CHAPTER 10
APPLYING FOR FEDERAL SENTENCE REDUCTIONS BASED ON CHANGES TO THE LAW*

A. Introduction

Federal laws and the U.S. Sentencing Guidelines ("the Guidelines") have been changed so that some people who are currently incarcerated for federal crimes may apply for a sentence reduction.

The Guidelines have been amended to allow courts to reduce the sentences of people who were convicted of drug offenses (especially crack cocaine) offenses. These amendments will impact people who received sentences before November 1, 2014. As of February 1, 2024, people can also apply for sentence reductions under an amendment to the Guidelines if they received "status points" or had zero criminal history points when they were originally sentenced. Federal law also changed in 2018 to allow courts to reduce the sentences of people who were convicted of crack cocaine offenses and sentenced to mandatory minimums before August 3, 2010.

Part B of this Chapter gives an overview of the federal sentencing process. It explains the rules—statutes and the Guidelines—that judges look at when sentencing someone for a federal crime. It also explains how the Guidelines are used to calculate someone's sentence.

Part C of this Chapter explains the amendments to the Guidelines that allow people to apply for sentence reductions. It explains what those amendments are, how to determine if you are eligible for a sentence reduction, and how to apply for a sentence reduction based on those amendments.

Part D of this Chapter explains the federal laws that allow some people sentenced to mandatory minimums for crack cocaine offenses to receive sentence reductions. It explains the First Step Act of 2010, which was passed August 3, 2010 and changed the mandatory minimums for crack cocaine offenses. It also explains the First Step Act of 2018, which allows people to apply for sentence reductions based on the new mandatory minimum laws. Finally, it explains how to determine if you are eligible for a sentence reduction and how you can apply for one.

B. Overview of the Federal Sentencing Process

The federal sentencing process is quite complex, but understanding the basics of how you received your original sentence can help you understand whether the changes described in this Chapter might make you eligible for resentencing. This Part gives a general overview of the federal sentencing process. Section 1 explains the different rules—statutes and the Guidelines—that courts follow when they sentence someone for a federal crime. Section 2 gives a general overview of how the Guidelines are used to calculate an individual's sentence.

1. Rules for Federal Sentencing: Statutes and the Guidelines

Judges are who ultimately decide what someone's sentence is, but they have to use rules to help them make that decision. This Section will give a brief overview of the two different sets of rules that judges use to decide someone's sentence: federal statutes and the Guidelines.

(a) Federal Statutes

Congress passes statutes that define what actions are crimes under federal law and how someone should be sentenced for committing a crime. When Congress passes a statute, this is called a federal statute. Most (but not all) federal statutes that define crimes are found in Title 18 of the U.S. Code.[1] Federal statutes also set a maximum punishment and sometimes a minimum punishment for

---

* This Chapter was revised by Peyton Lepp, based on previous versions written by Susan Reid, Sydney Bird and Nathan Piper. Special thanks to William Gibney of the New York Legal Aid Society for his valuable comments.

[1] 18 U.S.C. §§ 1–2725 (Title 18, Part 1 of the U.S. Code, defining most federal crimes). Some crimes are not in Title 18. For example, tax evasion is defined in Title 26 of the U.S. Code. 26 U.S.C. § 7201. Many drug-related crimes are found in Title 21 of the U.S. Code. *See, e.g.*, 21 U.S.C. §§ 841, 844, 856 (defining the crimes of distribution, manufacturing, and possession with intent to distribute; simple possession; and maintaining a drug-involve premise).

committing a certain crime, which is called the "statutory range." **Judges are required to follow federal statutes when sentencing someone for a crime**. So, when crimes include a minimum punishment, this is called a "mandatory minimum" because it sets the floor for the lowest possible punishment a judge can give you for that crime.[2] When a statute does not include a mandatory minimum, this means that the statute technically authorizes the judge to sentence you to no punishment for committing that crime.

To summarize, federal statutes define crimes and set a ceiling (and sometimes a floor) for your sentence that the judge *must* follow. For example, say you were convicted of a crime with a statutory maximum of forty years and a mandatory minimum of five years. Then, the judge would have to sentence you somewhere between five and forty years. Federal statutes also require judges to look at the second set of rules, the Guidelines, to help them make their sentencing decision.

(b) U.S. Sentencing Guidelines

You just learned that crimes have a statutory range that sets the maximum (and sometimes a minimum) for the sentence a judge can impose for that crime. Often, these statutory ranges are very large—in some cases, the statutory range could be as large as zero years to life in prison.[3] If statutes were the only guidance for sentencing, people in similar circumstances could end up with very different sentences for committing the same act depending on who their sentencing judge was. This is called the "indeterminate sentencing" system and is how federal sentencing worked until 1984.[4] To try to make sentences more consistent, Congress created the U.S. Sentencing Commission ("the Commission") and asked it to create the guidelines for judges to use when choosing sentences within the statutory range.

The Guidelines are a large set of rules that judges follow to calculate a much smaller range of punishment than what is usually set by the statutory range.[5] The Guidelines are intended to take into account both the seriousness of the crime you are being sentenced for and your own criminal history. An important difference between the Guidelines and statutes is that judges are *not* required to sentence you within the range they calculate using the Guidelines. In the 2005 case *United States v. Booker*, the Supreme Court held that the Guidelines are only advisory, not mandatory.[6] After *Booker*, **judges are still required to calculate your sentence using the Guidelines, but they are NOT required to follow the result**.[7] When a judge imposes a sentence above or below the range calculated

---

[2] There is one exception to the rule that judges cannot sentence you below the mandatory minimum, called the "safety-valve." The safety-valve is a provision in federal law that applies to some crimes (mostly drug-related crimes) and to some people who meet certain conditions. *See* 18 U.S.C. § 3553(f) (allowing judges to depart from the mandatory minimum in sentencing if: (1) the defendant does not have a certain number of criminal history points or certain offenses on their record; (2) the defendant did not use violence, threats of violence, or a dangerous weapon in connection with the offense; (3) the offense did not result in serious bodily injury or death; (4) the defendant was not an organizer or leader of others in the offense and was not engaged in a "continuing criminal enterprise;" and (5) if the offense(s) were part of a course of conduct or a common scheme, the defendant truthfully provided the Government with all relevant and useful information).

[3] *See, e.g.*, 18 U.S.C. § 1963(a) (setting the statutory range of punishment for certain racketeering crimes as zero to life imprisonment).

[4] *See* Peugh v. United States, 569 U.S. 530, 535, 133 S. Ct. 2072, 2079, 186 L. Ed. 2d 84, 94 (2013) ("Prior to 1984, the broad discretion of sentencing courts and parole officers had led to significant sentencing disparities among similarly situated offenders.").

[5] The Guidelines are published by the Commission in the Guidelines Manual. The most recent version of the Manual at the time of publishing is the 2023 Guidelines Manual. U.S. Sent'g Guidelines Manual (U.S. Sent'g Comm'n 2023). The full text of the Guidelines is also included in the U.S Codes Annotated volumes, which should be available in your law library if you are in a federal prison.

[6] United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 756–757, 160 L. Ed. 2d. 621, 651 (2005) (holding that the Guidelines are advisory rather than mandatory, that judges may use their own discretion when deciding to depart from the Guidelines, and that sentencing decisions can only be overturned by appeals courts for "abuse of discretion" even if the sentencing judge did not follow the Guidelines).

[7] *See* 18 U.S.C. § 3553(a)(4), (a)(5) (requiring judges to consider the Guidelines and policy from the U.S. Sentencing Commission during sentencing); United States v. Booker, 543 U.S. 220, 334, 125 S. Ct. 738, 807, 160

by the Guidelines, this is called a "departure" or "departing" from the Guidelines. If the judge departs from Guidelines for your sentence, the judge must state the exact reasons why did so both in open court during your sentencing and in a written a form submitted to the Commission.[8]

2. How Courts Use the Guidelines to Calculate a Sentence Range

Most often, a probation officer, not the judge, will do the first calculation of your sentence. The probation officer will conduct a presentence investigation and submit a presentence report ("PSR") to the judge.[9] The PSR describes how the probation officer applied the Guidelines to your case and how they calculated your sentence. The PSR is sent to the judge, who is ultimately responsible for choosing whether to adopt the probation officer's calculations in the PSR report or to do their own calculation.

To calculate a sentence using the Guidelines, the court must determine two things: (1) your offense level and (2) your criminal history points. Once both numbers are determined, the court will then consult the Sentencing Table to determine your final sentence calculation. Each of these steps are explained below.

(c) Calculating Your Offense Level

Your offense level represents the seriousness of the offense that you are being sentenced for and will be a number between 1 and 43. The offense you are being sentenced for during the Guideline calculation is called the "instant offense." Your offense level is calculated in three steps: (1) determining the base offense level for your instant offense; (2) applying any specific offense characteristics, cross references, and special instructions; and (3) applying any adjustments.

(i) *Determining the Base Offense Level*

First, the court begins by figuring out the base offense level for the instant offense. Chapter 2 is the longest chapter of the Guidelines because it includes a list of all possible offenses along with their corresponding base offense levels. For some offenses, this step is very simple because there is only one possible base offense level. For example, if you are being sentenced for voluntary manslaughter, the base offense level will always be 29.[10] However, many offenses list several possible base offense levels that could apply based on specific circumstances of the instant offense.

If you are being sentenced for an offense that has multiple possible base offense levels, the court will pick the highest possible base offense level that applies to your case. For example, the offense of possession with intent to distribute has a few possible base offense levels.[11] One possible base offense level for possession with intent to distribute is based only on the exact quantity of drugs you were convicted of possessing. To calculate a base offense level using drug quantity, you consult a table called the "Drug Quantity Table," which has base offense levels ranging from 6 to 38 along with a range of quantities of the most common drugs. So, if your instant offense involved 17 grams of heroin, you would consult the Drug Quantity Table and see that base offense level 14 applies to "at least 10 grams but less than 20 grams of heroin."[12] Another possible base offense level for possession with intent to

---

L. Ed. 2d. 621, 707 (2005) ("The district courts, while not bound to apaply the Guidelines, must consult those Guidelines and take them into account when sentencing."); Gall v. United States, 552 U.S. 38, 49, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445, 457 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the internal benchmark."); Peugh v. United States, 569 U.S. 530, 544, 133 S. Ct. 2072, 2084, 186 L. Ed. 2d 84, 100 (2013) (calling the Guidelines "the lodestone of sentencing").

[8] *See* 18 U.S.C. § 3553(c)(2) (when imposing a sentence that departs from the Guidelines, the court must state the specific reasons why they departed from the Guidelines in open court during sentencing); 28 U.S.C. § 994(w)(1)(B) (within 30 days of imposing a sentence that departs from the Guidelines, the judge must submit a written form to the Commission explaining why they departed from the Guidelines).

[9] FED. R. CRIM. P. 32(b), (c) (requiring the probation officer to complete a presentence investigation and submit a presentence report including what parts of the Guidelines were applied, the calculation of the offense level and criminal history category, and the resulting sentencing range).

[10] U.S. SENT'G GUIDELINES MANUAL § 2A1.3 (U.S. SENT'G COMM'N 2023).

[11] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(a) (U.S. SENT'G COMM'N 2023).

[12] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c)(13) (U.S. SENT'G COMM'N 2023).

distribute could also apply if your conviction established that death or serious bodily injuries resulted from the offense. Once the court figures out all possible base offenses that apply to the instant offense, it selects the highest number to use in the next two steps.

(ii) *Applying Specific Offense Characteristics, Cross References, and Special Instructions*

Next, the court will figure out if any specific offense characteristics, cross references, or special instructions apply. Specific offense characteristics, cross references, and special instructions do not apply to every offense. Some offenses have none of these, while others might have one, two, or all three. If these categories do exist, they will be listed under the base offense level for the instant offense in Chapter 2 of the Guidelines and will apply depending on specific facts of the case.

Specific offense characteristics are the most common and will be applied first. Specific offense characteristics tell the court to either increase or decrease the offense level. For possession with intent to distribute, there are eighteen possible special offense characteristics. The court will start with the first and move down the list, applying each special offense characteristic that fits your case. For example, if you possessed a dangerous weapon or used violence when you committed the offense, your offense level will increase by two.[13] If you brought the drugs in or out of the country while traveling on an airplane, your offense level will increase by two *or* it will be changed to twenty-six (whichever number is higher).[14]

Cross references are applied next and tell the court to look at a completely different offense's Guidelines. For possession with intent to distribute, there are two possible cross references. We will look at one for an example. The first cross reference would apply if someone was killed during your offense, but you were not charged with murder because the death happened out of United States jurisdiction.[15] This cross reference tells the court to determine whether the murder would have been first or second degree and then go to the Guideline for that offense and start the calculation over. Then, the court will determine which offense level would be higher: the one it already calculated following the above steps for possession with intent to distributed, or the one it just calculated after moving to the Guideline for either first- or second-degree murder. The court will then use the higher number as your offense level.

Finally, special instructions tell the court what to do during future steps of your sentence calculation. For example, the offense of drug distribution includes one special instruction.[16] The special instruction says that, if a previous cross reference did not apply to you *and* you attempted to commit a sexual offense against someone by giving them the drug, the court should automatically apply a specific adjustment later on (even if the wording of the adjustment would not have applied to you on its own).

(iii) *Applying Adjustments*

Finally, after adding or subtracting any special offense characteristics, the judge will determine whether any adjustments apply. These adjustments are listed in Chapter 3 and can either increase or decrease your offense level. There are five different categories of adjustments: (1) victim-related adjustments, (2) role in the offense adjustments; (3) obstruction and related adjustments; (4) multiple counts adjustments; and (5) acceptance of responsibility adjustments. For example, if the judge determines that you clearly demonstrated acceptance of your responsibility for the offense, your offense level will decrease by two.[17] If the judge determines that you played a minor role in your offense, your offense level will decrease by two.[18] Like special offense characteristics, the judge will

[13] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(1) (U.S. SENT'G COMM'N 2023).
[14] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(b)(3) (U.S. SENT'G COMM'N 2023).
[15] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(d)(1) (U.S. SENT'G COMM'N 2023).
[16] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(e)(1) (U.S. SENT'G COMM'N 2023).
[17] U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2023).
[18] U.S. SENT'G GUIDELINES MANUAL § 2D1.1 (U.S. SENT'G COMM'N 2023).

apply all adjustments that fit the facts of your case. The final number that results after applying adjustments is your offense level.

(d) Calculating Your Criminal History Points

Your criminal history points are calculated by looking at your criminal record and following the steps in Chapter 4 of the Manual. Once your criminal history points are calculated, you will be assigned to a criminal history category. There are six criminal history categories. Category one is the least serious (for people with zero to one point) and category six is the most serious (for people with thirteen or more points).

The amount of criminal history points you receive is based on the number of prior sentences you have and how long, if at all you were incarcerated for each sentence. A prior sentence is a sentence you previously received for conduct that is *not* related to the offense you are being sentenced for during this calculation. A previous sentence will not be considered a prior sentence if it was completed over fifteen years ago or over ten years ago if it involved a sentence of incarceration less than thirteen months.[19] If you have multiple prior sentences, some might be combined into one prior sentence. For example, multiple sentences will be combined if you received the sentences on the same day or if the sentences came from offenses that were listed on the same charging instrument (indictment or information).[20] If your sentence of incarceration was partially or fully suspended, it will still count as a prior sentence, but only the time that was not suspended would be count for your sentence of incarceration.[21] There are other rules for whether and how to count your prior sentences based on what the offenses were. For example, minor traffic violations and public intoxication convictions are never counted as prior sentences.[22] Special rules apply to sentences received before you were eighteen years old.[23]

After determining how many prior sentences you have, the following calculations will determine your criminal history points.[24] At each step, a prior sentence is removed each time points are added from it (so a prior sentence counted in step one will not count for step two). First, for each prior sentence of incarceration greater than thirteen months, three points will be added. Second, for each prior sentence of incarceration for sixty or more days, two points will be added. Third, for each remaining prior sentence, add one point but stop adding points if you reach four points during this step. Fourth, for any prior sentences that were not counted in the previous steps because they were combined into one sentence, add one point but stop adding points if you reach three points during this step. Finally, if you committed the offense you are being sentenced for during this calculation while serving a prior sentence, more points called "status points" will be added. The rules for status points were recently changed and are discussed in detail in Part C of this Chapter. If, after completing all of these steps, the judge determines that your total points do not reflect the seriousness of your criminal history (either because there are too many points or too few), the judge is allowed to adjust the points up or down.[25]

After calculating your criminal history points, the judge will also determine if you are a "career offender." You are a career offender if the following apply: you committed the offense you are being sentenced for during this calculation when you were older than eighteen, the offense is a violent felony or a felony drug offense, and you have at least two prior violent felony or felony drug convictions. [26] In that case, your criminal history category will automatically be category six, the most serious category. As of November 2023, a new adjustment for criminal history points called the "zero-point offender" adjustment, which is explained in more detail in Part C of this Chapter.

---

[19] U.S. SENT'G GUIDELINES MANUAL § 4A1.2(e) (U.S. SENT'G COMM'N 2023).

[20] U.S. SENT'G GUIDELINES MANUAL § 4A1.2(a)(2) (U.S. SENT'G COMM'N 2023).

[21] U.S. SENT'G GUIDELINES MANUAL § 4A1.2(a)(3), (b)(2) (U.S. SENT'G COMM'N 2023).

[22] U.S. SENT'G GUIDELINES MANUAL § 4A1.2(c)(2) (U.S. SENT'G COMM'N 2023).

[23] U.S. SENT'G GUIDELINES MANUAL § 4A1.2(d) (U.S. SENT'G COMM'N 2023).

[24] U.S. SENT'G GUIDELINES MANUAL § 4A1.2(a)–(e) (U.S. SENT'G COMM'N 2023).

[25] U.S. SENT'G GUIDELINES MANUAL § 4A1.3 (U.S. SENT'G COMM'N 2023).

[26] U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2023).

(e) Calculating Your Sentence

After calculating your offense level and your criminal history points, the judge will finally use the Sentencing Table in the Manual to calculate your sentence. The Sentencing Table includes all possible offense levels on the vertical (up and down) axis and a set of criminal history categories, based on your number of criminal history points, on the horizontal (left to right) axis.[27] Where your offense level and criminal history category intersects is your sentence calculation. The sentence calculation is listed as a range of numbers which represents the number of months in prison. Ranges for low offense levels start at 6 months, but can get quite large for high offense levels. For example, if you have an offense level of 7 and 10 criminal history points (which would put you in the fifth criminal history category), your sentencing calculation would be 12 to 18 months. If you had an offense level of 40 and 3 criminal history points (which would put you in the second criminal history category), your sentencing calculation would be 324 to 405 months.

So, in summary, judges are required to calculate your sentence using the Guidelines. They do this by determining your offense level and your criminal history category (based on the number of criminal history points you have). After they determine your sentence, the judge can choose to follow the range calculated under the Guidelines or the judge can choose to "depart" from the Guidelines by sentencing you to a greater or lesser term of incarceration.

C. Applying for a Sentence Reduction Under Amendments to the Guidelines

This Part explains how to apply for a sentence reduction under an amendment to the U.S. Sentencing Guidelines ("the Guidelines"). At the time this Edition of the *JLM* was published, the Guidelines have been amended (changed) 825 times. Some amendments just make a small technical change or clarify confusing language, but other amendments make big changes that impacts how sentence ranges are calculated. By default, amendments to the Guidelines only affect future defendants who are sentenced after the change took effect. However, the U.S. Sentencing Commission ("the Commission") can vote to make an amendment *retroactive*. Retroactive amendments allow past defendants to benefit from the change by applying for a sentence reduction.

Section C(1) ("Retroactive Amendments to the Guidelines") explains which amendments to the Guidelines have been made retroactive and the changes those amendments made. That Section focuses on the newest retroactive amendments, which might apply to you if: (1) you were sentenced for a drug offense (especially one involving crack cocaine); (2) you received a status point increase during your criminal history calculation; or (3) you received zero criminal history points. Section C(2) ("Determining Eligibility") will help you determine if you are eligible for a sentence reduction under these amendments. If you think you are eligible for a sentence reduction, Section C(3) ("Applying for a Sentence Reduction") will help you learn how to apply and what the process is like.

1. Retroactive Amendments to the Guidelines

There are thirty-one retroactive amendments to the Guidelines that allow people to apply for sentence reductions.[28] This Section focuses on the more recent amendments, those passed in 2007 and later, that are most likely to impact currently incarcerated people:

- The "Crack Amendments" (Amendments 706, 711, 715, and 750) which were passed from 2007 to 2011 and impact sentences for crack cocaine offenses;
- The "Drug Minus Two Amendment" (Amendment 782) which was passed in 2014 and impacts sentences for other drug offenses; and
- Amendment 821 which was passed in 2023 and impacts: (1) people who received status points during the criminal history point calculation and (2) people who received zero points during the criminal history point calculation.

---

[27] U.S. SENT'G GUIDELINES MANUAL § 3B1.2 (U.S. SENT'G COMM'N 2023).

[28] The following amendments are retroactive: Amendments 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 (as amended by 711, 715, and 705 Parts A and C), 782, and 821 (Part A and Part B Subpart 1). U.S. SENT'G GUIDELINES MANUAL § 1B1.10(d) (U.S. SENT'G COMM'N 2023).

(a) "Crack Amendments" Impacting Sentences for Crack Cocaine Offenses

If you were sentenced for a crack cocaine offense before November 1, 2014, you might be eligible for a sentence reduction.

The "Crack Amendments" (Amendments 706, 711, 715, and 750 (Parts A and C)) lowered the base offense level[29] for crack cocaine offenses on November 1, 2007. The "Drug Minus Two" (Amendment 782) lowered the base offense level again on November 1, 2014. So, some people sentenced for crack cocaine offenses before these amendments came into effect now have a lower sentence range calculation than what they originally received during sentencing. Subsection C(1)(a) explains the background of these amendments. Subsection C(1)(b) explains the changes for offenses involving *only* crack cocaine. Subsection C(1)(c) explains the changes for offenses involving crack cocaine *and* one or more other drugs.

(i) *Background to the "Crack Amendments"*

In the 1980s, nationwide concerns about a "crack epidemic" in the country led Congress to pass a series of laws intended to discourage people from using crack cocaine. These laws treated crack cocaine much more harshly than other drugs. Until these laws were changed, a person convicted of possessing a certain amount of crack cocaine would be sentenced the same as a person convicted of possessing 100 times as much powder cocaine.[30] This was known as the "100:1 disparity." The 100:1 disparity was widely criticized. Critics pointed out how these laws unfairly impacted Black Americans, who made up 80% of people sentenced for crack cocaine offenses despite the fact that more than 66% of crack cocaine users were white or Hispanic.[31]

After two decades of these harsh laws, critics who pushed for reform of the 100:1 disparity began to have success. In 2007, the U.S. Sentencing Commission started passing retroactive amendments to the Guidelines that reduced the disparity between crack and powder cocaine.[32] In 2010, Congress passed the Fair Sentencing Act which made important changes to the mandatory minimums for crack cocaine offenses (discussed further in Part D).[33] Today, there is still a roughly 16:1 disparity between crack and powder cocaine sentences. While some people are still pushing for more reform to bring the disparity down to 1:1, people convicted of crack cocaine offenses today receive significantly lighter sentences than they did under the previous laws.

(ii) *Offenses Involving Crack Cocaine and No Other Drugs*

On November 1, 2007, the Crack Amendments changed the Drug Quantity Table to reduce the amount of crack cocaine required to trigger each base offense level.[34] On November 1, 2014, the "Drug Minus Two Amendment" reduced these amounts even more.[35] So, if you were sentenced before these changes came into effect, your base offense level was probably calculated under an old Drug Quantity Table and you might be eligible for a sentence reduction that takes the new Drug Quantity Table into account

---

[29] Section B(2) ("How Courts Use the Guidelines to Calculate a Sentence Range") explains the role the base offense level plays in the sentence calculation.

[30] *See, e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3209 (assigning 5 grams of crack cocaine the same mandatory minimum as 500 grams of powder cocaine); U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) (U.S. SENT'G COMM'N 2003) (assigning 1.5 kilograms of crack cocaine the same base offense level as 150 kilograms of powder cocaine) *available at* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2003/manual/2003guid.pdf (last visited Apr. 4, 2024).

[31] Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law,* American Civil Liberties Union (Oct. 26, 2006), *available at* https://www.aclu.org/documents/cracks-system-20-years-unjust-federal-crack-cocaine-law.

[32] U.S. SENT'G GUIDELINES MANUAL app. C, amends. 706, 711, 715, 750 (U.S. SENT'G COMM'N 2023).

[33] Fair Sentencing Act of 2010, Pub. L. No. 111-20, §§ 2–3, 124 Stat. 2372, 2372 (codified at 21 U.S.C. §§ 841(b)(1), 844(a)) (reducing the quantity thresholds triggering mandatory minimum sentences for crack cocaine and eliminating mandatory minimums for possession-only offenses).

[34] U.S. SENT'G GUIDELINES MANUAL app. C, amends. 706, 711, 715, 750 (U.S. SENT'G COMM'N 2023).

[35] U.S. SENT'G GUIDELINES MANUAL app. C, amends. 782 (U.S. SENT'G COMM'N 2023).

The following table reflects how the Drug Quantity Table for crack cocaine looked before the 2007 Crack Amendments, how it looked after the 2007 Crack Amendments (between November 1, 2007 and November 1, 20014), and how it looks today after the 2014 Drug Minus Two Amendment.

Base Offense Level	**Amount of crack cocaine** *in grams (G) or kilograms (KG) (1 KG = 1,000 G)*		
	Before 2007[36]	**2007–2014**[37]	**After 2014**[38]
38	1.5 KG or more	4.5 KG or more	25.2 KG or more
36	500 G – less than 1.5 KG	1.5 KG – less than 4.5 KG	8.4 KG – less than 25.2 KG
34	150 G – less than 500 G	500 G – less than 1.5 KG	2.8 KG – less than 8.4 KG
32	50 G – less than 150 G	150 G – less than 500 G	840 G – less than 2.8 KG
30	35 G – less than 50 G	50 G – less than 150 G	280 G – less than 840 KG
28	20 G – less than 35 G	35 G – less than 50 G	196 G – less than 280 G
26	5 G – less than 20 G	20 G – less than 35 G	112 G – less than 196 G
24	4 G – less than 5 G	5 G – less than 20 G	28 G – less than 112 G
22	3 G – less than 4 G	4 G – less than 5 G	22.4 G – less than 28 G
20	2 G – less than 3 G	3 G – less than 4 G	16.8 G – less than 22.4 G
18	1 G – less than 2 G	2 G – less than 3 G	11.2 G – less than 16.8 G
16	.5 G – less than 1 G	1 G – less than 2 G	5.6 G – less than 11.2 G
14	.25 G – less than .5 G	.5 G – less than 1 G	2.8 G – less than 5.6 G
12	Less than .25 G	Less than .5 G	Less than 2.8 G

Today, the amount of crack cocaine needed to trigger a given base offense level is much lower than it was before these changes. These changes impact smaller amounts of crack cocaine more than they do larger amounts. For example, if you had one kilogram of crack cocaine, your base offense level would have been thirty-six before any of the amendments came into effect and thirty-two today (a *four-level reduction*). If you had five grams of crack cocaine, your base offense level would have been twenty-six before any of the amendments came into effect and thirteen today (a *thirteen-level reduction*).

(iii) *Offenses Involving Crack Cocaine and One or More Other Drugs*

The Crack Amendments, specifically Amendment 715, also changed how base offense levels are calculated for offenses involving crack cocaine *and* at least one other drug.[39] Base offense levels for multiple-drug offenses are still calculated using the Drug Quantity Table, but you have to take one extra step first. For offenses with more than one drug, you determine the base offense level by converting the amounts of all drugs into something called a "converted drug weight." It might be helpful to know that you used to convert the drugs into their equivalent weight of marijuana, so your sentence records probably say "marijuana" instead of "converted drug weight." In 2018, an amendment removed the word marijuana from the Drug Equivalency Tables and added the new "converted drug

[36] *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) (U.S. SENT'G COMM'N 2003), *available at* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2003/manual/2003guid.pdf (last visited Apr. 4, 2024).

[37] *See* U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) (U.S. SENT'G COMM'N 2008), *available at* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2008/manual/CHAP2_D.pdf (last visited Apr. 4, 2024).

[38] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) (U.S. SENT'G COMM'N 2023).

[39] U.S. SENT'G GUIDELINES MANUAL app. C, amend. 715 (U.S. SENT'G COMM'N 2023).

weight" type.[40] This amendment only changed the wording and not the calculation, so you do not need to worry about it other than knowing it exists.

To convert a drug to its converted drug weight, you use a different set of tables called the "Drug Equivalency Tables" which tell you how much one gram of a specific drug is in its converted drug weight.[41] After you convert the drugs into converted drug weights, you add them all together and use that total to find the base offense level on the Drug Quantity Table.

The conversion can be a little confusing, so an example may be helpful: Imagine you are convicted of selling 80 grams of powder cocaine, 30 grams of crack cocaine, and 1 kilogram (1,000 grams) of marijuana. To calculate the base offense level, you would look at the Drug Equivalency Tables and see that 1 gram of powder cocaine is equal to 200 grams of converted drug weight, and 1 gram of crack cocaine is equal to 3,571 grams of converted drug weight, and 1 gram of marijuana is equal to 1 gram of converted drug weight.

1 G of powder cocaine = **200 G** of converted drug weight
1 G of crack cocaine = **3,571 G** of converted drug weight
1 G of marijuana = **1 G** of converted drug weight

Now, you should multiply the converted amount by the number of grams you were actually convicted of possessing. So, 80 grams of powder cocaine now equals 16,000 grams of converted drug weight (80 × 200 = 16,000), 30 grams of crack cocaine now equals 107,130 grams of converted drug weight (30 × 3,571 = 107,130), and 1,000 grams of marijuana equals 1,000 grams of converted drug weight (1,000 × 1 = 1,000). The total offense, therefore, involves the equivalent of 124.13 kilograms of converted drug weight (16KG + 107.13KG + 1KG). Looking now at the Drug Quantity Table, we can see the 124.13 kilograms of converted drug weight corresponds to a base offense level of 24.

80 G of cocaine = **16,000 G (16 KG)** of converted drug weight
30 G of crack cocaine = **107,130 G (107.13 KG)** of converted drug weight
1,000 G of marijuana = **1,000 G (1 KG)** of converted drug weight

---

16 KG + 107.13 KG + 1KG = 124.13KG of converted drug weight (level 24)

The Crack Amendments did not change the old method of calculating the base offense level for multiple-drug offenses. Instead, they said that whenever the offense involves crack cocaine and at least one other drug, the base offense level you get using the method above should be lowered by two.[42] So, under the new Guidelines, your base offense level would be calculated exactly as it was under the old Guidelines (as demonstrated in the example above), *but* you then subtract two from the result. So, in the example above, the base offense level would now be 22 (24 – 2 = 22).

This means that if you were convicted of an offense involving crack cocaine and at least one other drug, you might be eligible to apply for a sentence reduction because your base offense level is most likely two levels lower now than it was when you were originally sentenced. You should be aware, however, that there are three exceptions to this two-level reduction rule. The two-level reduction will **not** apply if any of the following are true:

1. Your offense involved 4.5 kilograms or more of crack cocaine;
1. Your offense involved less than 250 milligrams (.25 grams) of crack cocaine; **or**
2. The base offense level after the two-level reduction would be lower than the base offense level for the same offense involving only the other drugs and not the crack cocaine.[43]

An example may be helpful to explain the third exception. Suppose a case involves 5 grams of crack cocaine and 6 kilograms of heroin. Under the Drug Equivalency Tables, 5 grams of crack cocaine converts to about 17.9 kilograms of converted drug weight (5 × 3,571 = 17,855), and 6 kilograms of

---

[40] U.S. SENT'G GUIDELINES MANUAL supp. app. C, amend. 808 (U.S. SENT'G COMM'N 2023) (removing "marijuana" from the Drug Con

[41] U.S. SENT'G GUIDELINES MANUAL § 2D1.1, comment. 8(d) (U.S. Sent'g Comm'n 2023) (the Drug Equivalency Tables).

[42] U.S. SENT'G GUIDELINES MANUAL app. C, amend. 715 (U.S. SENT'G COMM'N 2023).

[43] U.S. SENT'G GUIDELINES MANUAL app. C, amend. 715 (U.S. SENT'G COMM'N 2023).

heroin converts to 6,000 kilograms of converted drug weight (6 × 1,000 = 6,000), which, when added together equals 6,017.9 kilograms of converted drug weight.

5 G of crack cocaine	=	**17,855 G (~17.9 KG)** of converted drug weight
6 KG of heroin	=	**6,000 KG** of converted drug weight
17.9 KG + 6,000 KG	=	**6,017.9 KG** converted drug weight.

Under the Drug Quantity Table, 6,017.9 kilograms of converted drug weight leads to a base offense level of 32, which is reduced by two levels to 30. If you removed the crack cocaine, you would have 6 kilograms of heroin (or 6,000 kilograms of converted drug weight) which leads to an offense level of 32 under the Drug Quantity Table. The combined offense level for cocaine and heroin, if reduced, would be 30. Since this is less than the base offense level for only heroin (level 32), the third exception would apply. So, the base offense level for the cocaine and heroin would be 32, *not* 30.[44] This exception is most likely to apply if you have a small amount of crack cocaine compared to a very large amount of other drugs.

(b) "Drug Minus Two" Amendment Impacting Sentences for Other Drug Offenses

The Amendment 782, also called the "Drug Minus Two" Amendment, became effective in November 1, 2014. The Drug Minus Two Amendment reduced the base offense level for all drug offenses, making a large number of people eligible for sentence reductions.

The Drug Minus Two Amendment changed the Drug Quantity Table so that base offense levels assigned to specific drug quantities for are reduced by two.[45] This change applies to *any* controlled substance, unlike the Crack Amendments described above. It did not, however, does not change the minimum base offense level (Level 6) or the maximum base offense level (Level 38) for most drug types. Appendix A to this Chapter includes a copy of new Drug Quantity Table for you to reference.

(c) Amendment 821 Impacting "Status Point" and "Zero-Point Offenders"

Amendment 821 became effective on November 1, 2023.[46] Part A of the amendment makes changes to "status points," which are points that apply to certain people during the criminal history point calculation. Part B Subpart 1 of the amendment adds a new adjustment that applies to people who received zero criminal history points. Beginning February 1, 2024, eligible people could begin applying for sentence reductions under Amendment 821.[47]

Because these changes to the Guidelines have only been effective for a few months at the time this edition of the *JLM* was published, you should be sure to check for recent case law on Amendment 821 to see how judges are interpreting these changes. You might try searching terms like "Amendment 821," "status point," "zero-point offender," and "Guidelines" to find relevant cases.

(iv) *Changes to Status Points*

Status points are additional points added for certain people when their criminal history points[48] are calculated. You probably had status points added to your criminal history points if you committed any part of the offense that you were being sentenced for (called the instant offense) while under any criminal justice sentence. "Criminal justice sentence" is defined to mean any sentence that would count

[44] U.S. SENT'G GUIDELINES MANUAL app. C, amend. 715 (U.S. SENT'G COMM'N 2023).

[45] U.S. SENT'G GUIDELINES MANUAL app. C, amend. 782 (U.S. SENT'G COMM'N 2023).

[46] U.S. SENT'G GUIDELINES MANUAL supp. app. C, amend. 821 (U.S. SENT'G COMM'N 2023) (full text of Amendment 821); .S. SENT'G GUIDELINES MANUAL supp. app. C, amend. 825 (U.S. SENT'G COMM'N 2023) (full text of Amendment 825, which made Amendment 821 Part A and Part C Subpart 1 retroactive).

[47] U.S. SENT'G GUIDELINES MANUAL § 1B1.10(e)(2) (U.S. SENT'G COMM'N 2023) (allowing courts to issue sentence reductions under the retroactive portions of Amendment 821 beginning February 1, 2024).

[48] Section B(2) ("How Courts Use the Guidelines to Calculate a Sentence Range") explains how criminal history points are calculation.

as a prior sentence under the Guidelines that has a custodial or supervisory component.[49] In other words, you are under a criminal justice sentence if the state has custody of you or is supervising (watching) you in some way. Some common examples of you being under a criminal justice sentence when you committed the instant offense are if:

- You were incarcerated;
- You were on supervised or unsupervised probation or parole;[50]
- You were on supervised release or work release;
- You were under "escape status," which also applies if you failed to report for service of a sentence of incarceration; or
- You had an outstanding violation warrant from a prior sentence, like a probation, parole, or unsupervised release violation warrant.[51]

Before November 1, 2023, you would receive two status points if, when you committed the instant offense, you were under a criminal justice sentence (meaning while any of the bullet points listed above apply to you).[52] Now, you only receive *one* status point if two conditions are met: (1) you already have 7 or more criminal history points by the time you reach the status point step, and (2) you committed the instant offense while under a criminal justice sentence.[53] So, Amendment 821 Part A does two important things for people who received status points: (1) it reduced the number of status points from two to one, and (2) it eliminated status points for anyone who had six or less criminal history points before reaching the status point step. So, now the steps to calculate your criminal history points look like this:

Step One: Add 3 points for every prior sentence of incarceration greater than 13 months.

Step Two: Add 2 points for every prior sentence of incarceration for 60 days or more. Do not count prior sentences you received points for in step one.

Step Three: Add 1 point for every prior sentence not included in steps one or two. Stop if you reach 4 points during this step.

Step Four: If a prior sentence was not counted in the previous steps because it was combined into one sentence for this calculation *and* the sentence was a conviction for a crime of violence add 1 point for each. Stop if you reach 3 points during this step.

Step Five: [*Status Point*] If you have 7 or more points already, add 1 point if you committed the instant offense while under a criminal justice sentence.

If you had status points added during your original sentence calculation, you should do two things to figure out if the status points change would lower your sentence. First, go through the first four steps in the criminal history calculation listed above. If you count seven points, you would now have *one* less criminal history point than you did originally, since the new status point increase went from two to one. If you count six or less points, you would now have *two* less criminal history points than you did originally, since status points no longer apply to people with six or less points.

Next, you need to figure out if your decrease in points actually changes your criminal history category. If it does not change your criminal history category, it would not change your sentence calculation. The criminal history categories are as following: Category I (0–1 points), II (2–3 points), III (4–6 points), IV (7–9 points), V (10–12 points), and VI (13 or more points). For example, if you lost one point and you originally had twelve points, you would **not** have a category change because eleven and twelve points are both in Category V. However, if you lost one point and you originally had ten points, this **would** lower you from Category V to Category IV, which could significantly reduce your

---

[49] U.S. SENT'G GUIDELINES MANUAL § 4A1.1 comment. n. 5 (U.S. SENT'G COMM'N 2023) (defining "criminal justice sentence").

[50] U.S. SENT'G GUIDELINES MANUAL § 4A1.1 comment. n. 4 (U.S. SENT'G COMM'N 2023) (clarifying that probation and parole do not have to be under active supervision to count as a "criminal justice sentence").

[51] U.S. SENT'G GUIDELINES MANUAL § 4A1.1 comment. n. 4 (U.S. SENT'G COMM'N 2023) (clarifying that outstanding warrants from prior sentences count as a criminal justice sentence, "even if that sentence would have expired absent such a warrant").

[52] U.S. SENT'G GUIDELINES MANUAL § 4A1.1 comment. n. 5 (U.S. SENT'G COMM'N 2021) (the status point calculation before Amendment 812).

[53] U.S. SENT'G GUIDELINES MANUAL § 4A1.1 (U.S. SENT'G COMM'N 2023).

sentence. If, after following these steps, you think you would be placed in a lower criminal history category today, you might be eligible for a sentence reduction.

(v) *New Adjustment for "Zero-Point Offenders"*

If you received zero criminal history points during your sentencing calculation, you might be eligible for a sentence reduction. Amendment 821 Part B Subpart 1 created a new adjustment that decreases your offense level by two points if you meet **all** of the below requirements: [54]

(1) You received zero criminal history points;
(2) You did not use violence or credible threats of violence in connection with your offense;
(3) Your offense did not result in death or serious bodily injury;
(4) Your offense is not a sex offense;
(5) You did not "personally cause substantial financial hardship;"
(6) You did not "possess, receive, purchase, transport, transfer, sell, or otherwise dispose of" a firearm or other dangerous weapon (or get another person to do so) in connection with your offense;
(7) Your offense is not an offense involving individual rights;[55]
(8) You were not "engaged in a continuing criminal enterprise," meaning you were not a part of some sort of organized crime operation; **and**
(9) You did not qualify for *any* of the following adjustments:
    a. Terrorism adjustment[56]
    b. Hate crime motivation or vulnerable victim adjustment;[57]
    c. Serious human rights offense adjustment (applying to offenses involving genocide, torture, and war crimes);[58] or
    d. Aggravating role adjustment (applying if you were a leader, manager, or supervisor in a crime involving multiple participants)[59]

If you think you meet all of the other requirements listed above, you might be eligible for a sentence reduction.

2. Determining Eligibility

Not everyone is eligible for a sentence reduction. Federal law only allows court to grant sentence reductions due to an amendment to the Guidelines if: (1) your original sentence was "based on" the Guidelines and (2) the amendment would lower your sentence range calculation.[60] Both of these requirements are covered below.

---

[54] U.S. SENT'G GUIDELINES MANUAL § 4C1.1 (U.S. SENT'G COMM'N 2021) (the "Adjustment for Certain Zero-Point Offenders" created by Amendment 821).

[55] Offenses involving individual rights are usually offenses involving some sort of discrimination against another person because of their identity or beliefs. These offenses are covered by § 2H1.1 of the Guidelines. If you are unsure whether your offense would count, you should figure out what statute you were charged under and see if it is covered by § 2H1.1 by looking at Appendix A of the Guidelines Manual. U.S. SENT'G GUIDELINES MANUAL app. A (U.S. SENT'G COMM'N 2023) (listing which Guideline to use for most criminal statutes).

[56] U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2023) (the "Terrorism" adjustment, applying to anyone whose offense involved or was intended to promote terrorism).

[57] U.S. SENT'G GUIDELINES MANUAL § 3A1.1 (U.S. SENT'G COMM'N 2023) (the "Hate Crime Motivation or Vulnerable Victim" adjustment). This adjustment will apply if your conviction including a finding that you selected the victim because of their identity or if your victim was unusually vulnerable (for example, due to their age or physical or mental condition).

[58] U.S. SENT'G GUIDELINES MANUAL § 3A1.5 (U.S. SENT'G COMM'N 2023) (the "Serious Human Rights Offense" adjustment).

[59] U.S. SENT'G GUIDELINES MANUAL § 3B1.1 (U.S. SENT'G COMM'N 2023) (the "Aggravating Role" adjustment).

[60] 18 U.S.C. § 3582(c)(2) (allowing courts to consider a sentence reduction "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").

(a) Your Original Sentence Must Have Been "Based On" the Guidelines

The sentence you are trying to reduce must actually be *based on* the Guidelines for you to be eligible for a sentence reduction. Recall that judges are required to consider (though not necessarily follow) the Guidelines when sentencing someone for a crime.[61] So, most (but not all) people will meet this requirement because the judge likely considered the Guidelines to some extent.[62]

(i) *Sentences That Were the Result of a Binding Plea Agreement*

Even if your sentence was determined from a binding plea agreement, you are most likely still eligible for a sentence reduction.

Sometimes, a defendant and a prosecutor will sign what is called a "Type-C" plea agreement where both agree that a certain sentence (or sentence range) is appropriate or that the judge should apply the Guidelines to the defendant in a certain way.[63] If the court accepts a Type-C plea agreement, it is "binding" which means that the court must follow the agreement during sentencing. This was being interpreted by some courts to mean that the sentence was *not* based on the Guidelines, but instead the sentence was based on the plea agreement. In 2018, the Supreme Court clarified that Type-C plea agreements will typically meet the "based on" requirement because courts are still required to evaluate what the defendant's sentence would be under the Guidelines before they decide to accept the agreement.[64]

(ii) *Sentences Below a Mandatory Minimum Because of Substantial Assistance*

If you were sentenced below a mandatory minimum because of substantial assistance, you are probably **not** eligible for a sentence reduction. Judges almost always have to follow a mandatory minimum at sentencing, even if the Guidelines calculate a lower sentence. However, federal law allows a court to sentence a defendant below a mandatory minimum *if* the defendant "substantially assisted" the government in "the investigation or prosecution of another person."[65] So, if you cooperate with the government, a court is allowed to sentence you below the mandatory minimum.

If you were sentenced below a mandatory minimum because of substantial assistance *and* your Guidelines range fell below the mandatory minimum, you are **definitely not** eligible for a sentence reduction. The Supreme Court has held that these cases do not meet the "based on" requirement because the sentencing court essentially tossed aside the Guidelines and based the sentence on both the mandatory minimum and the fact that the defendant substantially assisted the government.[66]

If you were sentenced below a mandatory minimum because of substantial assistance but your initial Guidelines calculation did *not* fall below the mandatory minimum, it is **unclear** whether you will be eligible for a sentence reduction. The Supreme Court did not address this question directly. The Ninth Circuit has held that these cases are *not* eligible for sentence reductions,[67] but it is possible a different circuit may interpret these cases differently when they arise.

---

[61] *See* United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 756–757, 160 L. Ed. 2d. 621, 651 (2005) (holding that the Guidelines are advisory rather than mandatory, that judges may use their own discretion when deciding to depart from the Guidelines).

[62] *See* Hughes v. United States, 584 U.S. 675, 686, 138 S. Ct. 1765, 1775, 201 L. Ed. 2d 72, 83 (2018) ("In the typical sentencing case there will be no question that the defendant's Guidelines range was a basis for his sentence.").

[63] FED. R. CRIM. P. 11(c)(1)(C) (defining Type-C plea agreements).

[64] Hughes v. United States, 584 U.S. 675, 687, 138 S. Ct. 1765, 1776, 201 L. Ed. 2d 72, 84 (2018) (holding that, because the Guidelines prohibit courts from accepting a Type-C plea agreement without "first evaluating the recommended sentence in light of the defendant's Guidelines Range," in the "usual case" these cases are still eligible for a sentence reduction).

[65] 18 U.S.C. § 3553(e).

[66] Koons v. United States, 584 U.S. 700, 704, 138 S. Ct. 1783, 1788, 201 L. Ed. 2d 93, 98 (2018).

[67] *See* United States v. Buenrostro, 895 F.3d 1160, 1164 (2018) (holding that a defendant who was subjected to a mandatory minimum did not have their sentence "based on" the Guidelines, but the mandatory minimum).

(b) The Amendment Must Actually Lower the Sentence Range Calculation

The amendment must actually lower your sentence calculation for you to be eligible for a sentence reduction. You will never have your sentence increased because of an amendment to the Guidelines, you can only have it lowered.[68] However, just because an amendment changes part of the Guidelines that applied to you, this does not always mean the amendment actually lowers your sentence calculation.

It is very important to know how your sentence range was calculated to determine whether an amendment actually lowers that range. Below are common reasons where your sentence might not be lowered by an amendment, but you should try to check your own presentence report to see if something else may prevent your sentence range from decreasing.

(i) *Drug Offenses Where the Base Offense Level Was Not Determined by the Drug Quantity Table*

If you are seeking a sentence reduction because of a change to the Drug Quantity Table (like the Crack Amendments or the Drug Minus Two Amendment), your base offense level **must** have been calculated using the Drug Quantity Table for the amendments to have any impact on your sentence.

Remember from the earlier discussion in Section B(2) that drug-related offenses sometimes have multiple ways to calculate your base offense level. For example, if you were sentenced in 2003 for possession of crack cocaine with intent to distribute, your base offense level could have been calculated in one of three ways:

1. If your conviction established that death or serious bodily injury resulted from the use of the drug *and* you committed the offense after one or more prior convictions for a similar offense → your base offense level would automatically be forty-three and NOT calculated using the Drug Quantity Table.
2. If your conviction established that death or serious bodily injury resulted from the use of the drug *and* you did not have any prior convictions for a similar offense → your base offense level would automatically be thirty-eight and NOT calculated using the Drug Quantity Table.
3. If none of the above apply → your base offense level was likely calculated using the Drug Quantity Table.[69]

So, if your offense involved death or serious bodily injuries, the Drug Quantity Table was not used to calculate your base offense level and therefore any changes to the table would not lower your sentence.

(ii) *People Who Are "Career Offenders" Under the Guidelines*

If you were considered a "career offender" during your original sentence calculation, you will almost always **not** be eligible (but in very limited instances, you might be). This is because career offenders usually receive an automatic increase of their offense level and always receive the highest criminal history category (Category VI). So, if your offense level and criminal history category were actually determined by the career offender provisions, none of the retroactive amendments would lower your sentence range.

Under the Guidelines, you are a career offender if:

(1) You were at least eighteen years old when you committed the instant offense (the one you are seeking a reduction of);

(2) The instant offense is violent felony or a felony drug offense; **and**

---

[68] *See* Peugh v. United States, 569 U.S. 530, 533, 133 S. Ct. 2072, 2078, 186 L. Ed. 2d 84, 93 (2013) (holding that when Guidelines are amended after the date of the offense to *increase* a defendant's sentence, using the amended Guidelines at sentencing would violate the Constitution's prohibition on *ex post facto* laws).

[69] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(a) (U.S. SENT'G COMM'N 2003), *available at* https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2003/manual/2003guid.pdf (last visited Apr. 4, 2024).

(3) You had at least two prior felony convictions that were either violent felonies or felony drug offenses.[70]

Career offenders have their criminal history category automatically changed to Category VI, the highest category.[71] So, no amendment changing how criminal history points are calculated would lower a career offender's sentence.

Career offenders *usually* have their offense levels determined by a table in the career offender provision. The Guidelines say that a career offender's offense level should be whatever number is higher between (1) the offense level calculated by the Guidelines before reaching the career offender provision, or (2) the numbers listed in the table. The table is based on whatever the statutory maximum is for the instant offense and says:[72]

- If the maximum is **life** → your offense level should be **37**
- If the statutory maximum is **25 or more years** → your offense level should be **34**
- If the maximum is **20–25** years → your offense level should be **32**
- If the maximum is **15–20 years** → your offense level should be **29**
- If the maximum is **10–15 years** → your offense level should be **24**
- If the maximum is **5–10 years** → your offense level should be **17**
- If the maximum is **1–5 years** → your offense level should be **12**

So, unless your offense level calculated by the Guidelines is *higher* than the number you would receive based on your instant offense's statutory maximum, you are **not** eligible for a sentence reduction. If your offense level was higher than the number you would have received based on the statutory maximum, then you *may* be eligible for a sentence reduction under an amendment that lowers your offense level. However, you should note that your sentence may *not* be reduced below the guideline range that would have applied if the career offender provision set your offense level.[73]

3. Applying for a Sentence Reduction

(a) How Do You Apply?

Section 3582(c)(2) of Title 18 in the U.S. Code is the statute that grants courts the authority to reduce sentences because of amendments to the Guidelines. So, to apply for a sentence reduction because the new Guidelines have lowered the sentence for your offense, you file what is called a Section 3582(c)(2) motion.[74] You should file this motion in the same district court that gave you your original sentence. Sample motions are included in Appendix B at the end of this Chapter.

You do not have the right to counsel to help you apply for a sentence reduction, but you can still try to request that the court appoint you counsel.[75] Appendix B includes a sample form to request counsel. The court does not have to grant your request, so you might have to file *pro se* (on your own).

In order to file a motion *pro se* for resentencing under 18 U.S.C. § 3582(c)(2), you will need to prepare an application. When you are finished, you will file your application and submit it to the district court that handled your original sentencing. Before you begin your application, you should make sure you know some key facts about your case:

(1) Your criminal case number,
(2) Your base offense level—you can find this in the "Criminal Computation" section of your pre-sentence report or you can calculate it yourself,
(3) Your criminal history,

---

[70] U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2023).

[71] U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2023).

[72] U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2023).

[73] PRIMER ON RETROACTIVE GUIDELINE AMENDMENTS 13 (U.S. SENT'G COMM'N 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Retroactivity.pdf.

[74] *See* 18 U.S.C. § 3582(c)(2).

[75] *See, e.g.*, United States v. Manso-Zamora, 991 F.3d 694, 696 (6th Cir. 2021) ("[E]very federal court of appeals to address the issue has agreed there is no constitutional (or statutory) right to appointed counsel in § 3582(c)(2) proceedings.")

(4) The Sentencing Guideline range that was originally used in your sentencing,
(5) Your actual sentence,
(6) The new Sentencing Guideline range that would be applicable to your crime under the amended Guidelines,
(7) Whether you were sentenced pursuant to a binding plea agreement or were sentenced based on your status as a career offender,
(8) Your disciplinary record and program participation during your incarceration.

Your application is a chance for you to argue that you are an ideal candidate for a sentence reduction. You should remember that the court will probably receive many of these kinds of motions from incarcerated persons, so you may not want to make your application too long. Using the sample motions at the end of this chapter and filling in your own information is probably the simplest way to file an effective *pro se* motion.

(b) What Happens After You File?

After you file your motion, the judge will forward the motion to the District Attorney, who will likely file their own motion arguing that the judge should not grant you a sentence reduction.

The judge may or may not decide hold a hearing on your motion. You do not have a right to a hearing to argue your motion directly to the judge, but you *do* have a right to respond to any new information that the court receives and will rely upon when making their decision.[76] If there is a hearing, the court is not required to allow you to be present at the hearing.[77]

(c) How Will the Court Make Its Decision?

Just because you are eligible for a sentence reduction does not mean the court will grant you one. In deciding whether to grant you a sentence reduction, the court will consider the factors listed in 18 U.S.C. § 3553(a) and any policy statements included in the Guidelines.[78] The court may consider any of the following factors listed in Section 3553(a):

- The nature of your underlying offense
- Your criminal history and personal characteristics
- The need for your sentence to reflect the seriousness of the offense
- The need to deter similar conduct
- The need to protect the public
- The need to keep you incarcerated to provide you with educational or vocational training, medical care, or other correctional treatment

Essentially, the court may refuse to reduce your sentence for many reasons, including because they think that your offense was so serious that you should not benefit from a sentence reduction.

If the court does decide to grant you a sentence reduction, it will most likely be some sentence within the new calculation in the Guidelines. You may get a sentence that is lower than the recommended sentence from the changed Guidelines if your original sentence was already lower than the sentence recommended by the old Guidelines.

---

[76] *See, e.g.*, PRIMER ON RETROACTIVE GUIDELINE AMENDMENTS 4 (U.S. SENT'G COMM'N 2023), *available at* https://www.ussc.gov/sites/default/files/pdf/training/primers/2023_Primer_Retroactivity.pdf; United States v. Beltran-Estrada, 990 F.3d 1124, 1126 (8th Cir. 2021) (holding a defendant 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) (holding that a 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).

[77] 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).").

[78] 18 U.S.C. § 3582(c)(2) ("[T]he court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) . . . [and] if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.").

D. Applying for a Reduction to Your Crack Cocaine Sentence Under the First Step Act

If you are currently serving time for a crack cocaine sentence that involved a mandatory minimum received before August 3, 2010, you might be able to apply for a sentence reduction.

On August 3, 2010, Congress passed the Fair Sentencing Act which made changes to the mandatory minimums for possessing crack cocaine.[79] Specifically, the Act eliminated all mandatory minimums for simple possession (possession only) of crack and increased the quantity of crack cocaine that triggers mandatory minimum sentences for other crack cocaine offenses. Importantly, these changes were *not* made retroactive until Congress passed the First Step Act on December 21, 2018.[80] This means that, beginning on December 21, 2018, people who were sentenced to mandatory minimums under the old laws could apply to have their sentences reduced as if the new laws were in effect when they were originally sentenced.

1. New Mandatory Minimums for Crack Cocaine Offenses

(a) Simple Possession of Crack Cocaine

After the Fair Sentencing Act, there are no more mandatory minimums for simple possession. Simple possession means *only* possession, not possession with intent to do some other thing. The statute for simple possession is at Section 844, Title 21 of the U.S. Code.[81] Before the Fair Sentencing Act, simple possession of crack cocaine triggered mandatory penalties at 5 grams and at lower amounts if you had prior crack cocaine convictions. If you were sentenced before August 3, 2010, you would have a mandatory minimum of **five years** in prison if you were convicted of possessing:

- 5 grams of crack cocaine with no prior crack cocaine possession convictions
- 3 grams of crack cocaine with one prior crack cocaine possession conviction
- 1 gram of crack cocaine with two or more prior crack cocaine possession convictions

The Fair Sentencing Act amended Section 844 to eliminate all mandatory minimums. So, anyone sentenced for simple possession of crack cocaine after August 3, 2010 would not be subject to a mandatory minimum, no matter how much crack cocaine you were convicted of possessing.

(b) Trafficking and Possession with Intent to Manufacture or Distribute Crack Cocaine

The Fair Sentencing Act also changed the mandatory minimums for crack cocaine offenses involving trafficking, including possession with intent to distribute or manufacture. The Fair Sentencing Act amended two statutes: Sections 841 and 960, Title 21 of the U.S. Code. Section 841, the more commonly charged statute, applies to manufacturing and distribution of crack cocaine (or possession with intent to manufacture or distribute).[82] Section 960 applies to the import or export of crack cocaine.[83] The table below shows what the mandatory minimums were before and after the Fair Sentencing Act came into effect on August 3, 2010.

Before	After	Prior Felony Drug Convictions	Mandatory Minimum
5 grams	28 grams	0	5 years
		1 or more	10 years
50 grams	280 grams	0	10 years

[79] Fair Sentencing Act of 2010, Pub. L. No. 111-20, §§ 2–3, 124 Stat. 2372, 2372 (codified at 21 U.S.C. §§ 841(b)(1), 844(a)) (reducing the quantity thresholds triggering mandatory minimum sentences for crack cocaine and eliminating mandatory minimums for possession-only offenses).

[80] First Step Act of 2018, Pub. L. No. 114-391, § 404, 132 Stat. 5194, 5222 (making the Fair Sentencing Act retroactive so that a court may "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed).

[81] 18 U.S.C. § 844(a) (penalties for simple possession).

[82] 18 U.S.C. § 841(a).

[83] 18 U.S.C. § 960(a).

		1 (Section 841 only) 1 or more (Section 960 only)	20 years
		2 or more (Section 841 only)	Life

So, you now need 28 grams of crack cocaine (compared to only 5 grams before) to trigger mandatory minimums of 5 years with no prior felony drug convictions and 10 years with prior felony drug convictions. Additionally, you now need 280 grams of crack cocaine (compared to only 50 grams before) to trigger mandatory minimums of 10 years with no prior felony drug convictions and 20 years with one prior felony drug conviction. An important difference is the harsher penalty—life—for two or more felony drug convictions *only if* you were convicted for manufacturing or distribution (or intent to manufacture or distribute) under Section 841. If you have two or more felony drug convictions but were convicted for import or export under Section 960, the same mandatory minimum of 20 years applies.

2. Determining Eligibility

To be eligible for a sentence reduction under the First Step Act, you must have been sentenced to a mandatory minimum. This will not apply to most people sentenced for possessing less than 5 grams of crack cocaine.

There is another important limit on eligibility that applies to people sentenced under Section 841 for manufacturing or distribution (pr possession with intent to manufacture or distribute). First, this requires explaining how Section 841 is structured. Subsection (b) of Section 841 lists the penalties for committing the offense and is separated into three different categories:

- (b)(1)(A) applies to offenses involving 280 (formerly 50) grams or more of crack cocaine and carries the mandatory minimums listed above: 10 years, 20 years, or life.
- (b)(1)(B) applies to offenses involving 28 (formerly 5) grams or more of crack cocaine and carries the mandatory minimums listed above: 5 years or 10 years.
- (b)(1)(C) applies to offenses involving an unspecified amount of crack cocaine and does not carry *any* mandatory minimum, either before or after the Fair Sentencing Act.

So, when you are charged under Section 841 for crack cocaine, the prosecutor can charge you under (b)(1)(A) if you had 280 grams or more, under (b)(1)(B) if you had 28 grams or more, or under (b)(1)(C) in any case. It may appear that this last category—(b)(1)(C)—is only for amounts that are less 28 grams, but this is not always true. Because (b)(1)(C) does not list any amount, a prosecutor can charge anyone under this category regardless of how much crack cocaine they had. There are many possible reasons a prosecutor might choose to charge someone under (b)(1)(C) instead of another category, but the important point is that it could happen in any case.

This difference is important because the Supreme Court held in 2021 that a defendant who was sentenced under (b)(1)(C) is **not** eligible for resentencing under the First Step Act.[84] The Court held that the Fair Sentencing Act did not apply to (b)(1)(C) at all because it does not have a mandatory minimum for the Fair Sentencing Act to change. So, when the First Step Act made the Fair Sentencing Act retroactive, it only made defendants charged under (b)(1)(A) and (b)(1)(B) eligible for resentencing. For this reason, it is important to know exactly what subsection you were charged under if you were convicted under Section 841.

In conclusion, if you think you were sentenced to a mandatory minimum that was changed by the Fair Sentencing Act, you should apply to have your sentence reduced under the First Step Act.

3. Applying for a Sentence Reduction

To apply for a sentence reduction pursuant to the First Step Act, you should not file the Section 3582(c)(2) motion described in Section C(3) for amendments to the Guidelines. Circuits have come to different decisions on how exactly you should file your request for a sentence reduction because of the new mandatory minimums established by the Fair Sentencing Act.

---

[84] Terry v. United States, 141 S. Ct. 1858, 1864, 210 L. Ed. 2d 108 (2021) (holding that the Fair Sentencing Act only modified Sections 841(b)(1)(A) and (b)(1)(B), so defendants not sentenced under either of those provisions are not eligible for resentencing under the First Step Act).

The Second, Third, Sixth, and Tenth Circuits have held that you should file a motion under 18 U.S.C. § 3582(c)(1)(B).[85] The Seventh and Eleventh Circuits have held that you should file a motion pursuant to the First Step Act itself.[86] If you are in another circuit, you should try to file your motion under either the First Step Act or Section 3582(c)(1)(B).

E. Conclusion

Changes to federal law and the U.S. Sentencing Guidelines have made some incarcerated persons eligible to apply for sentence reductions. You should make sure to conduct your own research and find out how these changes apply to your own sentence. The reduction is not automatic, though, so you will need to make sure to file a motion requesting a sentence reduction.

[85] *See* United States v. Chambers, 956 F.3d 667, 671 (4th Cir. 2020); United States v. Holloway, 956 F.3d 660, 661 (2d Cir. 2020); United States v. Easter, 975 F.3d 318, 323 (3d Cir. 2020); United States v. Alexander, 951 F.3d 706, 708 (6th Cir. 2019); United States v. Mannie, 971 F.3d 1145 (10th Cir. 2020).

[86] *See* United States v. Edwards, 997 F.3d 1115, 1118 (11th Cir. 2021) ("[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."); United States v. Sutton, 962 F.3d 979, 984 (7th Cir. 2020).

Appendix A: Current U.S. Sentencing Guidelines Drug Quantity Table[87]

Drug Types and Quantity	Base Offense Level
• 90 KG or more of Heroin; • 450 KG or more of Cocaine; • 25.2 KG or more of Cocaine Base; • 90 KG or more of PCP, or 9 KG or more of PCP (actual); • 45 KG or more of Methamphetamine, or 4.5 KG or more of Methamphetamine (actual), or 4.5 KG or more of "Ice"; • 45 KG or more of Amphetamine, or 4.5 KG or more of Amphetamine (actual); • 900 G or more of LSD; • 36 KG or more of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • 9 KG or more of a Fentanyl Analogue; • 90,000 KG or more of Marihuana; • 18,000 KG or more of Hashish; • 1,800 KG or more of Hashish Oil; • 90,000,000 units or more of Ketamine; • 90,000,000 units or more of Schedule I or II Depressants; • 5,625,000 units or more of Flunitrazepam. • 90,000 KG or more of ***Converted Drug Weight***	38
• At least 30 KG but less than 90 KG of Heroin; • At least 150 KG but less than 450 KG of Cocaine; • At least 8.4 KG but less than 25.2 KG of Cocaine Base; • At least 30 KG but less than 90 KG of PCP, or at least 3 KG but less than 9 KG of PCP (actual); • At least 15 KG but less than 45 KG of Methamphetamine, or at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or at least 1.5 KG but less than 4.5 KG of "Ice"; • At least 15 KG but less than 45 KG of Amphetamine, or at least 1.5 KG but less than 4.5 KG of Amphetamine (actual); • At least 300 G but less than 900 G of LSD; • At least 12 KG but less than 36 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 3 KG but less than 9 KG of a Fentanyl Analogue; • At least 30,000 KG but less than 90,000 KG of Marihuana; • At least 6,000 KG but less than 18,000 KG of Hashish; • At least 600 KG but less than 1,800 KG of Hashish Oil; • At least 30,000,000 units but less than 90,000,000 units of Ketamine; • At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants; • At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam. • At least 30,000 KG but less than 90,000 KG of ***Converted Drug Weight***	36
• At least 10 KG but less than 30 KG of Heroin; • At least 50 KG but less than 150 KG of Cocaine; • At least 2.8 KG but less than 8.4 KG of Cocaine Base; • At least 10 KG but less than 30 KG of PCP, or	34

[87] U.S. SENT'G GUIDELINES MANUAL § 2D1.1(c) (U.S. SENT'G COMM'N 2023).

at least 1 KG but less than 3 KG of PCP (actual); • At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice"; • At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual); • At least 100 G but less than 300 G of LSD; • At least 4 KG but less than 12 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 1 KG but less than 3 KG of a Fentanyl Analogue; • At least 10,000 KG but less than 30,000 KG of Marihuana; • At least 2,000 KG but less than 6,000 KG of Hashish; • At least 200 KG but less than 600 KG of Hashish Oil; • At least 10,000,000 but less than 30,000,000 units of Ketamine; • At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; • At least 625,000 but less than 1,875,000 units of Flunitrazepam. • At least 10,000 KG but less than 30,000 KG of ***Converted Drug Weight***.	
• At least 3 KG but less than 10 KG of Heroin; • At least 15 KG but less than 50 KG of Cocaine; • At least 840 G but less than 2.8 KG of Cocaine Base; • At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); • At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice"; • At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual); • At least 30 G but less than 100 G of LSD; • At least 1.2 KG but less than 4 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 300 G but less than 1 KG of a Fentanyl Analogue; • At least 3,000 KG but less than 10,000 KG of Marihuana; • At least 600 KG but less than 2,000 KG of Hashish; • At least 60 KG but less than 200 KG of Hashish Oil; • At least 3,000,000 but less than 10,000,000 units of Ketamine; • At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants; • At least 187,500 but less than 625,000 units of Flunitrazepam. • At least 3,000 KG but less than 10,000 KG of ***Converted Drug Weight***.	32
• At least 1 KG but less than 3 KG of Heroin; • At least 5 KG but less than 15 KG of Cocaine; • At least 280 G but less than 840 G of Cocaine Base; • At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual); • At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice"; • At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual); • At least 10 G but less than 30 G of LSD; • At least 400 G but less than 1.2 KG of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide);	30

• At least 100 G but less than 300 G of a Fentanyl Analogue; • At least 1,000 KG but less than 3,000 KG of Marihuana; • At least 200 KG but less than 600 KG of Hashish; • At least 20 KG but less than 60 KG of Hashish Oil; • At least 1,000,000 but less than 3,000,000 units of Ketamine; • At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants; • At least 62,500 but less than 187,500 units of Flunitrazepam. • At least 1,000 KG but less than 3,000 KG of ***Converted Drug Weight***.	
• At least 700 G but less than 1 KG of Heroin; • At least 3.5 KG but less than 5 KG of Cocaine; • At least 196 G but less than 280 G of Cocaine Base; • At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual); • At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice"; • At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual); • At least 7 G but less than 10 G of LSD; • At least 280 G but less than 400 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 70 G but less than 100 G of a Fentanyl Analogue; • At least 700 KG but less than 1,000 KG of Marihuana; • At least 140 KG but less than 200 KG of Hashish; • At least 14 KG but less than 20 KG of Hashish Oil; • At least 700,000 but less than 1,000,000 units of Ketamine; • At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants; • At least 43,750 but less than 62,500 units of Flunitrazepam. • At least 700 KG but less than 1,000 KG of ***Converted Drug Weight***.	28
• At least 400 G but less than 700 G of Heroin; • At least 2 KG but less than 3.5 KG of Cocaine; • At least 112 G but less than 196 G of Cocaine Base; • At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); • At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice"; • At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual); • At least 4 G but less than 7 G of LSD; • At least 160 G but less than 280 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 40 G but less than 70 G of a Fentanyl Analogue; • At least 400 KG but less than 700 KG of Marihuana; • At least 80 KG but less than 140 KG of Hashish; • At least 8 KG but less than 14 KG of Hashish Oil; • At least 400,000 but less than 700,000 units of Ketamine; • At least 400,000 but less than 700,000 units of Schedule I or II Depressants; • At least 25,000 but less than 43,750 units of Flunitrazepam. • At least 400 KG but less than 700 KG of ***Converted Drug Weight***.	26
• At least 100 G but less than 400 G of Heroin;	24

• At least 500 G but less than 2 KG of Cocaine; • At least 28 G but less than 112 G of Cocaine Base; • At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual); • At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice"; • At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual); • At least 1 G but less than 4 G of LSD; • At least 40 G but less than 160 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • At least 10 G but less than 40 G of a Fentanyl Analogue; • At least 100 KG but less than 400 KG of Marihuana; • At least 20 KG but less than 80 KG of Hashish; • At least 2 KG but less than 8 KG of Hashish Oil; • At least 100,000 but less than 400,000 units of Ketamine; • At least 100,000 but less than 400,000 units of Schedule I or II Depressants; • At least 6,250 but less than 25,000 units of Flunitrazepam. • At least 100 KG but less than 400 KG of ***Converted Drug Weight***.	
• At least 80 G but less than 100 G of Heroin; • At least 400 G but less than 500 G of Cocaine; • At least 22.4 G but less than 28 G of Cocaine Base; • At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual); • At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice"; • At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual); • At least 800 MG but less than 1 G of LSD; • At least 32 G but less than 40 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] Propanamide); • At least 8 G but less than 10 G of a Fentanyl Analogue; • At least 80 KG but less than 100 KG of Marihuana; • At least 16 KG but less than 20 KG of Hashish; • At least 1.6 KG but less than 2 KG of Hashish Oil; • At least 80,000 but less than 100,000 units of Ketamine; • At least 80,000 but less than 100,000 units of Schedule I or II Depressants; • At least 5,000 but less than 6,250 units of Flunitrazepam. • At least 80 KG but less than 100 KG of ***Converted Drug Weight.***	22
• At least 60 G but less than 80 G of Heroin; • At least 300 G but less than 400 G of Cocaine; • At least 16.8 G but less than 22.4 G of Cocaine Base; • At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual); • At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice"; • At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual); • At least 600 MG but less than 800 MG of LSD;	20

• At least 24 G but less than 32 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] Propanamide); • At least 6 G but less than 8 G of a Fentanyl Analogue; • At least 60 KG but less than 80 KG of Marihuana; • At least 12 KG but less than 16 KG of Hashish; • At least 1.2 KG but less than 1.6 KG of Hashish Oil; • At least 60,000 but less than 80,000 units of Ketamine; • At least 60,000 but less than 80,000 units of Schedule I or II Depressants; • 60,000 units or more of Schedule III substances (except Ketamine); • At least 3,750 but less than 5,000 units of Flunitrazepam. • At least 60 KG but less than 80 KG of ***Converted Drug Weight***.	
• At least 40 G but less than 60 G of Heroin; • At least 200 G but less than 300 G of Cocaine; • At least 11.2 G but less than 16.8 G of Cocaine Base; • At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual); • At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice"; • At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual); • At least 400 MG but less than 600 MG of LSD; • At least 16 G but less than 24 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] Propanamide); • At least 4 G but less than 6 G of a Fentanyl Analogue; • At least 40 KG but less than 60 KG of Marihuana; • At least 8 KG but less than 12 KG of Hashish; • At least 800 G but less than 1.2 KG of Hashish Oil; • At least 40,000 but less than 60,000 units of Ketamine; • At least 40,000 but less than 60,000 units of Schedule I or II Depressants; • At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine); • At least 2,500 but less than 3,750 units of Flunitrazepam. • At least 40 KG but less than 60 KG of ***Converted Drug Weight***.	18
• At least 20 G but less than 40 G of Heroin; • At least 100 G but less than 200 G of Cocaine; • At least 5.6 G but less than 11.2 G of Cocaine Base; • At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual); • At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice"; • At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual); • At least 200 MG but less than 400 MG of LSD; • At least 8 G but less than 16 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide); • At least 2 G but less than 4 G of a Fentanyl Analogue; • At least 20 KG but less than 40 KG of Marihuana; • At least 5 KG but less than 8 KG of Hashish;	16

• At least 500 G but less than 800 G of Hashish Oil; • At least 20,000 but less than 40,000 units of Ketamine; • At least 20,000 but less than 40,000 units of Schedule I or II Depressants; • At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine); • At least 1,250 but less than 2,500 units of Flunitrazepam. • At least 20 KG but less than 40 KG of *Converted Drug Weight* (formerly marijuana).	
• At least 10 G but less than 20 G of Heroin; • At least 50 G but less than 100 G of Cocaine; • At least 2.8 G but less than 5.6 G of Cocaine Base; • At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual); • At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice"; • At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual); • At least 100 MG but less than 200 MG of LSD; • At least 4 G but less than 8 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] Propanamide); • At least 1 G but less than 2 G of a Fentanyl Analogue; • At least 10 KG but less than 20 KG of Marihuana; • At least 2 KG but less than 5 KG of Hashish; • At least 200 G but less than 500 G of Hashish Oil; • At least 10,000 but less than 20,000 units of Ketamine; • At least 10,000 but less than 20,000 units of Schedule I or II Depressants; • At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine); • At least 625 but less than 1,250 units of Flunitrazepam. • At least 10 KG but less than 20 KG of ***Converted Drug Weight***.	14
• Less than 10 G of Heroin; • Less than 50 G of Cocaine; • Less than 2.8 G of Cocaine Base; • Less than 10 G of PCP, or less than 1 G of PCP (actual); • Less than 5 G of Methamphetamine, or less than 500 MG of Methamphetamine (actual), or less than 500 MG of "Ice"; • Less than 5 G of Amphetamine, or less than 500 MG of Amphetamine (actual); • Less than 100 MG of LSD; • Less than 4 G of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide); • Less than 1 G of a Fentanyl Analogue; • At least 5 KG but less than 10 KG of Marihuana; • At least 1 KG but less than 2 KG of Hashish; • At least 100 G but less than 200 G of Hashish Oil; • At least 5,000 but less than 10,000 units of Ketamine; • At least 5,000 but less than 10,000 units of Schedule I or II Depressants; • At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine);	12

• At least 312 but less than 625 units of Flunitrazepam; • 80,000 units or more of Schedule IV substances (except Flunitrazepam). • At least 5 KG but less than 10 KG of ***Converted Drug Weight***.	
• At least 2.5 KG but less than 5 KG of Marihuana; • At least 500 G but less than 1 KG of Hashish; • At least 50 G but less than 100 G of Hashish Oil; • At least 2,500 but less than 5,000 units of Ketamine; • At least 2,500 but less than 5,000 units of Schedule I or II Depressants; • At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine); • At least 156 but less than 312 units of Flunitrazepam; • At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam) • At least 2.5 KG but less than 5 KG of ***Converted Drug Weight***.	10
• At least 1 KG but less than 2.5 KG of Marihuana; • At least 200 G but less than 500 G of Hashish; • At least 20 G but less than 50 G of Hashish Oil; • At least 1,000 but less than 2,500 units of Ketamine; • At least 1,000 but less than 2,500 units of Schedule I or II Depressants; • At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine); • Less than 156 units of Flunitrazepam; • At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam); • 160,000 units or more of Schedule V substances. • At least 1 KG but less than 2.5 KG of ***Converted Drug Weight***.	8
• Less than 1 KG of Marihuana; • Less than 200 G of Hashish; • Less than 20 G of Hashish Oil; • Less than 1,000 units of Ketamine; • Less than 1,000 units of Schedule I or II Depressants; • Less than 1,000 units of Schedule III substances (except Ketamine); • Less than 16,000 units of Schedule IV substances (except Flunitrazepam); • Less than 160,000 units of Schedule V substances. • Less than 1 KG of ***Converted Drug Weight***.	6

Appendix B: Sample Forms for Applying for Sentence Reductions
B-1. Sample Ex-Parte Application for Appointment of Counsel[88]

UNITED STATES DISTRICT COURT
DISTRICT OF _____
_____ DIVISION
UNITED STATES OF AMERICA,

Plaintiff,_____ NO. CR_____
v.
Defendant._____ Ex Parte Application for Appointment of Counsel; Exhibits

Defendant hereby respectfully requests that this Court re-appoint his counsel under the Criminal Justice Act to assist him in preparing and filing a motion for reduction of sentence pursuant to 18 U.S.C.§ 3582(c).

This application is made pursuant to 18 U.S.C. § 3006A, and is based on the attached memorandum of points and authorities, declaration of counsel, and exhibits; the files and records of this case; and any such further information as shall be made available to the Court.

Respectfully submitted,

DATED: [Month] __, 20__ By_____

[88] Adapted from an example from Off. of Defender Servs., Sample Motions, Briefs, Petitions and Orders Relating to Retroactive Application of Crack Cocaine Guideline Amendment, *available at* https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/motion-for-appointment-of-counsel-in-crack-cocaine-resentencing.pdf (last visited Sep. 18, 2022).

Memorandum of Points and Authorities

_____ respectfully applies to this Court to appoint counsel for his proceeding under 18 U.S.C. § 3582(c). As set forth in the attached declaration, undersigned counsel was appointed to represent _____ in his criminal proceedings. He was convicted of _____ and sentenced by this Court to a term of _____ months' imprisonment. His case involved cocaine use. Based on a review of records and files in this case, as well as the law, counsel believes that _____ is likely eligible to file a motion for reduction of sentence, pursuant to 18 U.S.C. § 3582(c).

This Court should appoint counsel. The amendments to USSG § 1B1.10, effective March 3, 2008, now invite the presentation of new facts and arguments in the context of § 3582(c) proceedings. See Amendment 712 to Guidelines. Moreover, in United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007), the Ninth Circuit held that, when resentencing defendants pursuant to § 3582(c)(2), district courts must treat the Guidelines as advisory, as required by United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). In view of these changes to § 3582(c) proceedings, _____ will be greatly assisted by the appointment of counsel. In addition, appointment of counsel will allow for negotiation with the Government, facilitate factual and legal presentation to the Court, and promote the efficient use of judicial resources.

_____ is still indigent. See Exhibit A. As the Court is aware, the Administrative Office of the United States Courts has established a new representation type for appointment of counsel in these cases. See Exhibit B.

For the foregoing reasons, _____ respectfully submits that appointment of counsel, as set forth in the proposed order, is appropriate.

Respectfully submitted,

DATED: [Month] __, 20__ By_____

B-2. Sample Motion for Sentence Reduction: Crack Amendments[89]

[DEFENDANT'S NAME]

UNITED STATES DISTRICT COURT
*** DISTRICT OF ***
*** DIVISION
UNITED STATES OF AMERICA,
Plaintiff, NO. CR_____
v.
[DEFENDANT'S NAME],
Defendant.

NOTICE OF MOTION; MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)(2); MEMORANDUM OF POINTS AND AUTHORITIES

TO: UNITED STATES ATTORNEY ***, AND ASSISTANT UNITED STATES ATTORNEY [AUSA'S NAME]:

PLEASE TAKE NOTICE that on [DATE], at [TIME], defendant, [NAME], will bring on for hearing the following motion:

MOTION

Defendant, [NAME], hereby moves this Honorable Court for a reduction in the sentence imposed in this case on [DATE]. This motion is made pursuant to 18 U.S.C. § 3582(c)(2) and is based upon the attached memorandum of points and authorities, all files and records in this case, and such further argument and evidence as may be presented at the hearing on this motion.

Respectfully submitted,

DATED: [Month] __, 20__ By_____

[89] Adapted from an example from Office of Defender Servs., Sample Motions, Briefs, Petitions and Orders Relating to Retroactive Application of Crack Cocaine Guideline Amendment, *available at* https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/motion-for-reduction-of-sentence-pursuant-to-3582c2.pdf (last visited Sep. 18, 2022).

MEMORANDUM OF POINTS AND AUTHORITIES[90]

I. INTRODUCTION

On [DATE], [NAME] was sentenced for [TYPE OF CRACK OFFENSE, I.E., DISTRIBUTION, POSSESSION WITH INTENT TO DISTRIBUTE, CONSPIRACY, ETC.], to serve _____ months of imprisonment and _____ years of supervised release. The sentence was imposed under the sentencing Guidelines [QUALIFY THIS IF POST-BOOKER], with a base offense level computed under § 2D1.1 of the Guidelines for a crack cocaine quantity of [INSERT AMOUNT IN YOUR CASE] grams. That base offense level—under the Guidelines in effect at the time—was _____. Combined with other Guidelines factors, it produced a guideline range of _____. The sentence imposed by the Court was _____ months, [WHICH WAS THE LOW END/WHICH WAS THE HIGH END/WHICH WAS WITHIN THE RANGE/WHICH WAS BELOW THE RANGE/ABOVE THE RANGE, BASED ON A (DESCRIBE DEPARTURE IF ANY)].

Subsequent to [NAME]'s sentencing—on November 1, 2007—an amendment to § 2D1.1 of the Guidelines took effect, which, generally, reduces base offense levels for most quantities of crack cocaine by two levels and, specifically, reduces the base offense level for the [INSERT AMOUNT IN YOUR CASE] gram quantity of crack cocaine in this case by two levels, to _____. *See* U.S.S.G. § 2D1.1. This amendment was adopted in response to studies that raise grave doubts about the fairness and rationale of the 100-to-1 crack/powder ratio incorporated into the sentencing Guidelines. *See generally Kimbrough v. United States*, 552 U.S. 85, 97–100, 128 S. Ct. 558, 568–569, 169 L. Ed. 2d 481, 492–494 (2007) (discussing history of crack cocaine guideline and various Sentencing Commission reports); United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2007) [hereinafter *2007 Sentencing Commission Report*]; United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997); United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995). Yet the amendment is only a partial response, as the Sentencing Commission itself recognized. The Commission explained:

> The Commission, however, views the amendment only as a partial remedy to some of the problems associated with the 100-to-1 drug quantity ratio. It is neither a permanent nor a complete solution to these problems. Any comprehensive solution requires appropriate legislative action by Congress. It is the Commission's firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 drug quantity ratio.

2007 Sentencing Commission Report, supra, at 10.

Subsequent to the effective date of this amendment to § 2D1.1, the Sentencing Commission considered whether to make the amendment retroactive under the authority created by 18 U.S.C. § 3582(c)(2). It took that action on December 11, 2007, by including this amendment in the list of retroactive amendments in § 1B1.10 of the Guidelines. *See* 73 Fed. Reg. 217-01 (2008). Based on this retroactivity, the statutory authority underlying it, and the Supreme Court's intervening [ONLY IF ALL OF FOLLOWING CASES WERE AFTER YOUR SENTENCING] decisions in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007); *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007), and *Kimbrough v. United States*, 552 U.S. 85, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007), [NAME] brings this motion to reduce his sentence.

II. ARGUMENT

---

[90] If you are NOT applying to a motion for a crack cocaine offense, you should modify this portion based on the legal authorities relevant to your amendment. You can find some legal authority in the footnotes of this Chapter for the relevant amendment(s).

A. [NAME]'S OFFENSE LEVEL SHOULD BE REDUCED FROM _____ TO _____, AND THE GUIDELINE RANGE REDUCED FROM _____ TO _____ BASED ON THE AMENDMENT TO § 2D1.1.

18 U.S.C. § 3582(c)(2) provides as follows:

[I]n 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 . . . 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.

Section 1B1.10 is the Guidelines policy statement which implements 18 U.S.C. § 3582(c)(2). Subsection (c) of that policy statement lists amendments that are covered by the policy statement, and one of the amendments listed is amendment 711 to the Guidelines. Amendment 711 reduced the base offense level for crack cocaine offenses. *See* U.S.S.G., App. C, § 711. Application of this amendment to the crack cocaine guideline in the present case results in a decrease of the base offense level from _____ to _____, a decrease in the total offense level from _____ to _____, and a decrease in the resulting guideline range from _____ to _____. [THEN GO THROUGH CALCULATIONS TO ESTABLISH THIS AND ALSO DISCUSS ANY OTHER ISSUES THAT ARE RELEVANT SUCH AS MANDATORY MINIMUMS THAT LIMIT REDUCTION, WHETHER QUESTION OF SAFETY VALVE CAN BE REOPENED, ETC.].

B. THE COURT SHOULD REDUCE [NAME]'S SENTENCE [TO (INSERT SPECIFIC AMOUNT/A SIGNIFICANT AMOUNT/SOME OTHER CHARACTERIZATION YOU CHOOSE].

Based on the amendment to § 2D1.1, the Court should significantly reduce [NAME]'s sentence. It follows from the discussion in the preceding section that the amendment alone justifies a reduction of [INSERT DIFFERENCE BETWEEN GUIDELINE RANGES] months.

[INCLUDE THIS PARAGRAPH ONLY IF ORIGINAL SENTENCING TOOK PLACE PRE-*BOOKER*, BUT CONSIDER ADAPTING *HICKS* AND *KIMBROUGH* DISCUSSION EVEN IF SENTENCING TOOK PLACE POST-*BOOKER*.] The Court should not stop there, however. At the time of [NAME]'s original sentence, the Court was required to treat the Guidelines as mandatory, under the controlling law at that time. Since then, the Supreme Court has held the Guidelines in their mandatory form are unconstitutional and—through severing 18 U.S.C. § 3553(b)—made them "effectively advisory." *Booker*, 543 U.S. at 245. *Booker* and subsequent Supreme Court cases clarifying it—namely, *Rita v. United States*, *Gall v. United States*, and *Kimbrough v. United States*—have created a brave new world, in which the Guidelines are but one of several factors to be considered under § 3553(a). What the Supreme Court has described as the "overarching provision" in § 3553(a) is the requirement that courts "'impose a sentence sufficient, but not greater than necessary" to accomplish the goals of sentencing. *Kimbrough*, 552 U.S. at 101 (internal quotation marks omitted) (quoting 18 U.S.C. § 3553(a) (2012)).

Moreover, *Booker* and its progeny apply to the imposition of a new sentence under 18 U.S.C. § 3582(c)(2). The Ninth Circuit considered this question in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007) and held, put most succinctly, that "*Booker* applies to § 3582(c)(2) proceedings." *Hicks*, 472 F.3d at 1169. As the court explained in more depth:

Booker explicitly stated that, "as by now should be clear, [a] mandatory system is no longer an open choice." Although the Court acknowledged that Congress had intended to create a mandatory guideline system, *Booker* stressed that this was not an option: "[W]e repeat, given today's constitutional holding, [a mandatory Guideline regime] is not a choice that remains open. . . . [W]e

have concluded that today's holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law." The Court never qualified this statement, and never suggested, explicitly or implicitly, that the mandatory Guideline regime survived in any context.

In fact, the Court emphasized that the Guidelines could not be construed as mandatory in one context and advisory in another. When the government suggested, in *Booker*, that the Guidelines be considered advisory in certain, constitutionally-compelled cases, but mandatory in others, the Court quickly dismissed this notion, stating, "we do not see how it is possible to leave the Guidelines as binding in other cases. . . . [W]e believe that Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others, given the administrative complexities that such a system would create." In short, *Booker* expressly rejected the idea that the Guidelines might be advisory in certain contexts, but not in others, and Congress has done nothing to undermine this conclusion. Because the "mandatory system is no longer an open choice," district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2).

Hicks, 472 F.3d at 1170 (citations omitted).

Here, there are a number of non-Guidelines factors that justify a sentence below even the new guideline range. [EITHER HERE OR BELOW, INSERT ARGUMENT ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH*] [EITHER CONTINUATION OF LAST TEXT SENTENCE ABOVE OR NEW PARAGRAPH] One [OR ANOTHER?] consideration to which the Court should give particular weight is a consideration expressly recognized by the Supreme Court in *Kimbrough* as a ground for not following the Guidelines—the questionable provenance of the crack/powder ratio. As the Government itself acknowledged in *Kimbrough*, "the Guidelines 'are now advisory' and . . . , as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'" *Kimbrough*, 552 U.S. at 101 (quoting Brief for United States 16). While the government then tried to distinguish policy disagreement with the 100-to-1 crack/powder ratio from other policy disagreements, the Supreme Court squarely rejected that argument. *See Kimbrough*, 552 U.S. at 100–108.

Indeed, the Court suggested that policy disagreement in this area was even *more* defensible than in other areas. It noted that "in the ordinary case, the Commission's recommendation of a sentence will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives,'" *id.* at 109 (quoting *Rita*, 551 U.S. at 350), and so "closer review may be in order when the sentencing judge varies from the Guidelines, based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case," *id.* (quoting *Rita*, 551 U.S. at 351). The Court then explained that this was not the case with the crack cocaine Guidelines:

The crack cocaine Guidelines, however, present no occasion for elaborative discussion of this matter because those Guidelines do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of "empirical data and national experience." Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.*, sentences for crack cocaine offenses "greater than the necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, *even in a mine-run case*.

Id. at 109–10 (emphasis added) (citations omitted).

These concerns are only partially assuaged by the recent amendment reducing crack cocaine offense levels, moreover. This also was recognized by the Supreme Court in *Kimbrough*:

This modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. (Citation and footnote omitted.) Describing the amendment as "only . . . a partial remedy" for the problems generated by the crack/powder disparity, the Commission noted that "[a]ny comprehensive solution requires appropriate legislative action by Congress."

Id. at 100 (quoting 2007 Sentencing Commission Report, *supra*, at 10).

Kimbrough's rationale for varying from the crack Guidelines therefore remains even after the new guideline is applied. [CONSIDER APPLYING THIS *KIMBROUGH* ARGUMENT TO YOUR SPECIFIC CASE IN SOME WAY; FOR EXAMPLE, BY POINTING OUT WHAT YOUR SENTENCE WOULD HAVE BEEN IF IT WAS JUST POWDER]

[INSERT ANY ARGUMENT ABOUT ANY § 3553(a) FACTORS AND ABOUT *BOOKER/GALL/KIMBROUGH* NOT ALREADY INCLUDED ABOVE]

III. CONCLUSION

The Court should adjust [NAME]'s sentencing guideline range downward to _____. It should then [RECOMMEND SPECIFIC SENTENCE AND/OR MORE GENERAL URGING FOR LOWER SENTENCE, IF YOU DON'T WANT TO RECOMMEND A SPECIFIC SENTENCE].

Respectfully submitted,

DATED: MONTH DAY, YEAR By_____