07-1151-pr

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1151-pr

MELVIN POINDEXTER,
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal case under 18 U.S.C. §§ 3231 and 3582(c)(2).[1] The district court denied the defendant's motion to reduce his term of imprisonment in an opinion dated March 16, 2007. A53. Judgment entered on March 19, 2007, and an amended judgment entered on March 20, 2007. A2-3. The defendant filed a timely notice of appeal, pursuant to Fed. R. App. P. 4(b), on March 21, 2007. A3, 21. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] The district court originally construed this motion as a second or successive motion under 28 U.S.C. § 2255, and assigned it a civil docket number. *See* Appellant's Appendix ("A") 2, 36. In an order dated May 24, 2006, however, this Court held that the motion should be construed as one under 18 U.S.C. § 3582(c)(2) and remanded it to the district court. A37. A motion under § 3582(c)(2) is considered a continuation of the prior criminal proceeding, *see United States v. Arrango*, 291 F.3d 170, 171-72 (2d Cir. 2002), and thus the district court had jurisdiction over the matter under 18 U.S.C. § 3231.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Title 18, United States Code, § 3582(c)(2) permits a district court to reduce a sentence previously imposed when a subsequent amendment to the Sentencing Guidelines lowers the applicable guideline range. The defendant moved for relief under this section arguing that his guideline range was lowered by (1) a subsequent Supreme Court decision and (2) an amendment to the Sentencing Guidelines which addressed the proper choice of applicable offense guidelines, a decision the defendant does not challenge. Did the district court properly deny the defendant's motion?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR UNITED STATES OF AMERICA

Preliminary Statement

In 1995, the defendant Melvin Poindexter was convicted after trial of conspiracy to possess with intent to distribute and to distribute cocaine. Thereafter, the district court imposed a sentence which included a term of incarceration of 360 months. More than 10 years later, in 2006, Poindexter moved to reduce his term of imprisonment under 18 U.S.C. § 3582(c)(2), claiming that he had been sentenced based on a sentencing range that

had subsequently been lowered by Amendment 591 to the United States Sentencing Guidelines. The district court denied his motion.

As explained more completely below, the district court's decision denying the defendant's motion under 18 U.S.C. § 3582(c)(2) should be affirmed. The defendant's argument rests first on an application of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), but § 3582(c)(2) provides relief only for subsequent *guideline amendments*, not subsequent *Supreme Court decisions*. The second part of the defendant's argument, based on Amendment 591 to the Sentencing Guidelines, is similarly unhelpful because that Amendment is inapplicable to this case. Amendment 591 altered the rules for choosing applicable offense guidelines – prohibiting the sentencing court from considering "relevant conduct" when selecting the offense guideline – but did not alter the rules for setting the base offense level within the guideline. Because the defendant does not challenge the selection of the applicable offense guideline here, and because the district court did not rely on relevant conduct in any event, Amendment 591 is inapplicable.

Statement of the Case

On March 2, 1994, a grand jury sitting in New Haven, Connecticut returned an indictment charging the defendant Melvin Poindexter and five others (Gerald Fullwood, Michael Moore, Richard Austin, Akali Dennie, "Juicey" (later identified as William Penn), and "Mooney" (later identified as Anthony Harris)) in Count One with

conspiracy to possess with intent to distribute and to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. A6, 23.

Jury selection for the defendant and co-defendant Anthony Harris took place on January 4, 1995. A14. That same day, the government filed a Second Offender Information for the defendant pursuant to 21 U.S.C. § 851, and trial began. A14. On January 18, 1995, the jury returned its verdict of guilty as to both defendants on the conspiracy charge. A15-16.

On April 13, 1995, the defendant appeared before Senior Judge Ellen Bree Burns for sentencing. A16. The court imposed a sentence of 360 months' incarceration and 8 years' supervised release. A16, 26, 104-105. This Court affirmed his conviction on appeal, *United States v. Fullwood*, 86 F.3d 27 (2d Cir. 2006), and the Supreme Court denied his petition for a writ of certiorari, *Poindexter v. United States*, 519 U.S. 985 (1996).

On June 13, 1997, the defendant filed a motion to vacate pursuant to 28 U.S.C. § 2255. A18. The district court denied this motion December 17, 1997. A19. The defendant appealed, and on January 13, 1998, this Court dismissed the appeal without prejudice to refiling within 30 days of the entry of an order granting or denying a certificate of appealability. A19. The appellant moved for such a certificate on January 27, 1998, *id*., and on November 19, 1998, this Court issued its mandate denying the certificate, A20.

On January 10, 2006, the defendant filed a motion to reduce his sentence under 18 U.S.C. § 3582(c)(2). A2, 20, 27. The district court construed the motion as one made under 28 U.S.C. § 2255, and transferred it to this Court as a second or successive motion under that statute. A2, 36. In relevant part, this Court found that the district court erred in construing the motion as a successive motion under 28 U.S.C. § 2255, and remanded for consideration of the motion under 18 U.S.C. § 3582(c)(2). A2, 37. On March 16, 2007, the district court denied the defendant's motion. A2, 53. Judgment entered March 19, 2007, and a corrected judgment entered March 20, 2007. A2-4. This appeal followed. A3, 21.

The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Defendant's Conviction and Sentence

On January 18, 1995, a federal jury sitting in the District of Connecticut found the defendant guilty of conspiring to possess with intent to distribute and to distribute cocaine in violation of 21 U.S.C. § 846. A15-16.

On April 13, 1995, the defendant appeared before the district court for sentencing. A16. At the sentencing hearing, the defendant disputed the determination by the Office of Probation and the Government that at least 15

but less than 50 kilograms of cocaine were properly attributable to him as a conspirator. A63.

In support of its contention regarding the attributable quantity of cocaine, Government counsel cited evidence from the investigation and trial of the case. Among the information relied upon by the Government were statements made by the defendant to law enforcement in October 1993 and March 1994, shortly after his arrest. In the statements, the defendant indicated knowledge of a cocaine distribution organization operated by co-defendants Gerald Fullwood and Michael Moore in which Fullwood would obtain approximately three kilograms of cocaine each week beginning in the summer of 1993 and share it with the defendant, Moore, and a third individual, who would all distribute it in the New Haven area. A67. The defendant also stated that he personally traveled to New York with Fullwood on at least one occasion where each of the men purchased one-half kilogram of cocaine. A68. Government counsel also referred to testimony which had been adduced at the defendant's trial in which cooperating witnesses substantially corroborated the defendant's statements. *Id.*

In its sentencing presentation, Government counsel made it clear that it viewed the quantities under consideration as reflecting the defendant's conduct in the charged conspiracy, as opposed to relevant conduct:

> [T]he question of attribution has to be viewed in light of the fact that this is a conspiracy charge of which Mr. Poindexter was convicted and the

> question really is what did he have reason to understand was the nature and scope of the conspiracy, what is it that he undertook to do in the context of the conspiracy . . . .

A69.

At the conclusion of the hearing, the district court accepted the recommendation of the Office of Probation and found that the defendant's offense conduct involved at least 15 but less than 50 kilograms of cocaine. A76. On this finding, the court rested its conclusion on the defendant's offense conduct, as opposed to any relevant conduct:

> I think that on the basis of the testimony during the course of the trial, and the evidence that was introduced during the course of the trial, that to attribute 15 to 50 kilograms to Mr. Poindexter, who has been found to be a co-conspirator, is not erroneous based on that evidence and therefore, I'm accepting the calculation on the part of the probation officer.

A76.

The district court further adopted the Probation Office's recommendation that the defendant qualified as a Career Offender under U.S.S.G. § 4B1.1(A). A104. The court then calculated his base offense level as 37, with a Criminal History Category of VI, for a guideline range of 360 months to life in prison. A104-105. The court

imposed a sentence of imprisonment of 360 months, the bottom of the defendant's applicable guideline range. A105.

The defendant appealed, and this Court affirmed his conviction in all respects. *Fullwood*, 86 F.3d 27. The Supreme Court denied his petition for a writ of certiorari. *Poindexter*, 519 U.S. 985.

B. The Defendant's Motions for Post-Conviction Relief

The defendant filed a motion to vacate under 28 U.S.C. § 2255 on June 13, 1997. A18. The district court denied that motion on December 17, 1997, A19, and this Court ultimately denied his motion for a certificate of appealability on November 19, 1998, A20. The defendant also filed a motion for reconsideration and a motion for declaratory judgment; those motions were denied on April 5, 2000. *Id.*

On January 10, 2006, the defendant moved the district court under 18 U.S.C. § 3582(c)(2) to reduce his term of imprisonment. He claimed that he was entitled to a reduced sentence under that section because he had been sentenced under a guideline range that had been subsequently lowered by an amendment to the Sentencing Guidelines, specifically, Amendment 591 to the Sentencing Guidelines. A2, 20, 27. The district court construed his motion as one made under 28 U.S.C. § 2255, and transferred it to this Court for an order authorizing a second or successive motion under that statute. A2, 36.

On May 24, 2006, this Court remanded the case to the district court. A2, 37. In relevant part, this Court found that the district court erred in construing the motion as a successive motion under 28 U.S.C. § 2255 and remanded for consideration of the motion under 18 U.S.C. § 3582(c)(2). A2, 37.

In an opinion dated March 16, 2007, the district court denied the defendant's motion under § 3582(c)(2). A2, 53. Judgment entered March 19, 2007, and a corrected judgment entered the next day. A2-4. This appeal followed.

SUMMARY OF ARGUMENT

The district court properly denied the defendant's motion for a reduction in his prison term under 18 U.S.C. § 3582(c)(2). The defendant's argument rests on the assumption that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to his case, but even though that decision altered the sentencing regime, it does not provide a basis for relief under § 3582(c)(2). That section, by its own terms, is limited to providing relief based on amendments to the Sentencing Guidelines.

And although the defendant also relies on an amendment to the Sentencing Guidelines, that provision, Amendment 591, does not help him. Amendment 591 prohibits the use of relevant conduct in selecting the appropriate offense guideline. Because the defendant does not challenge the selection of the offense guideline in his case, Amendment 591 does not apply. But even if it

applies to prohibit the use of relevant conduct in the setting of the base offense level, the district court complied with that standard here. The district court sentenced the defendant solely on the basis of his offense conduct.

ARGUMENT

I. The District Court Properly Denied the Defendant's Motion to Reduce His Term of Imprisonment

A. Governing Law and Standard of Review

This Court recently noted that while it has not "previously determined the appropriate standard of review to apply to a district court decision denying a motion under Section 3582(c)(2)," other circuits review such decisions for abuse of discretion. *Cortorreal v. United States*, 486 F.3d 742, 743 (2d Cir. 2007) (per curiam) (citing *United States v. Rodriguez-Pena*, 470 F.3d 431, 432 (1st Cir. 2006) (per curiam); *United States v. Moreno*, 421 F.3d 1217, 1219 (11th Cir. 2005) (per curiam)).

A sentencing court may not modify a sentence once it has imposed it except under limited conditions set forth in 18 U.S.C. § 3582. *See Cortorreal*, 486 F.3d at 744 (citing *United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998) ("Congress has imposed stringent limitations on the authority of courts to modify sentences, and courts must abide by those strict confines."). As relevant here,

§ 3582(c)(2) authorizes a court to reduce the term of imprisonment 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) . . . if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2); *see also Cortorreal*, 486 F.3d at 744; *Quesada-Mosquera v. United States*, 243 F.3d 685, 685 (2d Cir. 2001) (per curiam). In U.S.S.G. § 1B1.10, the Sentencing Commission set forth a policy statement enumerating the guideline amendments which could support relief under § 3582(c)(2), including Amendment 591. U.S.S.G. § 1B1.10(c).

Amendment 591 to the Sentencing Guidelines, which became effective by its terms on November 1, 2000, "requires that the initial selection of the offense guideline be based only on the statute or offense of conviction rather than on judicial findings of actual conduct not made by the jury." *United States v. Moreno*, 421 F.3d 1217, 1219 (11th Cir. 2005) (per curiam) (citing U.S.S.G. App. C, amend. 591), *cert. denied*, 547 U.S. 1050 (2006). This change

> was designed to clarify whether the enhanced penalties provided by U.S.S.G. § 2D1.2 (relating to drug offenses near protected locations or involving underage or pregnant individuals) apply only where the offense of conviction is referenced to that

> guideline, or whether such enhanced penalties can be used whenever a defendant's relevant, uncharged conduct includes drug sales in a protected location or drug sales involving a protected individual. . . . In short, Amendment 591 directs the district court to apply the guideline dictated by the statute of conviction, but does not constrain the use of judicially found facts to select a base offense level within the relevant guideline.

Id. (citing Amendment 591); *see also United States v. Rivera*, 293 F.3d 584, 586 (2d Cir. 2002) ("The plain wording of Amendment 591 applies *only* to the choice of the applicable offense guideline, not to the subsequent selection of the base offense level.").

B. Discussion

The defendant argues that he is entitled to a reduction in his term of imprisonment under § 3582(c)(2) because he was sentenced under a guideline range that was subsequently lowered by Amendment 591. Specifically, he argues that he was convicted of a narcotics conspiracy involving an unspecified quantity of cocaine, and thus his statutory maximum sentence (in light of his prior conviction) was 30 years' imprisonment under 21 U.S.C. § 841(b)(1)(C). Despite this statutory maximum sentence, according to the defendant, the district court increased his statutory maximum sentence to life imprisonment based on judicially found facts about relevant conduct. This increase in his statutory maximum sentence resulted in an increase in his base offense level under the career offender

guidelines. *See* U.S.S.G. § 4B1.1. Accordingly, the defendant argues that Amendment 591's prohibition on the use of relevant conduct entitles him to a reduction in his sentence.

The defendant's argument fails because it rests on two flawed premises. *First*, the defendant's argument rests on the premise that the statutory maximum term of imprisonment he faced after he was convicted was 30 years' imprisonment under 21 U.S.C. § 841(b)(1)(C).[2] *See* Appellant's Brief at 14. The defendant's statutory maximum term, however, based on judicially found facts on drug quantity, was life imprisonment as set forth in 21 U.S.C. § 841(b)(1)(A). Although it is clear now, after *Apprendi* and *United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc), that drug quantity is an element of the offense that must be charged in the indictment and proved to a jury beyond a reasonable doubt, at the time the defendant was sentenced in 1995, the issue of the applicable maximum penalty in a narcotics conspiracy case necessarily awaited the trial court's determination of the quantity of narcotics attributable to the defendant. Here, for example, the district court found that the defendant was responsible for at least 15 but less than 50 kilograms of cocaine, thus leading to the application of a statutory sentencing range which included a maximum term of life

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[2] The defendant relies heavily on *United States v. LaBonte*, 520 U.S. 751 (1997), for the proposition that the statutory maximum term of imprisonment for 21 U.S.C. § 841(b)(1)(C) was 30 years. As described in the text, however, the defendant was not sentenced under that section.

in prison. A76. This led the district court to its selection of the offense level and criminal history score set forth at U.S.S.G. § 4B1.1(A).

Although the defendant was sentenced under a sentencing scheme that was subsequently altered by *Apprendi* and *Thomas*, he is not entitled to a reduced prison term under § 3582(c)(2) based on that alteration. By its own terms, § 3582(c)(2) only allows for the reduction of a prison term based on a subsequent amendment to the Sentencing Guidelines. *See* § 3582(c)(2) (allowing for reduction in term for a defendant who was sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission"). It is not a catch-all mechanism to reduce prison terms based on all subsequent changes in the law. *See Cortorreal*, 486 F.3d at 744 (holding that district court may not reduce prison term under § 3582(c)(2) based on change in sentencing law announced in *United States v. Booker*, 543 U.S. 220 (2005)); *Moreno*, 421 F.3d at 1220 (same). *See also Coleman v. United States*, 329 F.3d 77, 89 (2d Cir. 2003) (holding that *Apprendi* does not apply retroactively on collateral review).

Second, the defendant's argument rests on the premise that the district court violated Amendment 591 when it sentenced him. By its own terms, however, Amendment 591 is simply inapplicable to the defendant's argument. As this Court explained in *Rivera*, Amendment 591 "applies *only* to the choice of the applicable offense guideline, not to the subsequent selection of the base

offense level." 293 F.3d at 586. Thus, while it prohibits the consideration of relevant conduct in the selection of the appropriate offense guideline, it does not prohibit the consideration of relevant conduct in selecting the base offense level. *Id.* Here, as the district court found, A54-55, the defendant does not challenge the selection of the offense guideline in his case, and hence Amendment 591 is inapplicable.

In any event, even if Amendment 591 applies and prohibits a court from considering relevant conduct in the setting of base offense levels under the career offender guidelines, the district court complied with that standard here. In a drug conspiracy case, for statutory sentencing purposes, the drug quantity attributable to a defendant is limited to the quantity the defendant personally participated in, and the quantity attributable to the conspiracy that was reasonably foreseeable to him. *See, e.g.*, *United States v. Adams*, 448 F.3d 492, 500 (2d Cir. 2006); *United States v. Martinez*, 987 F.2d 920, 925-26 (2d Cir. 1997) (citing *United States v. Miranda-Ortiz*, 926 F.2d 172, 178 (2d Cir. 1991), and *United States v. Lanni*, 970 F.2d 1092, 1093 (2d Cir. 1992)). Here, the record establishes that the district court calculated the defendant's drug quantity using exactly this standard, without reference to any relevant conduct.

In its sentencing presentation, Government counsel made clear that the proposed drug quantity attribution reflected the defendant's conduct in the charged conspiracy, as opposed to relevant conduct:

> [T]he question of attribution has to be viewed in light of the fact that this is a conspiracy charge of which Mr. Poindexter was convicted and the question really is what did he have reason to understand was the nature of the conspiracy, what is it that he undertook to do in the context of the conspiracy . . . .

A69.

Furthermore, the district court had before it statements made by the defendant indicating that he knew of a cocaine distribution organization operated by co-defendants Gerald Fullwood and Michael Moore in which Fullwood would obtain approximately three kilograms of cocaine each week beginning in the summer of 1993 and share it with the defendant, Moore and a third individual for distribution in the New Haven area. A67. The defendant also stated that he personally traveled to New York with Fullwood on at least one occasion where each of the men purchased one-half kilogram of cocaine. A68. The court also had heard testimony at trial from cooperating witnesses that substantially corroborated the defendant's statements. *Id.*

On this record, the district court's drug quantity finding clearly rested on its conclusion about the defendant's offense conduct, as opposed to any relevant conduct:

> I think that on the basis of the testimony during the course of the trial, and the evidence that was introduced during the course of the trial, that to

> attribute 15 to 50 kilograms to Mr. Poindexter, who has been found to be a co-conspirator, is not erroneous based on that evidence and therefore, I'm accepting the calculation on the part of the probation officer.

A76. Because the district court's quantity determination rested on the defendant's offense conduct, and not on relevant conduct, it was fully consistent with Amendment 591.

In sum, the district court properly denied the defendant's motion under § 3582(c)(2). The defendant is not entitled to relief under that section based on *Apprendi* because *Apprendi* was not an amendment to the sentencing guidelines. And the only amendment relied upon by the defendant, Amendment 591, is simply inapplicable. That amendment applies only to the selection of the appropriate offense guideline, a decision the defendant does not challenge here. In any event, the district court sentenced the defendant based solely on his offense conduct.

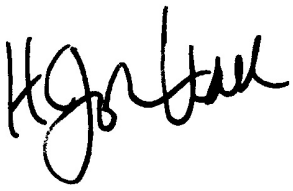
CONCLUSION

For the foregoing reasons, the district court's denial of the defendant's motion to reduce his term of imprisonment should be affirmed.

Dated: August 21, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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Addendum

18 U.S.C. § 3582(c)

(c) Modification of an imposed term of imprisonment.--
The court may not modify a term of imprisonment once it has been imposed except that--

(2) 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.

U.S.S.G. § 1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

591. Amendment: Section 1B1.1 is amended by striking subsection (a) in its entirety and inserting:

"(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. *See* § 1B1.2.".

Section 1B1.2(a) is amended by striking "most" each place it appears; by striking "Provided, however" and inserting "However"; and by adding at the end the following:

"Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.1 (Attempt,Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. *See* § 2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. *See* §1B1.9 (Class B or C Misdemeanors and Infractions).".

The Commentary to §1B1.2 captioned "Application Notes" is amended by striking the first paragraph of Note 1 and inserting the following:

"This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). The court is to use the Chapter Two guideline section referenced in the Statutory Index (Appendix A) for the offense of conviction. However, (A) in the case of a plea agreement containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section applicable to the stipulated offense is to be used; and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to § 2X5.1 (Other Offenses), is to be used.

In the case of a particular statute that proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and the Statutory Index will specify only one offense guideline for that offense of conviction. In the case of a particular statute that proscribes a variety of conduct that might constitute the subject of different offense guidelines, the Statutory Index may specify more than one offense guideline for that particular statute, and the court will determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted. If the offense involved a conspiracy, attempt, or solicitation, refer to § 2X1.l

(Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, the most analogous guideline is to be used. *See* § 2X5.1 (Other Offenses).".

The Commentary to § 1B1.2 captioned "Application Notes" is amended by striking Note 3 in its entirety; and by redesignating Notes 4 and 5 as Notes 3 and 4, respectively.

The Commentary to § 2D1.2 captioned "Application Note" is amended in Note 1 by striking "Where" and inserting the following:

"This guideline applies only in a case in which the defendant is convicted of a statutory violation of drug trafficking in a protected location or involving an underage or pregnant individual (including an attempt or conspiracy to commit such a violation) or in a case in which the defendant stipulated to such a statutory violation. *See* § 1B1.2(a). In a case involving such a conviction but in which".

Appendix A (Statutory Index) is amended by striking the entire text of the "Introduction" and inserting the following:

"This index specifies the offense guideline' section(s) in Chapter Two (Offense Conduct) applicable to the statute of conviction. If more than one guideline section is referenced for the particular statute, use the

guideline most appropriate for the offense conduct charged in the count of which the defendant was convicted. For the rules governing the determination of the offense guideline section(s) from Chapter Two, and for any exceptions to those rules, *see* § 1B1.2 (Applicable Guidelines).".

The Commentary to § 2Hl.1 captioned "Application Notes"is amended in Note 1 in the second paragraph by striking "Application Note 5" and inserting "Application Note 4".

Reason for Amendment: This amendment addresses a circuit conflict regarding whether the enhanced penalties in § 2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals) apply only in a case in which the defendant was convicted of an offense referenced to that guideline or, alternatively, in any case in which the defendant's relevant conduct included drug sales in a protected location or involving a protected individual. *Compare United States v. Chandler*, 125 F.3d 892,897-98 (5th Cir. 1997) ("First, utilizing the Statutory Index located in Appendix A, the court determines the offense guideline section 'most applicable to the offense of conviction.'" Once the appropriate guideline is identified, a court can take relevant conduct into account only as it relates to factors set forth in that guideline); *United States v. Locklear*, 24 F.3d 641(4th Cir. 1994) (finding that § 2D1.2 does not apply to convictions under 21 U.S.C. § 841 based on the fact that the commentary to § 2D1.2 lists as the "Statutory Provisions" to which it is applicable 21 U.S.C. §§ 859, 860,

and 861, but not § 841. "[S]ection 2D1.2 is intended not to identify a specific offense characteristic which would, where applicable, increase the offense level over the base level assigned by § 2Dl.1, but rather to define the base offense level for violations of 21 U.S.C. §§ 859,860 and 861."); *United States v. Saavedra*, 148 F.3d 1311 (11th Cir. 1998) (defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to the defendant's offense; such conduct is properly considered only after the applicable guideline has been selected when the court is analyzing the various sentencing considerations within the guideline chosen, such as the base offense level, specific offense characteristics, and any cross references), with *United States v. Clay*, 117 F.3d 317 (6th Cir.), *cert. denied*, 118 S. Ct. 395 (1997) (applying §2D1.2 to defendant convicted only of possession with intent to distribute under 21 U.S.C. § 841 but not convicted of any statute referenced to §2D1.2 based on underlying facts indicating defendant involved a juvenile in drug sales); *United States v. Oppedahl*, 998 F.2d 584 (8th Cir. 1993) (applying §2D1.2 to defendant convicted of conspiracy to distribute and possess with intent to distribute based on fact that defendant's relevant conduct involved distribution within 1,000 feet of a school); *United States v. Robles*, 814 F. Supp. 1249 (E.D. Pa), *aff'd* (unpub.), 8 F.3d 814 (3d Cir. 1993) (looking to relevant conduct to determine appropriate guideline).

In promulgating this amendment, the Commission also was aware of case law that raises a similar issue regarding selection of a Chapter Two (Offense Conduct) guideline,

different from that referenced in the Statutory Index (Appendix A), based on factors other than the conduct charged in the offense of conviction. *See United States v. Smith*, 186 F.3d 290 (3d Cir. 1999) (determining that §2F1.1 (Fraud and Deceit) was most appropriate guideline rather than the listed guideline of § 2S1.1 (Laundering of Monetary Instruments)); *United States v. Brunson*, 882 F. 2d 151, 157 (5th Cir. 1989) ("It is not completely clear to us under what circumstances the Commission contemplated deviation from the suggested guidelines for an 'atypical' case.").

The amendment modifies §§ 1B1.l(a), 1B1.2(a), and the Statutory Index's introductory commentary to clarify the inter-relationship among these provisions. The clarification is intended to emphasize that the sentencing court must apply the offense guideline referenced in the Statutory Index for the statute of conviction unless the case falls within the limited "stipulation" exception set forth in § 1B1.2(a). Therefore, in order for the enhanced penalties in § 2D1.2 to apply, the defendant must be convicted of an offense referenced to § 2D1.2, rather than simply have engaged in conduct described by that guideline. Furthermore, the amendment deletes Application Note 3 of § 1B1.2 (Applicable Guidelines), which provided that in many instances it would be appropriate for the court to consider the actual conduct of the offender, even if such conduct did not constitute an element of the offense. This application note describes a consideration that is more appropriate when applying § 1B1.3 (Relevant Conduct), and its current placement in § 1B1.2 apparently has caused confusion in applying that

guideline's principles to determine the offense conduct guideline in Chapter Two most appropriate for the offense of conviction. In particular, the note has been used by some courts to permit a court to decline to use the offense guideline referenced in the Statutory Index in cases that were allegedly "atypical" or "outside the heartland." *See United States v. Smith*, *supra.*

Effective Date: The effective date of this amendment is November 1, 2000.