

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for the United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of final action regarding amendment to Policy Statement ' 1B1.10, effective November 1, 2011.

SUMMARY: The Sentencing Commission hereby gives notice of an amendment to a policy statement and commentary made pursuant to its authority under 28 U.S.C. ' 994(a) and (u). The Commission promulgated an amendment to Policy Statement ' 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) clarifying when, and to what extent, a sentencing reduction is considered consistent with the policy statement and therefore authorized under 18 U.S.C. ' 3582(c)(2). The amendment amends ' 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement) in four ways.

First, it expands the listing in ' 1B1.10(c) to include Amendment 750 (Parts A and C only) as an amendment that may be applied retroactively. Second, it amends ' 1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of

the applicable guideline range at the time of sentencing. Third, it amends the commentary to ' 1B1.10 to address an application issue about what constitutes the "applicable guideline range" for purposes of ' 1B1.10. Fourth, it adds an application note to ' 1B1.10 to specify that the court shall use the version of ' 1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. ' 3582(c)(2).

DATES: The effective date of this policy statement and commentary amendment is November 1, 2011.

FOR FURTHER INFORMATION CONTACT: Jeanne Doherty, Office of Legislative and Public Affairs, 202-502-4502.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. ' 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. ' 994(o), and specifies in what circumstances and by what amount sentences of imprisonment may be reduced if the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses pursuant to 28 U.S.C. ' 994(u).

Additional information may be accessed through the Commission's website at www.ussc.gov.

AUTHORITY: 28 U.S.C. ' 994(a), (u).

Patti B. Saris

Chair

1. Amendment: Section 1B1.10(b) is amended in subdivision (2) by striking "Limitations" and inserting "Limitation"; in subdivision (2)(A) by striking "In General" and inserting "Limitation"; in subdivision (2)(B) by inserting "for Substantial Assistance" after "Exception"; by striking "original"; by inserting "pursuant to a government motion to reflect the defendant's substantial assistance to authorities" after "of sentencing"; and by striking the last sentence.

Section 1B1.10(c) is amended by striking "and"; and by inserting ", and 750 (parts A and C only)" before the period at the end.

The Commentary to ' 1B1.10 captioned "Application Notes" is amended in Note 1(A) in the first sentence by inserting "(i.e., the guideline range that corresponds to the offense level and criminal history category determined pursuant to ' 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance)" before the period; and in Note 1(B)(iii) by striking "original".

The Commentary to ' 1B1.10 captioned "Application Notes" is amended in Note 3 in the first paragraph by striking "original" in both places; by striking "shall not" and inserting "may" in both places; by inserting "as provided in subsection (b)(2)(A)," after "Specifically,"; by inserting "no" before "less than the minimum"; by striking "41 to 51" and inserting "70 to 87"; by striking "41" and inserting "70"; by striking "30 to 37" and inserting "51 to 63"; by striking "to a term less than 30 months" and inserting ", but shall

not reduce it to a term less than 51 months"; and by striking the second paragraph and inserting the following new paragraphs:

"If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range

applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are ' 5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. ' 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).";

and in the fifth paragraph, as redesignated by this amendment, by inserting "See subsection (b)(2)(C)." after "time served."

The Commentary to ' 1B1.10 captioned "Application Notes" is amended by redesignating Note 4 as Note 5 and inserting after Note 3 the following:

"4. Application to Amendment 750 (Parts A and C Only). CAs specified in subsection (c), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in ' 2D1.1 for

crack cocaine and made related revisions to Application Note 10 to ' 2D1.1. Part C deleted the cross reference in ' 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under ' 2D1.1."

The Commentary to ' 1B1.10 captioned "Application Notes" is amended by adding at the end the following:

"6. Use of Policy Statement in Effect on Date of Reduction. Consistent with subsection (a) of ' 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. ' 3582(c)(2)."

The Commentary to ' 1B1.10 captioned "Background" is amended in the second paragraph by adding at the end as the last sentence the following:

"The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See Dillon v. United States, 130 S. Ct. 2683 (2010)."

Reason for Amendment: This amendment amends ' 1B1.10 (Reduction in Term of

Imprisonment as a Result of Amended Guideline Range) (Policy Statement) in four ways.

First, it expands the listing in ' 1B1.10(c) to implement the directive in 28 U.S.C. ' 994(u) with respect to guideline amendments that may be considered for retroactive application. Second, it amends ' 1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Third, it amends the commentary to ' 1B1.10 to address an application issue about what constitutes the "applicable guideline range" for purposes of ' 1B1.10. Fourth, it adds an application note to ' 1B1.10 to specify that the court shall use the version of ' 1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. ' 3582(c)(2).

First, the Commission has determined, under the applicable standards set forth in the background commentary to ' 1B1.10, that Amendment 750 (Parts A and C only) should be included in ' 1B1.10(c) as an amendment that may be considered for retroactive application. Part A amended the Drug Quantity Table in ' 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for crack cocaine and made related revisions to Application Note 10 to ' 2D1.1. Part C deleted the cross reference in ' 2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under ' 2D1.1.

Under the applicable standards set forth in the background commentary to ' 1B1.10, the

Commission considers, among other factors, (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See ' 1B1.10, comment. (backg'd).

Applying those standards to Parts A and C of Amendment 750, the Commission determined that, among other factors:

- (1) The purpose of Parts A and C of Amendment 750 was to account for the changes in the statutory penalties made by the Fair Sentencing Act of 2010, Pub. L. 111B220, 124 Stat. 2372, for offenses involving cocaine base ("crack cocaine").
See USSG App. C, Amend. 750 (Reason for Amendment). The Fair Sentencing Act of 2010 did not contain a provision making the statutory changes retroactive. The Act directed the Commission to promulgate guideline amendments implementing the Act. The guideline amendments implementing the Act have the effect of reducing the term of imprisonment recommended in the guidelines for certain defendants, and the Commission has a statutory duty to consider whether the resulting guideline amendments should be made available for retroactive application. See 28 U.S.C. ' 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines . . . it shall specify in what circumstances and by what amount sentences of prisoners . . . may be reduced."). In carrying out its statutory duty to consider whether to give Amendment 750 retroactive effect, the Commission also considered the purpose of the underlying statutory changes made by the Act. Those statutory changes reflect congressional

action consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine "significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere" (see USSG App. C, Amend. 706 (Reason for Amendment)). The Fair Sentencing Act of 2010 specified in its statutory text that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine sentencing disparity reduction". See 124 Stat. at 2372.

It is important to note that the inclusion of Amendment 750 (Parts A and C) in ' 1B1.10(c) only allows the guideline changes to be considered for retroactive application; it does not make any of the statutory changes in the Fair Sentencing Act of 2010 retroactive.

- (2) The number of cases potentially involved is substantial, and the magnitude of the change in the guideline range is significant. As indicated in the Commission's analysis of cases potentially eligible for retroactive application of Parts A and C of Amendment 750, approximately 12,000 offenders would be eligible to seek a reduced sentence and the average sentence reduction would be approximately 23 percent.
- (3) The administrative burdens of applying Parts A and C of Amendment 750 retroactively are manageable. This determination was informed by testimony at

the Commission's June 1, 2011, public hearing on retroactivity and by other public comment received by the Commission on retroactivity. The Commission also considered the administrative burdens that were involved when its 2007 crack cocaine amendments were applied retroactively. See USSG App. C, Amendments 706 and 711 (amending the guidelines applicable to crack cocaine, effective November 1, 2007) and Amendment 713 (expanding the listing in ' 1B1.10(c) to include Amendments 706 and 711 as amendments that may be considered for retroactive application, effective March 3, 2008). The Commission received comment and testimony indicating that those burdens were manageable and that motions routinely were decided based on the filings, without the need for a hearing or the presence of the defendant, and did not constitute full resentencings. The Commission determined that applying Parts A and C of Amendment 750 would likewise be manageable, given that, among other things, significantly fewer cases would be involved. As indicated in the Commission's Preliminary Crack Cocaine Retroactivity Report (April 2011 Data) regarding retroactive application of the 2007 crack cocaine amendments, approximately 25,500 offenders have requested a sentence reduction pursuant to retroactive application of the 2007 crack cocaine amendments and approximately 16,500 of those requests have been granted.

In addition, public safety will be considered in every case because ' 1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of

imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. See ' 1B1.10, comment. (n.1(B)(ii)).

Second, in light of public comment and testimony and recent case law, the amendment amends ' 1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Under the amendment, the general limitation in subsection (b)(2)(A) continues to be that 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. The amendment restricts the exception in subsection (b)(2)(B) to cases involving a government motion to reflect the defendant's substantial assistance to authorities (i.e., under ' 5K1.1 (Substantial Assistance to Authorities), 18 U.S.C. ' 3553(e), or Fed. R. Crim. P. 35(b)). For those cases, a reduction comparably less than the amended guideline range may be appropriate.

The version of ' 1B1.10 currently in effect draws a different distinction for cases in which the term of imprisonment was less than the minimum of the applicable guideline range, one rule for downward departures (stating that "a reduction comparably less than the amended guideline range . . . may be appropriate") and another rule for variances (stating that "a further reduction generally would not be appropriate"). See ' 1B1.10(b)(2)(B). The Commission has received public comment and testimony indicating that this distinction has been difficult to apply and has prompted litigation. The Commission has

determined that, in the specific context of ' 1B1.10, a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases. The limitation that prohibits a reduction below the amended guideline range in such cases promotes conformity with the amended guideline range and avoids undue complexity and litigation.

Nonetheless, the Commission has determined that, in a case in which the term of imprisonment was below the guideline range pursuant to a government motion to reflect the defendant's substantial assistance to authorities (e.g., under ' 5K1.1), a reduction comparably less than the amended guideline range may be appropriate. Section 5K1.1 implements the directive to the Commission in its organic statute to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." See 28 U.S.C. ' 994(n). For other provisions authorizing such a government motion, see 18 U.S.C. ' 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance); Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect a defendant's substantial assistance). The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide

substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.

Third, the amendment amends the commentary to ' 1B1.10 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies a departure provision before determining the "applicable guideline range" for purposes of ' 1B1.10. The First, Second, and Fourth Circuits have held that, for ' 1B1.10 purposes, at least some departures (e.g., departures under ' 4A1.3 (Departures Based on Inadequacy of Criminal History Category) (Policy Statement)) are considered before determining the applicable guideline range, while the Sixth, Eighth, and Tenth Circuits have held that "the only applicable guideline range is the one established before any departures". See United States v. Guyton, 636 F.3d 316, 320 (7th Cir. 2011) (collecting and discussing cases; holding that departures under ' 5K1.1 are considered after determining the applicable guideline range but declining to address whether departures under ' 4A1.3 are considered before or after). Effective November 1, 2010, the Commission amended ' 1B1.1 (Application Instructions) to provide a three-step approach in determining the sentence to be imposed. See USSG App. C, Amend. 741 (Reason for Amendment). Under ' 1B1.1 as so amended, the court first determines the guideline range and then considers departures. Id. ("As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline

range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted."). Consistent with the three-step approach adopted by Amendment 741 and reflected in ' 1B1.1, the amendment adopts the approach of the Sixth, Eighth, and Tenth Circuits and amends Application Note 1 to clarify that the applicable guideline range referred to in ' 1B1.10 is the guideline range determined pursuant to ' 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.

Fourth, the amendment adds an application note to ' 1B1.10 to specify that, consistent with subsection (a) of ' 1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of ' 1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. ' 3582(c)(2).

Finally, the amendment amends the commentary to ' 1B1.10 to refer to Dillon v. United States, 130 S. Ct. 2683 (2010). In Dillon, the Supreme Court concluded that proceedings under section 3582(c)(2) are not governed by United States v. Booker, 543 U.S. 220 (2005), and that ' 1B1.10 remains binding on courts in such proceedings.