

Federal Sentencing

Crack Cocaine and Retroactivity

U.S. Sentencing Commission

Crack Amendment and Retroactivity

2007 Crack Amendment

Amendment #706 (as amended by #711)

- BOLs for crack lowered two levels
 - *e.g.*, previously: 5 gms OL 26 (63-78 mos.)
as amended: 5 gms OL 24 (51-63 mos.)
- Instructions for combining crack cocaine with other drugs (App. Note 10(D))
- Amendments apply retroactively effective March 3, 2008 (§1B1.10 & § 3582(c)(2))
- Federal Cocaine Sentencing Policy Report submitted to Congress on May 15, 2007

The Crack Amendment and Retroactivity

- The 2007 Crack Amendment, #706 (as amended by #711), made retroactive, effective March 3, 2008
- Retroactivity allows the sentencing court to consider a possible reduction of imprisonment for inmates meeting certain criteria set by statute and the guidelines

Understanding Retroactivity

- Relevant statutes and guideline policy statement
- Process

Relevant Statutes & Guideline Policy Statement

- 28 U.S.C. § 994(u)
- 18 U.S.C. § 3582(c)(2)
- §1B1.10

28 U.S.C. § 994(u)

“If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

18 U.S.C. § 3582(c)(2)

“In the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has been subsequently lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion . . .”

18 U.S.C. § 3582(c)(2) – (cont.)

“ . . .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.**”

§1B1.10 (Policy Statement)

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

- §1B1.10 amended effective March 3, 2008
 - Amendment available in a supplement to the *Guidelines Manual*, available at www.ussc.gov
 - NOT contained in the 2007 *Guidelines Manual*
- Implements 28 U.S.C. § 994(u) and provides guidance and limitations regarding motions under 18 U.S.C. § 3582(c)(2)

Process

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

General Eligibility under 18 U.S.C. § 3582(c)(2)

§1B1.10(a)(1) & App. Note 1(A)

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

General Eligibility Criteria under 18 U.S.C. § 3582(c)(2) (cont.)

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

- Note that an amendment listed in §1B1.10(c) may not always lower the defendant's applicable guideline range
 - The operation of another guideline
 - *e.g.*, an “override” by the Chapter Four Career Offender guideline
 - A statutory provision
 - *e.g.*, a mandatory minimum which “trumps” the otherwise applicable guideline range

Examples of When Crack Cocaine Amendment Would Not Result in a Lowering of the Guideline Range

- BOL is 12
- Quantity of crack cocaine exceeds 4500 gm.
- Defendant is Career Offender (§4B1.1) or Armed Career Criminal (§4B1.4)
- Defendant subject to mandatory minimum in excess of applicable guideline range (§5G1.1(b))
- Certain cases involving multiple drug types

The Process for Determining Eligibility: Establishing the Amended Guideline Range

§1B1.10(b)(1) & App. Note 2

- The amended guideline range is determined by substituting only the amendment listed at §1B1.10(c) into the guidelines as applied at the original sentencing
- All other guideline application decisions for the original sentencing remain unaffected

The Nature of 18 U.S.C. § 3582(c)(2)

§1B1.10(a)(3)

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

Defendant's Presence

Rule 43(b)(4)

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

Prohibition on the Extent of Possible Reduction

§1B1.10(b)(2)(C)

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

General Limitation on Extent of Possible Reduction

§1B1.10(b)(2)(A)

- If the original sentence was within the original guideline range, the term of imprisonment cannot be reduced to less than the minimum of the amended guideline range

Example: Original Sentence Within Range

§1B1.10(b)(1) & (2)(A) & App. Note 3

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

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

Limitations on Extent of Possible Reduction: Exception to General Limitation

§1B1.10(b)(2)(B) & App. Note 3

- If the original sentence was less than minimum of the original guideline range (*i.e.*, a departure or variance), a reduction comparably less than the amended guideline range is permissible
- *However*, when the original sentence was a variance pursuant to *Booker*, a reduction from the sentence originally imposed generally would not be appropriate

Example: Original Sentence Below Range

§1B1.10(b)(2)(B) & App. Note 3

- Original guideline range: 70 - 87 months
- Original term imposed: 56 months
 - Court imposed downward departure of 20% below minimum of the guideline range
- Amended guideline range: 57 - 71 months

A reduction of 20% from the amended guideline range minimum of 57 months would result in a comparable reduction (*i.e.*, **46 months**)

Factors to Consider in Determining if and to What Extent a Reduction is Warranted

§1B1.10, App. Note 1(B)

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

Factors to Consider in Determining if and to What Extent a Reduction is Warranted (cont.)

§1B1.10, App. Note 1(B)

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

Supervised Release Revocations

§1B1.10, App. Note 4

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

U.S.S.C.

Web Site

www.usssc.gov

HelpLine

202-502-4545