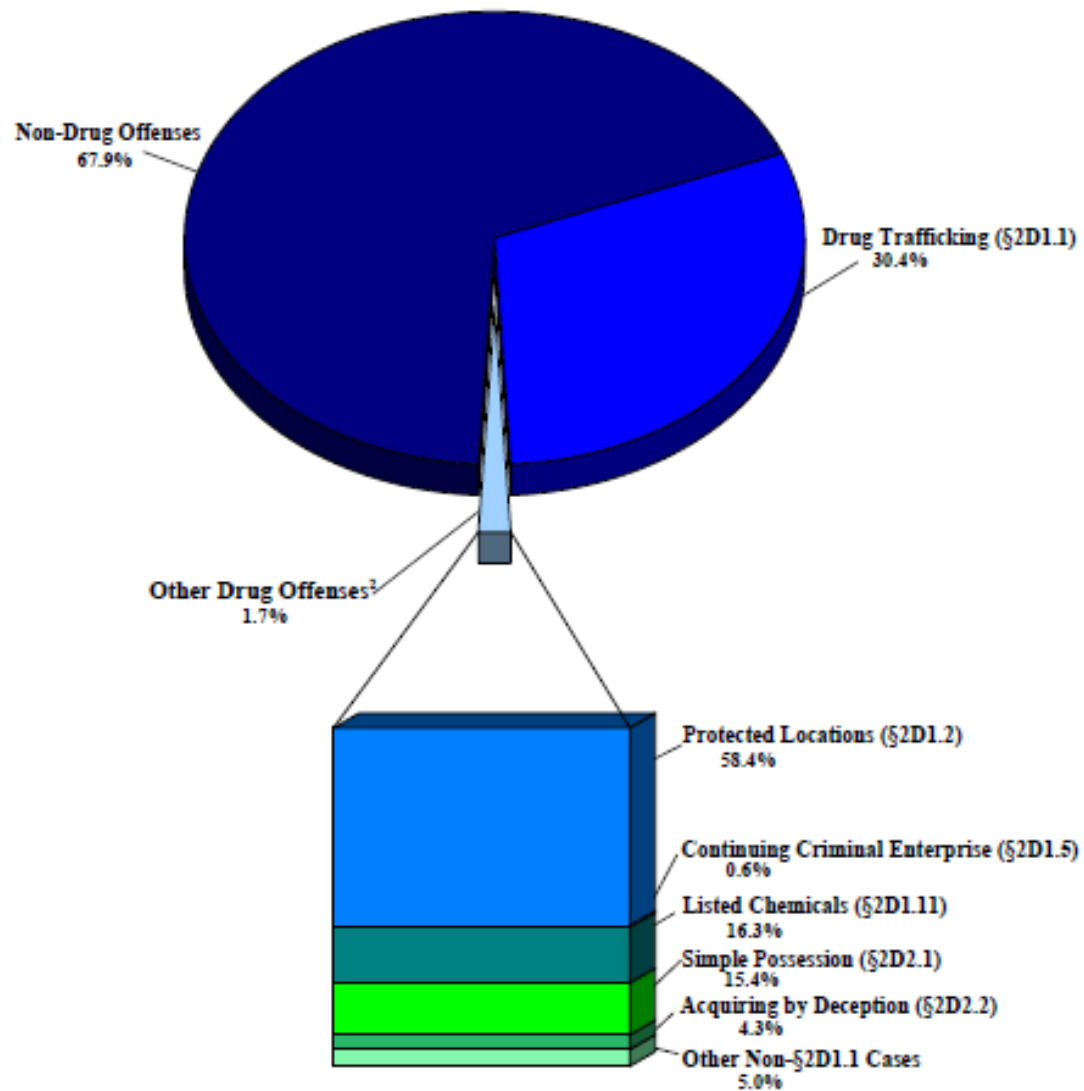
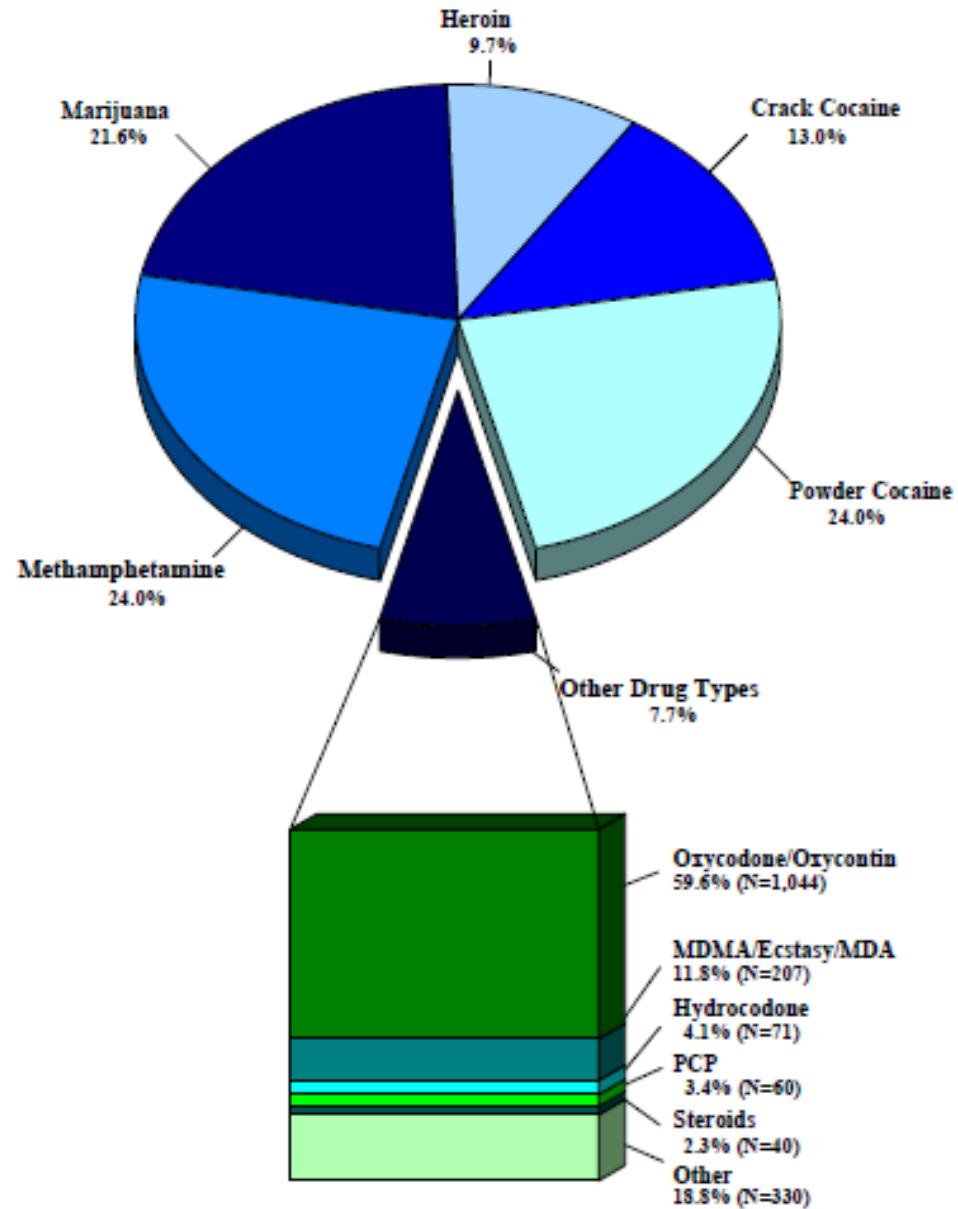


Figure K

DISTRIBUTION OF DRUG TYPE¹
Fiscal Year 2013



Proposed Amendments to §2D1.1

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)
 - On July 18, 2014, the Commission voted unanimously to make this amendment retroactive.

Proposed Amendments to §2D1.1 (cont.)

Amendment 783 **Effective November 1, 2014**

- A new SOC for marijuana cultivation at (b)(14) will reorder the SOCs
 - Note that a November 2012 amendment reordered the application notes to correspond more closely with sequence of the BOLs and SOCs

Relevant Conduct & Multiple Counts

§§2D1.1 & 1B1.3(a)(2) & 3D1.2(d)

- Acts in the same course of conduct, common scheme or plan as the offense(s) of conviction will be included
- There will only be a single application of the multiple counts of §2D1.1, based on all relevant conduct

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

	<u>Level</u>
(1) defendant convicted under 21/841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 960(b)(1), (b)(2), or (b)(3), and conviction establishes death/serious injury from drug use; and committed after similar prior conviction	43
(2) defendant convicted under 21/841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 960(b)(1), (b)(2), or (b)(3), and conviction establishes death/serious injury from drug use	38

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

	<u>Level</u>
(3) defendant convicted under 21/841(b)(1)(E) or 960(b)(5), and conviction establishes death/serious injury from drug use; and committed after similar prior conviction	30
(4) defendant convicted under 21/841(b)(1)(E), or 960(b)(5), and conviction establishes death/serious injury from drug use	26

§2D1.1 Drug Trafficking, Etc.

(a) Base Offense Level (apply the greatest):

(5) the offense level from the Drug Quantity Table

EXCEPT if *mitigating* role (§3B1.2) applies:

<u>BOL</u>	<u>Reduction</u>
32	-2
34 or 36	-3
38	-4

If resulting BOL is greater than 32, and *minimal* role (§3B1.2(a)) applies, decrease to BOL 32

Mitigating Role Reduction

§2D1.1(a)(5)

- After the BOL reduction(s), the SOC's and other adjustments are then applied
- Necessarily the defendant will also receive a mitigating role adjustment in Chapter Three (§3B1.2)

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	↑

Weight of Controlled Substance

Note (A) to Drug Quantity Table

- Unless otherwise specified, the weight of a controlled substance refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance
- If a mixture or substance contains more than one controlled substance, the weight is based on the one that results in the greatest offense level

“Mixture or Substance”

§2D1.1, App. Note 1

- Mixture or substance does not include materials that must be separated for use, *e.g.*, waste water from an illicit laboratory used to manufacture a controlled substance
 - Possible distinctions for statutory determinations

Drug “Actual” (*i.e.*, Pure Drug)

Drug Quantity Table Notes (A), (B), & (C)

- Drug purity is only factored for methamphetamine, amphetamine, “ice”, oxycodone, and PCP
- A comparison is made between the drug “actual” and the mixture or substance for meth, amphetamine, and PCP

Drug Equivalency Tables

§2D1.1, App. Note 8

- Drugs not included on the Drug Quantity Table are converted to marijuana
 - *E.g.*, MDMA (“ecstasy”) 1 gm. = 500 gm. marijuana
- Different types of drugs are converted to marijuana so as to be added together
 - *E.g.*, cocaine and heroin

Controlled Substances Not Referenced

§2D1.1, App. Note 6

- Determine the most closely related substance by considering the following
 - Similar chemical structure
 - Similar stimulant, depressant or hallucinogenic effect on the central nervous system
 - Lesser or greater quantity needed to produce a similar effect on the central nervous system

§2D1.1 Specific Offense Characteristics

- The most frequently applied SOCs at §2D1.1
 - (b)(1) Firearm/Dangerous Weapon - 10.9%
 - Note: An additional 5% (appx.) did not get this SOC because of a § 924(c) conviction for the firearm
 - (b)(16) “Safety Valve” Subdivision Criteria - 39.0%

Based on FY2012 sentencing data

“Firearm” SOC

§2D1.1(b)(1) & App. Note 11

“...should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.”

Note: Under relevant conduct a defendant can be held accountable for a coparticipant’s firearm

“Firearm” SOC & 18 U.S.C. § 924(c)

§2D1.1(b)(1) & §2K2.4, App. Note 4

- When the defendant is also convicted of § 924(c) (Use/Carry/Possession of a Firearm in a Crime of Violence or Drug Trafficking) **do not apply** the dangerous weapon SOC at §2D1.1(b)(1)
 - § 924(c) mandatory min. *at least 5 yrs. consecutive*
 - This accounts for *any* weapon in relevant conduct
 - §2D1.1(b)(2) (use of violence) also **would not apply**

SOC (b)(16) at §2D1.1

2-Level Decrease

- The defendant must only meet the criteria set forth in **subdivisions (1)–(5)** of subsection (a) of §5C1.2 (“The Safety Valve”)
 - Defendant does not have to be convicted under select statutes listed at §5C1.2(a) that qualify for “The Safety Valve” (18 USC § 3553(f))
 - Defendant does not have to otherwise be subject to a mandatory minimum penalty

“Safety Valve”

18 USC § 3553(f)
& §5C1.2

“Safety Valve”

18 U.S.C. § 3553(f)

- Court makes determination; no government motion required
- Sentence without regard to mandatory minimums for violations of select drug statutes
- Downward departures for mitigating factors or variances possible

“Safety Valve”

§5C1.2(a)

In the case of an offense subject to a mandatory minimum sentence under 21 U.S.C. §§ 841, 844, 846, 960, or 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds the defendant meets the criteria set forth below:

§5C1.2(a)

Subdivisions (1) – (5)

1. Defendant does not have more than 1 Criminal History Point
2. Defendant did not use violence/threats of violence or possess a firearm or other dangerous weapon in connection with the offense
3. Offense did not result in death or serious bodily injury

4. Defendant was not an organizer/leader/manager/supervisor of others in the offense; was not engaged in a CCE
5. Not later than the time of the sentencing hearing, defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or common scheme or plan.

Use of the Term “Defendant” in the Safety Valve

- **NOTE:** while a defendant may be accountable for a firearm at §2D1.1(b)(1) based on the act of another, he/she may still qualify for the SOC reduction at §2D1.1(b)(16) (“safety valve” subdivision criteria) or for the “safety valve” itself, because §5C1.2(a)(2) only requires that “the **defendant** did not ...possess a firearm... in connection with the offense”

§5C1.2(b)

In the case of a defendant

1. Who meets the criteria set forth in subsection (a); and
2. Who is facing a mandatory minimum sentence of at least five years,

The offense level applicable from Chapters Two and Three shall not be less than level **17**

Note: The guideline range for OL 17 at CHC I is 24-30 mos.; a departure or variance below this range is still possible²⁹



Retroactivity of the “Drugs Minus 2” Guideline Amendment

“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



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

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

Amendment 788

Effective November 1, 2014

- 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 788

Effective November 1, 2014

- 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

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))

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**

§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.**⁵⁵

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

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

- 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