PRIMER

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INTRODUCTION

This primer addresses some common procedural questions that have arisen in the context of motions for sentence reductions under 18 U.S.C. § 3582(c)(2) based on retroactive guideline amendments. Following the questions are cases that address the issue, including additional discussion where it may be helpful. This primer is not, however, intended as a comprehensive compilation of all case law addressing these issues. The document does not attempt to collect *all* cases addressing these issues; rather, it focuses on circuit precedent with binding force where available and generally includes only one authority from a given circuit even if the same court has addressed an issue more than once. Where relevant, the document also cites the guidelines and the Federal Rules of Criminal Procedure.

Section 3582(c)(2) provides as follows:

> The court may not modify a term of imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

The policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) is the applicable policy statement; it contains the list of amendments the Commission has determined may be given retroactive effect and limits in what circumstances and to what extent sentences may be reduced.

It is important to note that the Commission promulgated several amendments to this guideline that took effect on November 1, 2014. The changes generally fall into two categories: changes that implement the Commission's resolution of a circuit conflict over the interpretation of §1B1.10 in certain substantial assistance cases, and a special limitation on the retroactive effect of the 2014 amendment reducing the drug guidelines by two levels. A broad collection of information on the 2014 amendment reducing the drug guidelines by two levels, including FAQs, training videos, and related documents, is available on the Commission's website at: http://www.ussc.gov/amendment-process/materials-2014-drug-guidelines-amendment.

Does *Booker* apply to a § 3582(c)(2) sentence reduction?

No.

Dillon v. United States, 560 U.S. 817, 828 (2010) ("Given the limited scope and purpose of § 3582(c)(2), we conclude that proceedings under that section do not implicate the interests identified in *Booker*.").

Is a § 3582(c)(2) proceeding a full resentencing?

No.

USSG §1B1.10(a)(3) ("[P]roceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.").

Dillon v. United States, 560 U.S. 817, 826 (2010) ("Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.").

Can a court reduce a defendant's sentence under § 3582(c)(2) even if the defendant waived the right to request such a reduction as part of a plea agreement?

Yes.

18 U.S.C. § 3582(c)(2) (". . . on its own motion, the court may reduce the term of imprisonment . . .").

United States v. St. James, 569 F. App'x 495, 496 (9th Cir. 2014) (declining to address whether the defendant waived his right to file a § 3582(c)(2) motion "because the district court expressly invoked its sua sponte authority to decide whether to reduce his sentence.").

United States v. Goudeau, 2014 WL 1328348 (D. Kan. 2014) (concluding that the defendant effectively waived his right to file a § 3582(c)(2) motion, but reducing the defendant's sentence "on its own motion").

Yes, but it must act explicitly on its own motion.

United States v. Malone, 503 F. App'x 499 (9th Cir. 2012) (reversing sentence reduction where district court granted a motion the defendant had waived the right to make; observing that district court had authority to act sua sponte, but had not).

Do the lower mandatory minimums contained in the Fair Sentencing Act of 2010 apply to defendants whose offense conduct occurred before its enactment but whose sentences are imposed after its enactment?

Yes.

Dorsey v. United States, 567 U.S. 260 (2012) (resolving a circuit split and holding that "the Fair Sentencing Act's new, lower mandatory minimums . . . apply to the post-Act sentencing of pre-Act offenders").

However, a "correction" of sentence pursuant to 28 U.S.C. § 2255(b) does not constitute a resentencing at which a defendant may receive the benefit of the FSA. *United States v. Palmer*, -- F.3d. --, 2017 WL 1364991 (D.C. Cir. Apr. 14, 2017).

Does a defendant have the right to a hearing on a § 3582(c)(2) motion?

Possibly, if the sentence was based on contestable factual propositions that affected the denial of the motion.

United States v. Neal, 611 F.3d 399, 401-02 (7th Cir. 2010) (although "[r]eliance on the prior resolution of factual disputes means that the court usually need not hold evidentiary hearings before acting on motions under § 3582(c)(2)," if judge wishes to rely on contestable post-sentence facts to deny a § 3582(c)(2) motion, defendant "is entitled to an opportunity to contest propositions that affect how long he must spend in prison.").

No, but if the court does not hold a hearing, it must provide enough explanation of its reasoning to allow for meaningful appellate review.

United States v. Christie, 736 F.3d 191, 195 (2d Cir. 2013) (meaningful appellate review requires some elaboration of the district court's reasoning).

United States v. Trujillo, 713 F.3d 1003, 1009 (9th Cir. 2013).

United States v. Howard, 644 F.3d 455, 461 (6th Cir. 2011).

United States v. Jules, 595 F.3d 1239, 1245 (11th Cir. 2010) ("[E]ach party must be given notice of and an opportunity to contest new information relied on by the district court in a § 3582(c)(2) proceeding. . . . Further, although a hearing is a permissible vehicle for contesting any new information, the district court may instead allow the parties to contest new information in writing.").

United States v. Burrell, 622 F.3d 961, 966 (8th Cir. 2010) ("On remand, the district court need not conduct a resentencing hearing or consider additional briefing from the parties[,] engage in formulaic recitations of the relevant factors or provide lengthy reasoning for their decisions on § 3582(c)(2) motions. All that is required is enough explanation of the court's reasoning to allow for meaningful appellate review." (internal citations omitted)).

No, and there is no general requirement for the district court to provide any explanation for its denial of a motion under § 3582(c)(2).

United States v. Chavez-Meza, -- F.3d --, 2017 WL 1360760 (10th Cir. Apr. 14, 2017) (analyzing the circuit split and finding no statutory requirement for providing reasons in § 3582(c)(2) cases, although they may be "good practice.").

United States v. Zayas-Ortiz, 808 F.3d 520, 524 (1st Cir. 2015) (form order is sufficient so long as some rationale is discernible from the record as a whole).

United States v. Brown, 497 F. App'x 196, 198-99 (3d Cir. 2012).

Must the court order a new presentence report on a § 3582(c)(2) motion?

No.

United States v. Grafton, 321 F. App'x 899, 901 (11th Cir. 2009) ("Because Grafton did not have an absolute right to a hearing before the district court decided his § 3582(c)(2) motion and there was no factual dispute in the pleadings before the court, we conclude that the district court did not abuse its discretion or violate Grafton's right to procedural due process by denying the motion without a hearing or the benefit of a new PSI.").

No, but if the court orders one, the defendant must be given the opportunity to respond to it.

United States v. Jules, 595 F.3d 1239, 1245 (11th Cir. 2010) ("The fairness and due process principles embodied in the Federal Rules of Criminal Procedure, the Sentencing Guidelines' policy statements, and the reasoning of our sister courts compel us to hold that each party must be given notice of and an opportunity to contest new information relied on by the district court in a § 3582(c)(2) proceeding."). *But cf. United States v. Daniel*, 503 F. App'x 804 (11th Cir. 2013) (distinguishing *Jules*, where an opportunity to respond was required when the court relied on a memorandum submitted by the probation officer making factual claims about a defendant's prison conduct, from the situation where a defendant is ineligible for a reduction as a matter of law).

United States v. Neal, 611 F.3d 399, 402 (7th Cir. 2010) (if judge wishes to rely on contestable post-sentence facts to deny a § 3582(c)(2) motion, defendant "is entitled to an opportunity to contest propositions that affect how long he must spend in prison").

United States v. Foster, 575 F.3d 861, 864 (8th Cir. 2009) (holding that district court abused its discretion in relying on a modified presentence report that, due to procedural error, the defendant never received).

United States v. Mueller, 168 F.3d 186, 189 (5th Cir. 1999) ("The district court certainly has the discretion to consider a PSR addendum in resolving a § 3582(c)(2) motion if it determines that such an addendum would be helpful. However, a defendant must have notice of the contents of the addendum and notice that the court is considering it such that he will have the opportunity to respond to or contest it.").

Does a defendant have the right to be present at a § 3582(c)(2) hearing?

No.

Fed. R. Crim. P. 43(b)(4) ("A defendant need not be present [when] [t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).")

United States v. Styer, 573 F.3d 151, 154 (3d Cir. 2009).

United States v. Webb, 565 F.3d 789, 795 (11th Cir. 2009).

United States v. Young, 555 F.3d 611, 615 (7th Cir. 2009).

Does a defendant have a right to counsel for purposes of filing a motion under § 3582(c)(2)?

No.

United States v. Brown, 565 F.3d 1093, 1094 (8th Cir. 2009).

United States v. Webb, 565 F.3d 789, 794 (11th Cir. 2009).

United States v. Brown, 556 F.3d 1108, 1113 (10th Cir. 2009).

United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000) (holding that due process did not require court to appoint counsel or hold a hearing to resolve § 3582(c)(2) motion).

United States v. Tidwell, 178 F.3d 946, 949 (7th Cir. 1999) ("The judge can appoint counsel for a movant, but need not do so.").

United States v. Townsend, 98 F.3d 510, 512-13 (9th Cir. 1996).

United States v. Reddick, 53 F.3d 462, 464 (2d Cir. 1995) (holding that CJA did not require appointment of counsel on § 3582(c)(2) motion).

United States v. Whitebird, 55 F.3d 1007, 1011 (5th Cir. 1995) (holding that 18 U.S.C. § 3006A(c) did not entitle a defendant to appointed counsel for purposes of filing a § 3582(c)(2) motion).

Possibly.

United States v. Robinson, 542 F.3d 1045, 1052 (5th Cir. 2008) (declining to decide whether defendant has a right to counsel, but exercising discretion to appoint counsel for purposes of arguing appeal).

May the Commission establish a delayed effective date for a retroactive amendment?

Yes.

United States v. Navarro, 800 F.3d 1104, 1111-12 (9th Cir. 2015) (Commission permissibly considered rehabilitation in delaying the effective date of Amendment 788).

United States v. Maiello, 805 F.3d 992, 999-1000 (11th Cir. 2015) (establishing a delayed effective date did not violate the separation of powers or exceed the Commission's statutory authority).

If a court did not calculate a specific drug quantity at the original sentencing, may the court do so when considering a motion under § 3582(c)(2)?

Yes.

United States v. Spears, 824 F.3d 908, 913 (9th Cir. 2016).

United States v. Peters, 843 F.3d 572, 578 (4th Cir. 2016).

United States v. Wyche, 741 F.3d 1284, 1293 (D.C. Cir. 2014).

United States v. Battle, 706 F.3d 1313, 1319 (10th Cir. 2013).

United States v. Moore, 706 F.3d 926, 929 (8th Cir. 2013).

United States v. Hernandez, 645 F.3d 709, 712-13 (5th Cir. 2011).

United States v. Moore, 582 F.3d 641, 646 (6th Cir. 2009).

United States v. Woods, 581 F.3d 531, 538-39 (7th Cir. 2009).

Under what circumstances may a court go below the amended guideline range?

Where a substantial assistance-related downward departure was given at the original sentence:

Yes.

USSG §1B1.10(b)(2)(B) ("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.").

United States v. Marroquin-Medina, 817 F.3d 1285, 1291-92 (11th Cir. 2016) (finding that it is permissible to calculate a "comparable" downward reduction by either a "percentage-based" approach or an "offense-level-based" approach.); *see also United States v. Mann*, 666 F. App'x 488 (6th Cir. 2016) (same); *United States v. Lindsey*, 556 F.3d 238, 245-46 (4th Cir. 2009) (same).

Where a downward departure *not* related to substantial assistance or a downward variance was granted at the original sentencing:

No.

United States v. Ramirez, 846 F.3d 615 (2d Cir. 2017) (finding that this restriction, imposed pursuant to a 2011 amendment to §1B1.10, does not violate the *ex post facto* clause, even where the defendant was originally sentenced prior to 2011); *see United States v. Kruger*, 838 F.3d 786 (6th Cir. 2016) (same).

United States v. Muldrow, 844 F.3d 434 (4th Cir. 2016).

United States v. Contreras, 820 F.3d 773 (5th Cir. 2016).

United States v. Taylor, 815 F.3d 248, 251-52 (6th Cir. 2016).

United States v. Pierce, 616 F. App'x 410 (Mem.) (11th Cir. 2015).

United States v. Taylor, 743 F.3d 876, 879-80 (D.C. Cir. 2014).

United States v. Davis, 739 F.3d 1222, 1224-26 (9th Cir. 2014).

United States v. Erskine, 717 F.3d 131, 137-141 (2d Cir. 2013).

United States v. Hogan, 722 F.3d 55, 62 (1st Cir. 2013).

United States v. Colon, 707 F.3d 1255, 1258 (11th Cir. 2013).

United States v. Berberena, 694 F.3d 514, 518–19 (3rd Cir. 2012).

United States v. Anderson, 686 F.3d 585, 588 (8th Cir. 2012).

United States v. Valdez, 492 F. App'x 895, 898–99 (10th Cir. 2012).

United States v. Beserra, 466 F. App'x 548, 550 (7th Cir. 2012).

Where a downward departure was not given at the original sentence:

No.

USSG §1B1.10(b)(2)(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.").

Does § 3582(c)(2) authorize a court to reduce a term of imprisonment where the defendant received a sentence below a mandatory minimum pursuant to a downward departure for substantial assistance?

Yes, in light of Amendment 780.

There was a circuit split on when, if at all, §1B1.10 provides that a statutory minimum continues to limit the amount by which a defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2) when the defendant's original sentence was below the statutory minimum due to substantial assistance. **In a 2014 amendment, the Commission resolved this circuit conflict.** *See* USSG App. C, Amend. 780 (effective Nov. 1, 2014). The Commission generally adopted the approach of the courts that concluded that the mandatory minimums in these substantial assistance cases did not limit the courts' authority to reduce the defendants' sentences under 18 U.S.C. § 3582(c)(2).

See generally United States v. Williams, 808 F.3d 253, 260 (4th Cir. 2015) (describing the circuit split and its resolution).

United States v. Wren, 706 F.3d 861, 864 (7th Cir. 2013) (holding that "when a district court is authorized (by the prosecutor's substantial-assistance motion or a safety-valve reduction) to give a sentence below the presumptive statutory floor, that authority is equally applicable to a sentence-reduction motion after a change in the Guideline range.") *See also United States v. Liberse*, 688 F.3d 1198 (11th Cir. 2012).

United States v. Savani, 733 F.3d 56, 67 (3d Cir. 2013) (holding that, due to ambiguity in the guidelines, the rule of lenity dictates that the mandatory minimum should not be held to limit the court's authority under 18 U.S.C. § 3582(c)(2)).

In re Sealed Case, 722 F.3d 361, 369-70 (D.C. Cir. 2013).

No, despite Amendment 780.

United States v. Koons, 850 F.3d 973 (8th Cir. 2017). The Eighth Circuit held that Amendment 780 is inconsistent with the language of 18 U.S.C. § 3582(c)(2), which permits a reduction in sentence only if the defendant was initially sentenced "based on a sentencing range that has subsequently been lowered."

Does § 3582(c)(2) authorize a court to reduce a term of imprisonment imposed on a supervised release violation?

No.

USSG §1B1.10, comment. (n.5(A)) ("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.").

United States v. Morales, 590 F.3d 1049, 1052 (9th Cir. 2010).

United States v. Fontenot, 583 F.3d 743, 744-45 (10th Cir. 2009).

United States v. Forman, 553 F.3d 585, 589 (7th Cir. 2009) (per curiam).

If a defendant was a career offender, may a court reduce the sentence as a result of a retroactively applicable amendment to the Chapter Two guideline?

Only in limited circumstances.

Because the court, in imposing a sentence pursuant to §4B1.1, does not take into account the offense level applicable to the offense of conviction, amendments to the drug guideline do not impact the defendant's applicable guideline range and therefore § 3582(c)(2) is not applicable. See USSG §1B1.10(a)(2)(A) (No reduction is permitted if "none of the amendments listed in subsection (c) is applicable to the defendant...").

United States v. Charles, 759 F.3d 767, 744 (9th Cir. 2014).

United States v. Riley, 726 F.3d 756, 758-59 (6th Cir. 2013)

United States v. Hogan, 722 F.3d 55, 60 (1st Cir. 2013).

United States v. Hodge, 721 F.3d 1279, 1280-81 (10th Cir. 2013).

United States v. Reeves, 717 F.3d 647, 650 (8th Cir. 2013).

United States v. Montanez, 717 F.3d 287, 294 (2d Cir. 2013).

United States v. Hippolyte, 712 F.3d 535, 540-43 (11th Cir. 2013).

United States v. Griffin, 652 F.3d 793, 803 (7th Cir. 2011).

United States v. Berry, 618 F.3d 13, 15 (D.C. Cir. 2010).

United States v. Anderson, 591 F.3d 789, 791 (5th Cir. 2009).

United States v. Mateo, 560 F.3d 152, 156 (3d Cir. 2009).

This analysis would not apply where the defendant would have been sentenced under §4B1.1 but was sentenced under a Chapter Two guideline because that offense level was higher than the offense level from §4B1.1. *See* §4B1.1(b). However, the career offender provision continues to operate in these cases, so a defendant may still be excluded if the reduced guideline range under the Chapter Two guideline is equal to or lower than the guideline range that would have applied if §4B1.1 had set the offense level.
USSG §1B1.10(a)(2)(B) (No reduction is permitted if the amendment "does not have the effect of lowering the defendant's applicable guideline range."); §1B1.10(b)(1) ("[T]he court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines . . . had been in effect at the time the defendant was sentenced.").

United States v. Thompson, 825 F.3d 198 (3d Cir. 2016).

United States v. Smith, 814 F.3d 802, 804 (6th Cir. 2016).

United States v. Stevenson, 749 F.3d 667, 670 (7th Cir. 2014).

United States v. Crawford, 522 F. App'x 758, 760 (11th Cir. 2013).

United States v. Johnson, 523 F. App'x. 689, 689-90 (11th Cir. 2013).

United States v. Waters, 359 F. App'x. 517, 518 (5th Cir. 2010).

Even if a defendant is eligible for a reduction, the court may not reduce the sentence below the range that would have applied if §4B1.1 had set the offense level.

USSG §1B1.10(b)(2)(A) ("Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this section.")

United States v. Counts, 500 F. App'x. 220, 221 (4th Cir. 2012).

Does § 3582(c)(2) permit a reduction in sentence if the defendant's sentence was dictated by a statutory mandatory minimum?

No.

United States v. McPherson, 629 F.3d 609, 611 (6th Cir. 2011) (holding defendant ineligible for sentence reduction under § 3582(c)(2) because "sentence was not based on a guidelines range that was subsequently reduced . . . [but rather] was based on the 240-month minimum sentence mandated by statute").

United States v. Cook, 594 F.3d 883, 891 (D.C. Cir. 2010).

United States v. Coleman, 314 F. App'x 201, 204-05 (11th Cir. 2008).

United States v. Luckey, 290 F. App'x 933, 934 (7th Cir. 2008).

United States v. Jones, 523 F.3d 881, 882 (8th Cir. 2008).

Is relief pursuant to § 3582(c)(2) available where, under the revised guidelines, there would be no reduction in the defendant's base offense level?

No.

United States v. Koglin, 822 F.3d 984 (7th Cir. 2016) (affirming denial of relief when there was no reduction in base offense level because the §2D1.1(a)(5) mitigating role safety valve applied at original sentencing, but would not apply after application of Amendment 782).

United States v. Leniear, 574 F.3d 668, 673 (9th Cir. 2009) (affirming denial of relief where offense level for only one count of conviction would be reduced, and ultimate guideline range was unaffected).

United States v. Williams, 551 F.3d 182, 186 (2d Cir. 2009) (affirming denial of relief where defendant's sentence was dictated by statutory mandatory minimum higher than guideline range otherwise applicable under §2D1.1)

United States v. Poole, 550 F.3d 676, 679 (7th Cir. 2008) (affirming denial of relief where defendant's sentence was dictated by statutory mandatory minimum higher than guideline range otherwise applicable under §2D1.1).

United States v. James, 548 F.3d 983, 986 (11th Cir. 2008) (affirming denial of relief where defendant was sentenced prior to increase in offense level at top of drug table, and therefore defendant's new offense level would be higher than the offense level at his original sentencing).

United States v. Thomas, 545 F.3d 1300, 1302 (11th Cir. 2008) (affirming denial of relief where defendant was sentenced as an armed career criminal pursuant to §4B1.4).

United States v. Herrera, 291 F. App'x 886, 891 (10th Cir. 2008) (affirming denial of relief where defendant's applicable guideline range would not change because his offense involved more than 4.5 kilograms of crack).

United States v. Wanton, 525 F.3d 621, 622 (8th Cir. 2008) (summarily affirming district court's denial of relief where defendant's sentence was based on a quantity of crack cocaine greater than 4.5 kilograms, citing §1B1.10 in holding that, under these circumstances "[the] guideline range would not be lowered, and [the] original sentence is unaffected by the amendments.").

United States v. Fernandez, 269 F. App'x 192, 193 (3d Cir. 2008) (affirming district court's conclusion that the defendant was not eligible for relief under the amended guideline because it would not lower the defendant's guideline range, stating that the defendant's "sentence was not based on the crack cocaine involved in the conspiracy but rather the heroin").

May a court amend a sentence pursuant to § 3582(c)(2) where the original sentence was imposed pursuant to a plea agreement with a binding sentence recommendation?

Yes, under some circumstances.

In *Freeman v. United States*, 564 U.S. 522 (2011), a 5-4 majority of the Supreme Court held that the defendant was eligible for a sentence reduction after pleading guilty to drug and firearm charges pursuant to a Fed. R. Crim. P. 11(c)(1)(C) plea agreement ("Type C agreement"). The five justices who formed the majority were split, however, on the reasons the defendant was eligible for a reduction.

A plurality of the court concluded that Freeman was eligible for a sentence reduction as a result of a retroactively-applicable guideline amendment because the district court, in accepting the Type C agreement, had an "independent obligation to exercise its discretion" in imposing the sentence, and part of that exercise was consideration of the guidelines, including the crack cocaine guideline that was subsequently amended and given retroactive effect. As a result, the sentence was "based on" that guideline, and § 3582(c)(2) permitted the sentence to be reduced. Justice Sotomayor concurred in the judgment, but did so after finding that the Type C agreement in this particular case "expressly use[d] a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment," and that, because it did, the sentence was "based on" the crack cocaine guideline.

Finding that Justice Sotomayor's concurrence represents a narrower ground for the Supreme Court's decision than the plurality opinion, the majority of circuits have applied the rule she articulated, but the Ninth Circuit and D.C. Circuit have instead applied the rule articulated by the plurality opinion, which is typically more favorable to defendants. The Second Circuit has recognized the disagreement but declined to decide the question.

Courts applying Justice Sotomayor's rule:

United States v. Hughes, 849 F.3d 1008, 1014 (11th Cir. 2017) ("[I]t is clear that Justice Sotomayor's opinion controls," and a plea agreement does not "make clear" that it is based on the guidelines by stating that the court will calculate the guidelines range).

United States v. Bogdan, 835 F.3d 805, 809 (8th Cir. 2016) (finding that Justice Sotomayor's opinion was controlling and holding that a plea agreement was not "based on" a guideline range "merely because the agreement expressly adopts a statutory mandatory minimum sentence" that would become the guideline range under §5G1.1(b)).

United States v. Benitez, 822 F.3d 807 (5th Cir. 2016) (finding that Justice Sotomayor's opinion is binding under *Marks*, and that, in any event, its "holding is generally consistent with prior precedent of this court . . . holding that [a] sentence was not 'based on' [the] Guidelines where [a] Rule 11(c)(1)(C) plea agreement never stated that the stipulated

sentence depended on, or was even connected to, the applicable sentencing range, and there was no indication that the district court based its sentencing decision on a guideline calculation.") (citations and punctuation omitted).

United States v. Graham, 704 F.3d 1275, 1278 (10th Cir. 2013); *see also United States v. Jordan*, -- F.3d – , 2017 WL 1378887, at *3 (10th Cir. Apr. 18, 2017) (finding that, under Justice Sotomayor's rule, a plea agreement may be "based on" the guidelines even if it does not spell out every "particular sentencing variable").

United States v. Thompson, 682 F.3d 285, 290 (3d Cir. 2012).

United States v. Dixon, 687 F.3d 356, 359-6 (7th Cir. 2012).

United States v. Rivera-Martinez, 665 F.3d 344 (1st Cir. 2011) (finding that, where the court could not identify an agreed-upon guideline calculation within the four corners of the plea agreement itself, the defendant was not eligible for a sentence reduction under Justice Sotomayor's rule).

United States v. Smith, 658 F.3d 608 (6th Cir. 2011) (finding that the defendant was eligible for a sentence reduction under Justice Sotomayor's rule under a plea agreement to a term of imprisonment slightly above the bottom of a guideline range that was agreed upon by the parties and reflected in a worksheet attached to the plea agreement, even if the district court before accepting the plea agreement calculated the guideline range differently).

United States v. Brown, 653 F.3d 337 (4th Cir. 2011) (finding that the defendant was not eligible for a sentence reduction under Justice Sotomayor's rule under a plea agreement that "simply states that 'the appropriate sentence in this case is incarceration for not less than 180 months and not more than 240 months'" did not permit a sentence reduction under Justice Sotomayor's rule).

Courts applying the plurality's rule:

United States v. Davis, 825 F.3d 1014 (9th Cir. 2016) (en banc) (finding that Justice Sotomayor's opinion is not binding under *Marks*, adopting the approach of the *Freeman* plurality opinion, and holding that "even when a defendant enters into an 11(c)(1)(C) agreement, the judge's decision to accept the plea and impose the recommended sentence is likely to be based on the Guidelines; and when it is, the defendant should be eligible to seek § 3582(c)(2) relief").

United States v. Epps, 707 F.3d 337 (D.C. Cir. 2013) (same).

Court declining to decide which *Freeman* opinion controls:

United States v. Leonard, 844 F.3d 102, 109 (2d Cir. 2016) (no need to decide because defendant was entitled to relief under either standard).

May a court reduce a term of supervised release based on a retroactive amendment?

Yes, but only pursuant to 18 U.S.C. § 3583(e)(1).

USSG §1B1.10, comment (n.5(B)) ("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).").

18 U.S.C. § 3583(e)(1), (2) (A court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if [the court] is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice" and may "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release.").

United States v. Johnson, 529 U.S. 53, 60 (2000) (stating that under § 3583(e), "[t]he trial court, as it sees fit, may modify an individual's conditions of supervised release.").

If a court wishes to modify terms of supervision at the same time it modifies the sentence pursuant to § 3582(c)(2), is a hearing required?

Yes, subject to two exceptions.

Fed. R. Crim. P. 32.1(c)(1) ("Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.").

Fed. R. Crim. P. 32.1(c)(2) (a hearing is not required where (1) defendant waives the hearing, (2) relief is favorable to the person and does not extend term of supervision and (3) the government has notice and does not object).

United States v. Padilla, 415 F.3d 211 (1st Cir. 2005) (recognizing general hearing requirement and its two exceptions).

United States v. Fernandez, 379 F.3d 270, 277 n.8 (5th Cir. 2004) (stating that transfer of supervision does not require a hearing).

Do courts of appeals have jurisdiction to consider allegations that a § 3582(c)(2) proceeding was procedurally or substantively unreasonable within the meaning of *Booker* and its progeny?

There is a circuit conflict over whether courts of appeals review grants or denials of § 3582(c)(2) motions under the general grant of appellate jurisdiction over final decisions of district courts at 28 U.S.C. § 1291, or the more limited grant of appellate jurisdiction to review sentences found at 18 U.S.C. § 3742(a). It is not clear how often this disagreement effects the substantive outcome of § 3582(c)(2) appeals, given the other restrictions on the scope of relief available in § 3582(c)(2) proceedings.

Courts holding that § 3582(c)(2) proceedings receive plenary review under 28 U.S.C. § 1291:

United States v. Rodriguez, -- F.3d --, 2017 WL 1526279 (3d Cir. Apr. 28, 2017).

United States v. Jones, 846 F.3d 366, 369-70 (D.C. Cir. 2017) (reviewing outcome of § 3582(c)(2) proceeding for reasonableness).

United States v. Washington, 759 F.3d 1175, 1179-81 (10th Cir. 2014) (courts have such jurisdiction because § 3582(c)(2) appeals are reviewed pursuant to the broad grant of appellate jurisdiction at 28 U.S.C. § 1291, but defendants will typically be procedurally barred from relitigating issues that could have been raised on direct appeal).

United States v. Dunn, 728 F.3d 1151, 1156 (9th Cir. 2013).

United States v. Johnson, 732 F.3d 109, 116 n.11 (2d Cir. 2013); *see also United States v. Nugent*, No. 16-1149, 2017 WL 1187480, at *1-2 (2d Cir. Mar. 30, 2017) (unpublished) (summarizing the circuit conflict and finding that *Johnson* had decided the question in the Second Circuit).

United States v. Mills, 613 F.3d 1070, 1074 (11th Cir. 2010).

Court holding that § 3582(c)(2) proceedings are reviewed under the more limited sentencing appeal provision at 18 U.S.C. § 3742(a):

United States v. Bowers, 615 F.3d 715, 727 (6th Cir. 2010) (holding that "a defendant's allegation of *Booker* unreasonableness in a § 3582(c)(2) proceeding does not state a cognizable 'violation of law' that § 3742(a)(1) would authorize us to address on appeal," and the broader grant of appellate jurisdiction in 28 U.S.C. § 1291 does not apply).

May a court of appeals review a district court's ruling on a defendant's motion for relief under § 3582(c)(2) if the defendant waived his right to appeal as part of a plea agreement?

No.

United States v. Monroe, 580 F.3d 552, 556-59 (7th Cir. 2009) (finding that, in light of particular language used in the plea agreement and at the plea colloquy, the defendant had not unambiguously waived his right to seek a sentence reduction under 18 U.S.C. § 3582(c)(2), but concluding that the defendant was not eligible for such a reduction because he was sentenced pursuant to a statutory mandatory minimum).

United States v. Chavez-Salais, 337 F.3d 1170, 1173 (10th Cir. 2003) ("In this case, however, the plea agreement did not explicitly state that Defendant was waiving his right to bring a later motion to modify his sentence under 18 U.S.C. § 3582(c)(2). Had the agreement contained such language, or language suggesting that Defendant waived the right 'to attack collaterally or otherwise attempt to modify or change his sentence,' we would likely find that Defendant had waived his right to bring the instant motion. The agreement contained no such language, however, and we do not believe that motions under 18 U.S.C. § 3582(c)(2) are clearly understood to fall within a prohibition on 'any collateral attack.' Defendant's motion under § 3582(c)(2) does not so much challenge the original sentence as it seeks a modification of that sentence based upon an amendment to the Guidelines. Thus, we find that the language of the plea agreement itself does not clearly reach Defendant's instant motion under 18 U.S.C. § 3582(c)(2).").

United States v. Contreras, 215 F.3d 1334, *1 (9th Cir. 2000) (unpublished) (dismissing appeal of denial of a § 3582(c)(2) motion for lack of jurisdiction on grounds that defendant waived right to appeal "any sentence imposed by the Court and the manner in which the sentence is determined so long as the court determines that the total offense level is 31 or below.")

May a defendant file successive motions for relief based on the same retroactive amendment?[1]

Yes, there is no jurisdictional bar to successive motions.

United States v. Trujillo, 713 F.3d 1003 (9th Cir. 2013) (disagreeing with the Seventh Circuit's decision in *Redd* and finding that district courts have subject matter jurisdiction over successive § 3582(c)(2) motions, and that other procedural defenses the government may have against such motions are waived if not raised in the district court).

United States v. Weatherspoon, 696 F.3d 416 (3d Cir. 2012).

No.

United States v. Redd, 630 F.3d 649, 651 (7th Cir. 2011) (defendant dissatisfied with disposition of first motion under § 3582(c) for reduction in sentence and who failed to appeal or file for reconsideration "could not use a new § 3582(c)(2) motion to obtain a fresh decision—or to take what amounts to a belated appeal of the original decision").

United States v. Goodwyn, 596 F.3d 233, 236 (4th Cir. 2010) ("When the Sentencing Commission reduces the Guidelines range applicable to a prisoner's sentence, the prisoner has an opportunity pursuant to § 3582(c)(2) to persuade the district court to modify his sentence. If the result does not satisfy him, he may timely appeal it. But he may not, almost eight months later, ask the district court to reconsider its decision.").

Can a defendant get a sentence reduction pursuant to a retroactive amendment to the guidelines by filing a petition for habeas relief under 28 U.S.C. § 2255?

No.

The proper vehicle for seeking a sentence reduction pursuant to an amendment to the guidelines given retroactive application by the Commission is a motion to reduce sentence pursuant to 18 U.S.C. § 3582. *See United States v. Carter*, 500 F.3d 486, 490 (6th Cir. 2007) (holding that "[w]hen a § 3582 motion requests the type of relief that § 3582 provides for - that is, when the motion argues that sentencing guidelines have been modified to change the applicable guidelines used in the defendant's sentencing - then the motion is rightly construed as a motion to amend sentencing pursuant to § 3582" and "when a motion titled as a § 3582 motion otherwise attacks the petitioner's underlying conviction or sentence,

[1] Courts have also addressed the question of whether a defendant may file successive motions based on different retroactive amendments, when the second amendment would lower the guideline range from that originally imposed, but would not lower the range imposed after the first modification. Courts have found that such defendants are ineligible for relief. *E.g.*, *United States v. Derry*, 824 F.3d 299, 306 (2d Cir. 2016); *United States v. Tellis*, 748 F.3d 1305, 1307 (11th Cir. 2014).

that is an attack on the merits of the case and should be construed as a § 2255 motion"); *United States v. Rios-Paz*, 808 F. Supp. 206 (E.D.N.Y. 1992) (holding relief sought in form of reduction of sentence by reason of subsequent amendment of sentencing guidelines was beyond the scope of a motion for reduction under the habeas statutes because a sentencing court must consider the guidelines in effect at the sentencing date); *United States v. Snow*, 2008 WL 239517 (W.D. Pa. Jan. 29, 2008) (finding that waiver of right to file § 2255 motion would not result in a miscarriage of justice because § 3582(c)(2) "will provide the Court with an avenue for addressing [the retroactivity] issue once the issue is ripe").

Courts have held it is not proper for a court to treat a motion to reduce sentence as a petition for habeas relief. *See Simon v. United States*, 359 F.3d 139 (2d Cir. 2004) (holding that the district court erred in converting motion pursuant to 18 U.S.C. § 3582(c) into petition for writ of habeas corpus). *See also Castro v. United States*, 540 U.S. 375 (2003) (holding that a district court was required to notify defendant prior to recharacterizing motion as motion to vacate, and to provide defendant with certain warnings and an opportunity to withdraw). These decisions are based, in part, upon the limitations for filing a petition under section 2255 established by the Antiterrorism and Effective Death Penalty Act (AEDPA). Pursuant to AEDPA, a petition for habeas relief must be filed within one year of certain specified events. *See* 28 U.S.C. § 2255. Moreover, AEDPA barred the filing of a second or subsequent petition except under specified circumstances. *See* 28 U.S.C. §§ 2244; 2255.

A petition for relief under section 2255 is proper only when it alleges that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." *See* 28 U.S.C. § 2255(a); *see also Hill v. United States*, 368 U.S. 424, 428 (1962) (discussing types of errors cognizable under a writ of habeas corpus: error that is "jurisdictional" or "constitutional," or that is a "fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure," or presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent").

The Supreme Court has held that post-sentencing changes in policy do not support a collateral attack on the original sentence under section 2255. *See United States v. Addonizio*, 442 U.S. 178 (1979) (holding that actions taken by Parole Commission after sentencing do not retroactively affect the validity of the final judgment, nor do they provide a basis for collaterally attacking the sentence). Other courts have held that changes in the guidelines after the defendant's sentencing did not provide grounds for post-conviction relief under section 2255. *See, e.g.*, *Burke v. United States*, 152 F.3d 1329 (11th Cir. 1998) (holding that defendant's claim that enhancement of his sentence was contrary to a subsequently enacted clarifying amendment to the guidelines was not cognizable on a motion for postconviction relief). Moreover, erroneous application of the guidelines at sentencing do not provide grounds for relief under section 2255. *See Kirkeby v. United*

States, 940 F. Supp. 241 (D.N.D. 1996) (holding that, absent a complete miscarriage of justice, claims involving a sentencing court's failure to properly apply the sentencing guidelines will not be considered on a § 2255 motion where the defendant failed to raise them on direct appeal); *see also United States v. Faubion*, 19 F.3d 226, 232-33 (5th Cir. 1994) (holding that an erroneous upward departure under sentencing guidelines was not a "miscarriage of justice"); *Knight v. United States*, 37 F.3d 769, 773 (1st Cir. 1994) (holding that a misapplication of the sentencing guidelines does not amount to a "complete miscarriage of justice"); *United States v. Schlesinger*, 49 F.3d 483, 484-86 (9th Cir. 1994) (acknowledging that nonconstitutional sentencing errors may not be reviewed under § 2255 with possible exception for errors not discoverable at time of appeal); *Scott v. United States*, 997 F.2d 340, 341-42 (7th Cir. 1993) (holding that an erroneous criminal history score under sentencing guidelines was not subject to collateral attack); *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992) (holding that an error in technical application of sentencing guidelines was not subject to collateral attack).