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I. INTRODUCTION

This primer provides a general overview of the statute, policy statement, and case law applicable to motions for a sentence reduction based on retroactive guideline amendments. Although the primer identifies some of the key cases and concepts, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. APPLICABLE STATUTE AND POLICY STATEMENT

Federal law provides that " 'a judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified [] except in limited circumstances."[1] Section 3582(c)(2) of title 18 provides one such "exception to the general rule of finality,"[2] namely 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.[3]

In accordance with the statute, courts must consult §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) to determine whether a sentence reduction is available under section 3582(c)(2).[4] Applying the policy statement requires three steps.[5]

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1 Dillon v. United States, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. § 3582(b)) (first alteration in original).

2 *Id.*

3 18 U.S.C. § 3582(c)(2).

4 U.S. SENT'G COMM'N, *Guidelines Manual*, §1B1.10 (Nov. 2021) [hereinafter USSG].

5 *See generally Dillon*, 560 U.S. at 821–22 (articulating this general framework); USSG §1B1.10, comment. (n.1) (same).

First, the court must consult §1B1.10(d) for the list of amendments that may be given retroactive effect.[6] The court may not reduce a defendant's sentence if "none of the amendments listed in subsection (d) is applicable to the defendant."[7]

Second, the court must "determine the amended guideline range that would have been applicable to the defendant" as if the amendments under subsection (d) "had been in effect at the time the defendant was sentenced."[8] Notably, "the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected."[9] Because of this limitation, the court may not revisit any other guideline application decisions in evaluating whether and to what extent a defendant's sentence should be reduced.[10] The court may reduce a defendant's sentence only when an amendment has "the effect of lowering the defendant's applicable guideline range."[11]

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6 *See* USSG §1B1.10(a)(2)(A) ("A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if [] none of the amendments listed in subsection (d) is applicable to the defendant . . . ."); USSG §1B1.10(d) (listing amendments covered by the policy statement). Further, where the Commission delays the effective date of an amendment, a sentence reduction is permitted only once the amendment is effective. *See, e.g.*, USSG §1B1.10(e)(1) ("The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later."); *see also* United States v. Navarro, 800 F.3d 1104, 1111–12 (9th Cir. 2015) (Commission permissibly delayed 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).

7 USSG §1B1.10, comment. (n.1(A)).

8 USSG §1B1.10(b)(1). Section 1B1.10(c) and Application Note 4 outline procedures for properly calculating the amended guideline range in cases involving a mandatory minimum sentence and substantial assistance. *See* USSG §1B1.10(c); USSG §1B1.10, comment. (n.4).

9 USSG §1B1.10(b)(1).

10 *See, e.g.*, United States v. Koglin, 822 F.3d 984, 986 (7th Cir. 2016) ("The phrase 'leave all other guideline application decisions unaffected' simply instructs the court to apply only the amendments listed in §1B1.10(d) and avoid relitigating the factual findings made in the original sentencing decision. The policy statement does not instruct the court to ignore the effect of the amended guideline on other guideline provisions that, in combination, produced the defendant's sentencing range." (emphasis omitted)).

11 USSG §1B1.10(a)(2)(B); *see also* USSG §1B1.10, comment. (n.1(A)); *Koglin*, 822 F.3d at 986–87 (affirming denial of relief when there was no reduction in guideline range; while §2D1.1(a)(5) mitigating role reduction, which reduces defendants' offense level only where the Drug Quantity Table provides a base offense level of 32 or greater, applied at original sentencing, it would not reduce the defendant's offense level after applying Amendment 782); 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. 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).

Finally, the court must consult the other provisions of §1B1.10 and the accompanying application notes to determine whether a reduction is warranted for a particular defendant[12] and the extent to which the defendant's sentence may be reduced.[13]

The Commission last amended §1B1.10 effective November 1, 2014.[14] The amendments resolved a circuit conflict over the interpretation of §1B1.10 in certain substantial assistance cases and further made retroactive a two-level reduction to the Drug Quantity Table.[15]

III. PROCEEDINGS UNDER SECTION 3582(c)(2)

A. PROCEDURAL REQUIREMENTS

Because section 3582(c)(2) "authorize[s] only a limited adjustment" to a defendant's "otherwise final sentence,"[16] sentence reduction proceedings differ significantly from original sentencings. Among the most salient differences:

- The rule of *United States v. Booker*[17] does not apply.[18] As a consequence, subject to the exception set forth in §1B1.10(b)(2)(A),[19] courts must comply

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[12] Application Note 1(B) to §1B1.10 sets forth factors for the court to consider in determining whether a sentence reduction is warranted and to what extent. *See* USSG §1B1.10, comment. (n.1(B)). These considerations include the factors set forth in 18 U.S.C. § 3553(a), public safety, and a defendant's post-sentencing conduct. *Id.*

[13] Except for defendants who received a departure for substantial assistance, the court may not reduce a defendant's sentence to "a term that is less than the minimum of the amended guideline range." USSG §1B1.10(b)(2)(A); *see, e.g.*, United States v. Spruhan, 989 F.3d 266, 269–70 (4th Cir.) (affirming denial of § 3582(c)(2) motion where the defendant's original sentence was below the amended guideline range without a departure for substantial assistance), *cert. denied*, 143 S. Ct. 373 (2021). Section 1B1.10(b)(2)(C) categorically prohibits reducing a sentence to a term "less than the term of imprisonment the defendant has already served." USSG §1B1.10(b)(2)(C).

[14] USSG App. C, amends. 780, 788 (effective Nov. 1, 2014).

[15] *See id.*; USSG App. C, amend. 782 (effective Nov. 1, 2014) (amending USSG §§2D1.1, 2D1.11). More information regarding the drug guideline amendments is available on the Commission's website. *See* U.S. Sent'g Comm'n, *Materials on 2014 Drug Guidelines Amendment*, https://www.ussc.gov/policymaking/amendments/materials-2014-drug-guidelines-amendment.

[16] Dillon v. United States, 560 U.S. 817, 826 (2010); *see also* 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.").

[17] 543 U.S. 220, 245 (2005) (concluding that the Sixth Amendment required the Court to treat the guidelines as "effectively advisory").

[18] *Dillon*, 560 U.S. at 828 ("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*.").

[19] *See* discussion *infra* Section IV.C.

with §1B1.10's directive that any reduction must be within the amended guideline range.

- The defendant lacks a right to a hearing,[20] though he must be provided with an opportunity to respond to any new information (such as an updated presentence report) upon which the court may rely.[21]
- If the court decides to hold a hearing, the defendant need not be permitted to attend the hearing.[22]
- The defendant does not have a right to assistance of counsel in pursuing a sentence reduction.[23]

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[20] *See, e.g.*, United States v. Alaniz, 961 F.3d 998, 999 (8th Cir. 2020) (per curiam) ("There is no 'constitutionally protected liberty interest' in a discretionary sentence reduction, so the Due Process Clause does not afford procedural protections [such as an evidentiary hearing] to those who seek one." (citation omitted)); United States v. Caraballo-Martinez, 866 F.3d 1233, 1249 (11th Cir. 2017) ("To the extent Caraballo argues that the district court erred in denying him an evidentiary hearing on the subject of his remorse, district courts are not required to hold hearings in § 3582[(c)(2)] proceedings . . . .").

[21] *See, e.g.*, United States v. Beltran-Estrada, 990 F.3d 1124, 1126 (8th Cir. 2021) (per curiam) (while the Due Process Clause does not provide procedural protections, a defendant nonetheless must be "apprised of the information on which the district court rest[s] its decision"); 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)," the defendant must have an opportunity to challenge contestable post-sentence facts upon which the court may rely in denying a § 3582(c)(2) motion); United States v. Jules, 595 F.3d 1239, 1245 (11th Cir. 2010) ("[A]lthough 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. 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.").

[22] 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)."); *see, e.g.*, *Caraballo-Martinez*, 866 F.3d at 1249 ("[D]istrict courts are not required to hold hearings in § 3582 proceedings or to even have the defendant present.").

[23] United States v. Manso-Zamora, 991 F.3d 694, 696 (6th Cir. 2021) (per curiam) ("[E]very federal court of appeals to address the issue has agreed that there is no constitutional (or statutory) right to appointed counsel in § 3582(c) proceedings. We now join these courts."); United States v. Guerrero, 946 F.3d 983, 985 (7th Cir. 2020) ("[D]istrict courts are not required to appoint counsel [for proceedings under § 3582(c)(2)], but [Seventh Circuit precedent] does not prohibit them from doing so."); United States v. Brown, 565 F.3d 1093, 1094 (8th Cir. 2009) (per curiam) ("[T]here is no constitutional right to counsel in § 3582(c) proceedings.").

The Fifth Circuit has not squarely resolved the issue of whether defendants have a right to counsel in section 3582(c) proceedings, *see* United States v. Robinson, 542 F.3d 1045, 1052 (5th Cir. 2008) (declining to decide whether a defendant has a right to counsel, but exercising discretion to appoint counsel for purposes of arguing appeal), though subsequent unpublished Fifth Circuit decisions have suggested that there is no right to counsel in section 3582(c)(2) proceedings. *See, e.g.*, United States v. Perez, 623 F. App'x 282, 283 (5th Cir. 2015) ("Perez has not shown that the district court erred in denying him counsel because there is no

In short, a section 3582(c)(2) proceeding is not a plenary resentencing.[24]

In resolving a motion for a sentence reduction, the district judge must provide enough explanation to allow for meaningful appellate review.[25] As the Supreme Court has explained, satisfying this requirement will vary "upon the circumstances of the particular case."[26] In simpler cases, a statement that the judge relied upon the record and considered the arguments raised and section 3553 factors "may be sufficient," whereas "in other cases, more explanation may be necessary (depending, perhaps, upon the legal arguments raised at sentencing)."[27]

B. DRUG QUANTITY

Evaluating a defendant's eligibility for relief under section 3582(c)(2) may require the court to calculate a specific drug quantity where a specific finding was not needed at the original sentencing.[28] For example, at the time one defendant was originally sentenced under the 1999 guidelines for distribution of crack cocaine, the district court found only that the defendant was responsible for "at least 1.5 kilograms of cocaine base" because the highest base offense level (38) applied to any defendant who distributed at least that quantity of crack cocaine.[29] In 2008, the defendant sought a reduction under Amendment 706,[30] which provided that the base offense level of 38 applied only to

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right to counsel in § 3582(c)(2) proceedings, and he has not demonstrated that his case is exceptional or that the interest of justice warranted such appointment.").

[24] Dillon v. United States, 560 U.S. 817, 826 (2010) ("Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding."); *see also* United States v. Mock, 612 F.3d 133, 137 (2d Cir. 2010) ("[A] defendant may not seek to attribute error to the original, otherwise-final sentence in a motion under [§ 3582(c)(2)].").

[25] *See, e.g.*, United States v. Alaniz, 961 F.3d 998, 1000 (8th Cir. 2020) (per curiam) ("The court must consider any applicable sentencing factors and provide some rationale for its ruling, but it need not give lengthy explanations or categorically rehearse the factors. What matters for us is having enough information for meaningful appellate review." (internal quotation omitted)); United States v. Martin, 916 F.3d 389, 398 (4th Cir. 2019) ("[A] district court cannot ignore a host of mitigation evidence and summarily deny a motion to reduce a sentence and leave both the defendant and the appellate court in the dark as to the reasons for its decision.").

[26] Chavez-Meza v. United States, 138 S. Ct. 1959, 1965 (2018).

[27] *Id.*

[28] *See, e.g.*, United States v. Wyche, 741 F.3d 1284, 1293 (D.C. Cir. 2014) ("[A] resentencing court is permitted to make an independent drug quantity finding if it cannot determine the defendant's amended guideline range without doing so."); United States v. Moore, 706 F.3d 926, 928 (8th Cir. 2013) ("[D]istrict courts may make supplemental findings in a § 3582(c)(2) proceeding if the findings are necessary to deciding the motion and do not contradict any findings made at sentencing.").

[29] United States v. Moore, 582 F.3d 641, 642–43 (6th Cir. 2009) (citing U.S. SENT'G COMM'N, *Guidelines Manual*, §2D1.1(c) (Nov. 1999)).

[30] USSG App. C, amend. 706 (effective Nov. 1, 2007).

defendants responsible for at least 4.5 kilograms.[31] Responsibility for a quantity between 1.5 kilograms and 4.5 kilograms would result in a base offense level of 36.[32] Therefore, while no specific drug quantity calculation was necessary at the original sentencing (because the amount was at least 1.5 kilograms), the resentencing court was required to make a finding to resolve whether the defendant distributed less than 4.5 kilograms, as required for the defendant to be eligible for a reduction under Amendment 706.[33]

In general, a court considering a motion under section 3582(c)(2) is bound by findings from the original sentencing only where the court made a specific drug quantity finding or where the defendant admitted to a specific quantity.[34] Any supplemental findings must be supported by the record and cannot contradict findings from the original sentencing.[35] The court may not, however, make supplemental findings regarding drug quantities when they are unnecessary to resolve the defendant's eligibility for a reduction.[36]

C. SUCCESSIVE MOTIONS, *SUA SPONTE* CONSIDERATION, AND WAIVER

Neither section 3582(c)(2) nor §1B1.10(d) expressly imposes any limits on successive motions for sentence reduction based on the same retroactive amendment, and the courts of appeals that have considered the question have uniformly concluded that there is no jurisdictional prohibition on successive motions.[37] Nonetheless, certain circuits

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[31] *Moore*, 582 F.3d at 643.

[32] *Id.*

[33] *Id.*

[34] United States v. Rodriguez, 921 F.3d 1149, 1158 (9th Cir. 2019) (in a § 3582(c)(2) hearing, a court is bound to drug quantities alluded to in the original sentencing only if (1) the sentencing court made a specific drug quantity finding, or (2) the defendant admitted to a specific quantity).

[35] United States v. Peters, 843 F.3d 572, 578 (4th Cir. 2016) ("[A] district court may make additional findings on the drug quantity attributable to a defendant. Such findings cannot contradict earlier ones and must be supported by the record."); *see, e.g.*, United States v. Rendon, 965 F.3d 943, 944 (8th Cir. 2020) (remanding § 3582(c)(2) motion for further consideration where district court relied on drug quantity rejected as too high at the defendant's original sentencing); *Moore*, 582 F.3d at 646 (remanding for trial court to consider defendant's factual objection to finding that defendant was responsible for possessing or distributing more than 4.5 kilograms of crack cocaine where presentence report from original sentencing "stated only that 'for computational purposes, [the defendant] is being held responsible for at least 1.5 kilograms of cocaine base' ").

[36] *See, e.g.*, United States v. Hardiman, 982 F.3d 1234, 1238 & n.5 (9th Cir. 2020) (per curiam).

[37] *See* United States v. Mofle, 989 F.3d 646, 648 (8th Cir. 2021) ("[W]e join every other circuit that has considered the question in holding that there is no jurisdictional bar to second or successive § 3582(c)(2) motions." (citing United States v. Weatherspoon, 696 F.3d 416, 421 (3d Cir. 2012)); United States v. May, 855 F.3d 271, 274 (4th Cir. 2017); United States v. Calton, 900 F.3d 706, 710–11 (5th Cir. 2018); United States v. Beard, 745 F.3d 288, 291 (7th Cir. 2014); United States v. Trujillo, 713 F.3d 1003, 1005 (9th Cir.

have imposed several non-jurisdictional limits on a defendant's ability to file a successive motion under section 3582(c)(2).

The Fourth Circuit has taken a bright-line approach, holding that a defendant may file only one motion seeking a reduction based on a particular amendment because section 3582(c)(2) contains an "implied prohibition on" both motions for reconsideration and successive motions for reduction.[38] While the Seventh, Eighth, and Tenth Circuits agree that section 3582(c)(2) generally prohibits serial motions based on a single amendment, they do not view the statute as implicitly prohibiting motions for reconsideration. In this context, these courts have held that any subsequent motion regarding an amendment on which the district court has previously ruled must be filed within the time limit for filing an appeal under Federal Rule of Appellate Procedure 4(b).[39] Finally, several other courts have acknowledged the possibility of a non-jurisdictional bar on successive motions, but have not yet resolved the issue.[40]

2013); United States v. Green, 886 F.3d 1300, 1306 (10th Cir. 2018); United States v. Anderson, 772 F.3d 662, 667 (11th Cir. 2014).

[38] *May*, 855 F.3d at 275 (citing United States v. Goodwyn, 596 F.3d 233, 235–36 (4th Cir. 2010)).

[39] United States v. Warren, 22 F.4th 917, 926 (10th Cir. 2022) ("Guided by our prior published decisions, we conclude motions for reconsideration can be filed under § 3582 in this circuit. Such motions are untimely, however, if not filed within the time to appeal the order that is the subject of reconsideration."); *Mofle*, 989 F.3d at 648–69 ("[O]nce a court has issued an order granting or denying a § 3582(c)(2) sentence reduction, subsequent § 3582(c)(2) motions are subject to Rule 4(b)'s timeliness requirements if they present the same legal question that the court addressed in its previous order. Such motions are motions for reconsideration in substance, regardless of how they are labelled . . . . Therefore, once a court has issued an order granting or denying a § 3582(c)(2) sentence reduction, any future § 3582(c)(2) motions based on the same grounds are subject to Rule 4(b)'s timeliness requirements." (citation omitted)); United States v. Redd, 630 F.3d 649, 651 (7th Cir. 2011) (defendant dissatisfied with disposition of first motion under § 3582(c) who failed to appeal or seek reconsideration within the timeframe provided in Federal Rule of Appellate Procedure 4(b) "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" because "[o]nce the district judge makes a decision [on a motion under § 3582(c), Federal Rule of Criminal Procedure] 35 applies and curtails any further power of revision, unless the Commission again changes the Guidelines and makes that change, too, retroactive"); *see also* United States v. Guerrero, 946 F.3d 983, 989 (7th Cir. 2020) (describing the limitations of *Redd*'s "one bite" rule).

The Eleventh Circuit has rejected the Seventh Circuit's reliance on Rule 35 for its prohibition on successive motions, concluding instead that the denial of a section 3582(c)(2) motion is not a "sentencing" that triggers Rule 35(a). *See* United States v. Caraballo-Martinez, 866 F.3d 1233, 1247 (11th Cir. 2017).

[40] *See, e.g.*, *Calton*, 900 F.3d at 714 (explaining that "denial of a § 3582(c)(2) motion does not operate as a res-judicata bar to a successive § 3582(c)(2) motion because such a motion is a step in the same criminal case" and rejecting the government's law-of-the-case argument because the court had "not previously decided whether [the defendant] may obtain relief on her successive motion for sentence reduction"); *Caraballo-Martinez*, 866 F.3d at 1247 ("In this appeal, the government has not argued that other non-jurisdictional restrictions might limit a successive or renewed § 3582(c)(2) motion based on the same Guidelines amendment.").

Relatedly, the courts of appeals have diverged on whether a district judge's *sua sponte* consideration and denial of a sentence reduction precludes a subsequent motion based on the same retroactive amendment. The Seventh Circuit has held that a district court may not take an action that would deprive a defendant of the opportunity to seek a reduction under section 3582(c)(2) without first providing advance warning to the defendant.[41] In contrast, the Eighth Circuit has strongly suggested (but not squarely held) that a defendant who wants to be heard on a district judge's *sua sponte* resolution of a retroactive amendment issue must file a motion within the timeframe provided by Rule 4(b).[42] Finally, the Fourth Circuit has acknowledged the unfairness that might result from the delay between a judge's *sua sponte* ruling and when a defendant receives notice of that ruling, but has not adopted a rule to address those circumstances.[43]

At least two courts also have addressed 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. The courts have thus far concluded that such defendants are ineligible for relief.[44]

As with other types of post-conviction relief, a defendant may waive the right to seek a reduction under section 3582(c)(2) in a plea agreement.[45] But even where a

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[41] *Guerrero*, 946 F.3d at 989–90 (district court erred by construing defendant's letter seeking recruited counsel as motion under § 3582(c)(2) without first warning the defendant of the recharacterization; because of district court's error, defendant's subsequent counseled motion under § 3582(c)(2) was not an impermissible "second or successive" motion for relief). Relatedly, in *United States v. Larry*, the Fifth Circuit held that the district court erred by *sua sponte* raising and denying a motion under section 3582(c)(2) based on the section 3553(a) factors without first providing the parties an opportunity to address the merits of the *sua sponte* motion. 632 F.3d 933, 937 (5th Cir. 2011).

[42] *Mofle*, 989 F.3d at 648–49 (holding, in case where district court thrice denied a reduction under § 3582(c)(2)—once *sua sponte* and twice in response to defendant's motions—that "once a court has issued an order granting or denying a § 3582(c)(2) sentence reduction, any future § 3582(c)(2) motions based on the same grounds are subject to Rule 4(b)'s timeliness requirements," but concluding that defendant's second motion for reduction (construed as a motion for reconsideration) was untimely "[e]ven setting aside the *sua sponte* order and treating the denial of [the defendant's] motion as the first order on the matter").

[43] United States v. May, 855 F.3d 271, 275 n.3 (4th Cir. 2017) (in light of government's waiver of the prohibition on motions for reconsideration under § 3582(c)(2), the court declined to "explore other avenues of relief available to a defendant who, as here, was subject to a *sua sponte* denial of § 3582(c)(2) relief that he or she did not learn about (through no fault of the defendant) until after the applicable appeal deadline has passed"; the court acknowledged the "self-evident" "unfairness of such a situation" and observed that, "[a]t a minimum," the defendant could receive an extension of the deadline to appeal under Federal Rule of Appellate Procedure 4(b)(4)).

[44] *See, 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).

[45] *Compare, e.g.*, United States v. Clardy, 877 F.3d 228, 231 (6th Cir. 2017) (per curiam) ("[W]here a waiver provision in a valid plea agreement specifically forbids a defendant from challenging his sentence under § 3582(c), he cannot challenge his sentence under § 3582(c)."), *with* United States v. Monroe, 580 F.3d

defendant has waived that right, section 3582(c)(2) provides the district court the authority to reduce a defendant's sentence pursuant to a retroactive amendment on its own motion.[46] Further, at least one court has held that the district court may not *sua sponte* use a defendant's waiver to deny an otherwise valid motion under section 3582(c)(2).[47] Rather, it remains the government's role to argue (or decline to argue) a valid waiver in response to a defendant's motion.[48]

IV. APPLICATION ISSUES

This Part reviews four common application issues in section 3582(c)(2) proceedings, including (A) the test for determining whether a defendant's sentence was "based on" a guideline range that was subsequently lowered, (B) when a career offender may be eligible for a sentence reduction, (C) the circumstances under which a court may reduce a sentence below the amended guideline range, and (D) issues regarding supervised release.

A. DETERMINING WHETHER A SENTENCE IS BASED ON THE SENTENCING GUIDELINES

Section 3582(c)(2) provides relief only to defendants who are "sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered by the Sentencing Commission."[49] The Supreme Court has interpreted this provision to limit relief

552, 556–59 (7th Cir. 2009) (finding, in light of language used in the plea agreement and at the plea colloquy, that the defendant had not unambiguously waived his right to seek a sentence reduction under 18 U.S.C. § 3582(c)(2), but concluding the defendant was not eligible for such a reduction because he was sentenced pursuant to a statutory mandatory minimum), *and* 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) . . . . [W]e 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).").

[46] 18 U.S.C. § 3582(c)(2) ("[O]n its own motion, the court may reduce the term of imprisonment . . . ."); *see, e.g.*, *Clardy*, 877 F.3d at 230 ("That a defendant waives the right to file a § 3582(c) motion does not strip the court of any power to grant relief under that section. Instead the waiver merely denies the defendant the right to seek it."); United States v. St. James, 569 F. App'x 495, 496 n.1 (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"); *cf.* United States v. Malone, 503 F. App'x 499, 499–500 (9th Cir. 2012) (reversing sentence reduction where defendant waived the right to seek a reduction and observing that district court had authority to act *sua sponte*, but had not done so).

[47] United States v. Sainz, 933 F.3d 1080, 1082 (9th Cir. 2019).

[48] *Id.*

[49] 18 U.S.C. § 3582(c)(2) (emphasis added).

to defendants whose guideline range served as a "relevant part of the framework" used at sentencing.[50]

As the Supreme Court explained in *Hughes v. United States*, a defendant sentenced pursuant to a binding plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), commonly called a "Type-C" plea, usually will satisfy this requirement.[51] This is because "[a] sentence imposed pursuant to a Type-C agreement is no exception to the general rule that a defendant's Guidelines range is both the starting point and a basis for his ultimate sentence."[52] Specifically, in deciding whether to accept a Type-C plea, a district court must "first evaluat[e] the recommended sentence in light of the defendant's Guidelines range."[53] Thus, "in the usual case the court's acceptance of a Type-C agreement and the sentence to be imposed pursuant to that agreement are 'based on' the defendant's Guidelines range."[54]

In contrast, in *Koons v. United States*, the Supreme Court held that defendants whose initial guideline ranges fell entirely below a statutory minimum, and who received sentences below that mandatory minimum because of their substantial assistance to the government, may not receive the benefit of a retroactive guideline amendment.[55] Though the district court must initially calculate the guideline range for all defendants, a range that falls entirely below the statutory minimum is then "tossed aside" in favor of the mandatory minimum. From that point, these defendants were sentenced based on the mandatory minimums and the separate substantial-assistance factors set forth in §5K1.1.[56] Accordingly, such defendants are ineligible for reductions under section 3582(c)(2) because their final sentences are not "based on" the guideline range, but rather on the mandatory minimum.[57]

Prior to *Koons*, the Commission had promulgated Amendment 780, which added §1B1.10(c)—a provision covering cases involving mandatory minimums and substantial

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50 Hughes v. United States, 138 S. Ct. 1765, 1778 (2018).

51 *Id.*

52 *Id.* at 1776.

53 *Id.*

54 *Id.*

55 138 S. Ct. 1783, 1787–90 (2018).

56 *Id.* at 1788; *see also, e.g.*, United States v. McPherson, 629 F.3d 609, 611 (6th Cir. 2011) (the defendant was ineligible for sentence reduction under § 3582(c)(2) because the defendant's "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) ("[B]ecause Cook was sentenced to a statutory mandatory minimum sentence, he is ineligible for relief under section 3582(c)(2) . . . .").

57 *Koons*, 138 S. Ct. at 1788.

assistance—to the guidelines. The amendment clarified that in cases in which a defendant's original sentence was below a mandatory minimum based on the defendant's substantial assistance, the amended guideline range for purposes of a sentence reduction would not be restricted by the mandatory minimum.[58] *Koons* limited the effect of Amendment 780 by holding that a subcategory of such defendants—those whose initial guideline range fell entirely below the mandatory minimum before receiving substantial assistance departures below the mandatory minimum—are statutorily ineligible for relief.[59] The Court did not address the distinct situations where a defendant's original guideline range fell completely or partially above the statutory minimum.[60] In 2018, the Commission proposed further amendments to address these situations in light of *Koons*.[61]

The Third and Fifth Circuits each have considered the implications of *Koons* for defendants whose original guideline range straddled a statutory *maximum* penalty and have reached different conclusions.[62]

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[58] USSG App. C, amend. 780 (effective Nov. 1, 2014). *See generally* United States v. Williams, 808 F.3d 253, 260 (4th Cir. 2015) (describing circuit split on treatment of substantial assistance cases and its resolution).

[59] 138 S. Ct. at 1789–90. The Court suggested, however, that its approach was consistent with §§1B1.1(a)(8) (outlining how to determine sentencing requirements and options for a particular guideline range) and 5G1.1(b) (specifying that "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the [final] guideline sentence"). *Id.* at 1787.

[60] *See* Sentencing Guidelines for United States Courts, Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary, 83 FR 65,400, 65,402 (Dec. 20, 2018) [hereinafter Dec. 2018 Proposed Amendments] ("*Koons* rested on the defendants' statutory ineligibility for a sentence reduction under 18 U.S.C. § 3582(c)(2) and did not analyze the policy statement at §1B1.10 or the correct application of the guidelines in sentence reduction proceedings. In addition, *Koons* did not address whether two other categories of defendants whose cases involve mandatory minimum sentences are eligible for relief: (1) those with guideline ranges that straddle the mandatory minimum penalty ('*straddle* defendants') and (2) those with guideline ranges completely above the mandatory minimum penalty ('*above* defendants')."). The Ninth Circuit applied the logic of *Koons* to a defendant whose guideline range straddled the mandatory minimum and concluded that the defendant was ineligible for a sentence reduction. United States v. Buenrostro, 895 F.3d 1160, 1164 (9th Cir. 2018) (citing *Koons* for the proposition that "[a] sentence is not 'based on a sentencing range' when it is based instead on a statutory mandatory minimum that exceeds the otherwise applicable Guidelines range" and further opining that "[t]he same is true even if a statutory mandatory minimum falls within the otherwise applicable Guidelines range").

[61] Dec. 2018 Proposed Amendments, *supra* note 60, at 65,401–06 (proposing to revise §1B1.10 by (1) clarifying that a defendant is eligible for reduction only when "sentenced based on a guideline range"; (2) clarifying that whether an amendment has the effect of lowering a defendant's guideline range is determined by comparing the defendant's original guideline range to the amended guideline range; and (3) proposing three alternatives to amend §1B1.10(c), each of which would have a different impact on defendants whose guideline ranges fall either completely above the mandatory minimum or "straddle" the mandatory minimum by falling partly above and partly below the mandatory minimum).

[62] *Compare* United States v. Rivera-Cruz, 904 F.3d 324, 327–28 (3d Cir. 2018) (holding that because the statutory maximum displaces the top of the guideline range pursuant to §5G1.1, the defendant's sentence is not "based on" the guideline range and the defendant is not eligible for a sentence reduction), *with* United States v. Lopez, 989 F.3d 327, 334 (5th Cir. 2021) (defendant whose guideline range straddled the statutory

B. CAREER OFFENDERS' ELIGIBILITY FOR RELIEF

Only under limited circumstances may a defendant sentenced pursuant to the career offender guideline in §4B1.1 be eligible for a sentence reduction. Section 4B1.1 requires that the greater of the offense level from that section or the offense level applicable to the underlying offense of conviction be applied.[63] Thus, amendments that reduce the offense level of the underlying offense would not, in the ordinary course, reduce the defendant's guideline range.[64] Without a reduced guideline range, the defendant may not obtain a reduction under section 3582(c)(2).[65]

On the other hand, a career offender occasionally may have an offense level for the offense of conviction that is higher than the offense level set forth in §4B1.1.[66] Under these circumstances, the defendant may seek a reduction based on a retroactive amendment to the applicable Chapter Two offense guideline. However, the career offender provision continues to operate in such cases. Therefore, a career offender can receive a reduction, if at all, only to the extent the reduced sentence does not go below the guideline range that would have applied if §4B1.1 (rather than the underlying offense) had set the offense level at the original sentencing.[67]

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maximum penalty satisfied the "based on" requirement because the statutory maximum reduced the top of the guideline range without affecting the bottom of the range, and the defendant was sentenced at the bottom of the range).

63 *See* USSG §4B1.1(b) ("[I]f the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply.").

64 *See, e.g.*, United States v. Charles, 749 F.3d 767, 770 (9th Cir. 2014) ("[R]etroactive amendments regarding sentences under the drug guidelines do not affect individuals who were sentenced as career offenders because . . . the two sentencing schemes are mutually exclusive." (internal quotation and alteration omitted)); United States v. Hodge, 721 F.3d 1279, 1280–81 (10th Cir. 2013) ("Although Mr. Hodge's underlying conviction is related to crack cocaine, he was sentenced under the career offender guideline, U.S.S.G. §4B1.1(B). Amendment 750 affected none of his sentencing calculations, and therefore 18 U.S.C. § 3582(c)(2) does not authorize a reduction of his sentence.").

65 *See* USSG §1B1.10(a)(2)(B) (sentence reductions are not permitted where a retroactive amendment "does not have the effect of lowering the defendant's applicable guideline range").

66 *See* USSG §4B1.1(b).

67 USSG §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."); 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 subsection."); *see, e.g.*, United States v. Thompson, 825 F.3d 198, 204 (3d Cir. 2016) ("[A]fter Amendment 759, [the defendants'] 'applicable guideline ranges' under the Sentencing Commission's policy statement in §1B1.10 are their Career Offender Guidelines ranges . . . . [T]hey cannot satisfy the second requirement of § 3582(c)(2) because Amendment 782 only lowered their Drug Guidelines ranges."); United States v. Smith, 814 F.3d 802, 804 (6th Cir. 2016) (per curiam) ("Amendment 782 does not have the effect of lowering the Guidelines range applicable to Smith's

C. Reduction of Sentence Below the Amended Guideline Range

Subject to an exception for substantial assistance cases, a court may "not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range" as calculated under the retroactive amendment.[68] Therefore, where a defendant did not receive a downward departure as part of his original sentence, or where a downward departure was awarded for reasons other than substantial assistance, the defendant may not receive a reduction below the minimum of the amended guideline range.[69]

The sole exception applies when a defendant originally received a sentence below the guideline range "pursuant to a government motion to reflect the defendant's substantial assistance to authorities."[70] In this situation, the court may provide the defendant "a reduction comparably less than the amended guideline range."[71] Several courts of appeals have held that district judges have discretion to calculate a "comparable" downward reduction based on either the percentage of the departure from the bottom of the original guideline range or the number of offense levels represented by the departure.[72]

Courts of appeals have disagreed over whether a sentence reduction may reflect only the departure attributable to substantial assistance or whether the amended sentence may reflect additional departures and variances applied at the defendant's original sentencing. The Sixth and Eleventh Circuits have held that a court may reduce a sentence below the amended guideline range by an amount attributable only to the substantial

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case, because Smith still would have been subject to a Guidelines range of 360 months to life due to the operation of §4B1.1."); United States v. Stevenson, 749 F.3d 667, 670 (7th Cir. 2014) ("At Stevenson's original sentencing, the district court sentenced him using the crack cocaine offense guideline, which produced a higher offense level than the applicable career offender guideline. But that decision did not erase the court's determination that Stevenson was a career offender . . . .").

68 USSG §1B1.10(b)(2)(A).

69 USSG §1B1.10, comment. (n.3).

70 USSG §1B1.10(b)(2)(B).

71 *Id.*; *see, e.g.*, United States v. Lopez, 989 F.3d 327, 336–38 (5th Cir. 2021) (remanding for resentencing where statutory maximum, (which served as the "guideline sentence" because the original guideline range exceeded the statutory maximum) after retroactive application of Amendment 780, would still result in a "guideline sentence" of 240 months; the district court should have applied the same three-level substantial assistance departure from the original sentencing to arrive at an amended guideline range of 188 to 235 months); United States v. Guerrero, 946 F.3d 983, 989 (7th Cir. 2020) (the guideline does not prohibit reductions based on retroactive amendments in substantial assistance cases).

72 *See, e.g.*, United States v. Marroquin-Medina, 817 F.3d 1285, 1291–92 (11th Cir. 2016) (endorsing both the "percentage-based" and "offense-level-based" approaches); United States v. Lindsey, 556 F.3d 238, 245–46 (4th Cir. 2009) (same); United States v. Mann, 666 F. App'x 488, 490 (6th Cir. 2016) (per curiam) (same).

assistance departure.[73] In contrast, the Seventh and Ninth Circuits have held that a court may reduce the defendant's sentence further below the amended guideline minimum to reflect other departures or variances the defendant received, in addition to the substantial assistance departure.[74] In 2018, the Commission proposed guideline amendments that would resolve the circuit split.[75]

D. APPLICABILITY TO SUPERVISED RELEASE

While section 3582(c)(2) does not allow the court to reduce a term of supervised release, 18 U.S.C. § 3583(e)(1) permits the court to "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice."[76] Further, 18 U.S.C. § 3583(e)(2) authorizes the court to "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release."[77]

In this regard, the Commentary to §1B1.10 explains that if the prohibition on a reduction of imprisonment to less than time served prevents the court from reducing a defendant's sentence,[78] "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)."[79] However, this factor does not automatically "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" had the court been able to reduce the defendant's sentence.[80]

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[73] United States v. Taylor, 815 F.3d 248, 250–52 (6th Cir. 2016); *Marroquin-Medina*, 817 F.3d at 1290.

[74] United States v. D.M., 869 F.3d 1133, 1138–39 (9th Cir. 2017) (district court should "consider additional applicable departures in an original sentence, not just the deduction specifically attributed to substantial assistance"); United States v. Phelps, 823 F.3d 1084, 1088 (7th Cir. 2016) (trial court erred in "tr[ying] to isolate the effect of Phelps's substantial-assistance credit").

[75] Dec. 2018 Proposed Amendments, *supra* note 60, at 65,406–07 (proposing to adopt either the approach of the Sixth and Eleventh Circuits or that of the Seventh and Ninth Circuits).

[76] 18 U.S.C. § 3583(e)(1).

[77] *Id.* § 3583(e)(2).

[78] *See* USSG §1B1.10(b)(2)(C) ("In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.").

[79] USSG §1B1.10, comment. (n.7(B)).

[80] *Id.*

Should the court wish to modify the terms of a defendant's supervision at the same time as it grants a reduction of sentence, the court ordinarily must hold a hearing.[81] The hearing requirement for supervision modifications is subject to two exceptions: (1) the defendant may waive the right to a hearing; and (2) no hearing is required where the relief is favorable to the defendant and the government does not object.[82]

Finally, a defendant may not use section 3582(c)(2) to seek a reduction of a term of imprisonment imposed upon revocation of supervised release.[83]

V. RELATIONSHIP WITH OTHER PROCEDURAL MECHANISMS

A. 28 U.S.C. § 2255

The proper vehicle for seeking a sentence reduction pursuant to an amendment made retroactive by the Commission is a motion to reduce sentence pursuant to section 3582(c)(2). A defendant may not receive such a reduction by filing a petition for habeas relief under 28 U.S.C. § 2255.[84] Rather, section 2255 only permits a defendant to allege "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

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[81] *See* 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.").

[82] *See* FED. R. CRIM. P. 32.1(c)(2) (a hearing is not required where (1) the defendant waives the hearing, or (2) relief is favorable to the person and does not extend term of supervision, and (3) the government has notice and does not object); *see, e.g.*, United States v. Padilla, 415 F.3d 211, 223 (1st Cir. 2005) (en banc) (recognizing general hearing requirement and its two exceptions); United States v. Fernandez, 379 F.3d 270, 277 n.8 (5th Cir. 2004) (transfer of supervision does not require a hearing).

[83] USSG §1B1.10, comment. (n.7(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."); *see, e.g.*, United States v. Morales, 590 F.3d 1049, 1052 (9th Cir. 2010) ("[R]educing a supervised release revocation sentence is inconsistent with [] §1B1.10.").

[84] *See, e.g.*, United States v. Prophet, 989 F.3d 231, 238–39 (3d Cir. 2021) ("[T]he Commission's list of retroactive amendments in §1B1.10(d) is only relevant when a defendant brings a motion for a resentencing under § 3582(c)(2) 'based on a sentencing range that has subsequently been lowered by the Sentencing Commission.' When a petitioner seeks relief under § 2255 or § 2241, the analysis is different from § 3582(c)(2)." (quoting 18 U.S.C. § 3582(c)(2)) (internal citations omitted)); United States v. Carter, 500 F.3d 486, 490 (6th Cir. 2007) ("When 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, that is an attack on the merits of the case and should be construed as a § 2255 motion.").

sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."[85]

Further, courts have held it is not proper to treat a motion to reduce a sentence as a petition for habeas relief.[86] These decisions are based in part on the limitations on petitions under section 2255 established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[87] Pursuant to AEDPA, a petition for habeas relief must be filed within one year of certain specified events.[88] Moreover, AEDPA bars the filing of a second or subsequent petition except under specified circumstances.[89]

The Supreme Court has held that post-sentencing changes in policy generally cannot support a collateral attack under section 2255,[90] and other courts have held that changes in the guidelines after the defendant's sentencing do not provide grounds for post-conviction relief under section 2255.[91] Moreover, an erroneous application of the guidelines at sentencing does not provide a basis for relief under section 2255.[92]

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[85] 28 U.S.C. § 2255(a); *see* 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"; a "fundamental defect which inherently results in a complete miscarriage of justice"; "an omission inconsistent with the rudimentary demands of fair procedure"; or "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent").

[86] *See* Simon v. United States, 359 F.3d 139, 141–45 (2d Cir. 2004) (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, 381–83 (2003) (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).

[87] Pub. L. No. 104–132, 110 Stat. 1214.

[88] *Id.* § 105 (codified as amended at 28 U.S.C. § 2255(f)).

[89] *Id.* § 105, 106 (codified as amended at 28 U.S.C. §§ 2244(a)–(b), 2255(h)).

[90] *See* United States v. Addonizio, 442 U.S. 178 (1979) (actions taken by Parole Commission after sentencing do not retroactively affect the validity of a final judgment or provide a basis for collaterally attacking a sentence).

[91] *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). *But see, e.g.*, United States v. Marmolejos, 140 F.3d 488, 489 (3d Cir. 1998) (holding, on motion under § 2255, that defendant was entitled to resentencing because Amendment 518 "clarified the existing application note, rather than effecting a substantive change in the law"); United States v. Prophet, 989 F.3d 231, 236–38 (3d Cir. 2021) (discussing the scope of *Marmolejos* and explaining that the availability of a retroactive amendment under § 2255 was not determined by §1B1.10, but concluding that Amendment 801 was substantive and therefore could not provide relief under § 2255).

[92] *See* Spencer v. United States, 773 F.3d 1132, 1135 (11th Cir. 2014) (en banc) ("Spencer cannot collaterally attack his sentence [under § 2255] based on a misapplication of the advisory guidelines."); Welch v. United States, 604 F.3d 408, 412 (7th Cir. 2010) ("[D]eviations from the Sentencing Guidelines generally are not cognizable on a § 2255 motion."); *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

Finally, because section 3582(c)(2) does not allow for a plenary resentencing, courts have uniformly held that a sentence reduction under section 3582(c)(2) "does not reset the count for purposes of AEDPA's bar on second or successive § 2255 motions."[93]

B. FIRST STEP ACT

Motions for sentence reduction under the First Step Act of 2018[94] do not fall within the scope of section 3582(c)(2). Rather, several circuits have held that First Step Act motions "fall under § 3582(c)(1)(B), a distinct exception to finality,"[95] and the Seventh and Eleventh Circuits have held that the First Step Act itself provides "its own procedural vehicle."[96]

VI. SCOPE OF APPELLATE REVIEW

Most circuits have concluded that the courts of appeals review orders on section 3582(c)(2) motions under the general grant of appellate jurisdiction over final decisions of district courts at 28 U.S.C. § 1291, rather than the more limited authority found at 18 U.S.C. § 3742(a). The Second, Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits have held that appeals from section 3582(c)(2) proceedings are reviewed under 28 U.S.C. § 1291.[97]

"miscarriage of justice"); Knight v. United States, 37 F.3d 769, 773 (1st Cir. 1994) (a misapplication of the sentencing guidelines does not amount to a "complete miscarriage of justice").

93 Armstrong v. United States, 986 F.3d 1345, 1351 (11th Cir. 2021); *see also, e.g.*, United States v. Quary, 881 F.3d 820, 822 (10th Cir. 2018) (per curiam) (same); Sherrod v. United States, 858 F.3d 1240, 1242 (9th Cir. 2017) (same); United States v. Jones, 796 F.3d 483, 486 (5th Cir. 2015) (same); White v. United States, 745 F.3d 834, 837 (7th Cir. 2014) (same).

94 Pub. L. No. 115–391, § 404(b), 132 Stat. 5194, 5222.

95 United States v. Chambers, 956 F.3d 667, 671 (4th Cir. 2020); *see also* United States v. Holloway, 956 F.3d 660, 661 (2d Cir. 2020) (same); United States v. Easter, 975 F.3d 318, 323 (3d Cir. 2020) (same); United States v. Alexander, 951 F.3d 706, 708 (6th Cir. 2019) (same); *cf.* United States v. Mannie, 971 F.3d 1145 (10th Cir. 2020) (identifying § 3582(c)(1)(B) as the proper vehicle but also noting that the specific standards for a sentence modification are contained in the Fair Sentencing Act of 2010 and the First Step Act of 2018).

96 United States v. Edwards, 997 F.3d 1115, 1118 (11th Cir.) ("[W]e hold that the First Step Act is a self-contained, self-executing, independent grant of authority empowering district courts to modify criminal sentences in the circumstances to which the Act applies."), *cert. denied*, 142 S. Ct. 509 (2021); United States v. Sutton, 962 F.3d 979, 984 (7th Cir. 2020) ("[Defendant]'s pro se motion [for a sentence reduction under the First Step Act] invoked § 3582(c)(2), but everyone agrees that was the wrong vehicle.").

97 United States v. Calton, 900 F.3d 706, 712–13 (5th Cir. 2018) ("We join the Second, Third, Ninth, Tenth, and D.C. Circuits and hold that § 1291 provides the proper jurisdictional basis for reviewing appeals from denials of § 3582(c)(2) sentence-reduction motions."); 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. Rodriguez, 855 F.3d 526, 531 (3d Cir. 2017) ("Section 3742 is not an 'obstacle' to our Section 1291 jurisdiction because it

Only the Sixth Circuit has held that section 3582(c)(2) proceedings are reviewed under the more limited sentencing appeal provision in 18 U.S.C. § 3742(a).[98] Under the former, courts may review a reduced sentence for procedural and substantive reasonableness, while review under the latter is generally limited to challenges based on a violation of law or an incorrect application of the guidelines. However, it is unclear how often this disagreement affects the substantive outcome of section 3582(c)(2) appeals, given the other restrictions on the scope of relief available in section 3582(c)(2) proceedings.

does not bar review for reasonableness."); United States v. Washington, 759 F.3d 1175, 1179–81 (10th Cir. 2014) (section 3582(c)(2) appeals are reviewed pursuant to the broad grant of appellate jurisdiction at 28 U.S.C. § 1291, but defendants typically will be procedurally barred from relitigating issues that could have been raised on direct appeal); United States v. Purnell, 701 F.3d 1186, 1188 (7th Cir. 2012) ("We have jurisdiction [over the defendant's appeal of the denial of his § 3582(c)(2) motion] under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 . . . .").

[98] United States v. Bowers, 615 F.3d 715, 727 (6th Cir. 2010) ("[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."). Though *Bowers* framed the issue in terms of the scope of appellate jurisdiction, the Sixth Circuit more recently explained that § 3742(a) "establishes a non-jurisdictional rule governing the relief that appellate courts may grant" and is "not a jurisdictional exception to [the court's] otherwise broad appellate jurisdiction under § 1291." United States v. Smithers, 960 F.3d 339, 344 (6th Cir. 2020) (citation omitted).