UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In Re: USSG Amendment 782

Petitions for sentencing reduction based on the amendments to the Drug Quantity Table at USSG. § 2D1.1(c) made retroactive by the United States Sentencing Commission effective November 1, 2014.

Misc. No. 14-426 (ADC)

ADMINISTRATIVE DIRECTIVE

I. Introduction

On April 10, 2014, the United States Sentencing Commission ("USSC") approved by unanimous vote an amendment to the United States Sentencing Guidelines–Amendment 782– that would revise the offense levels found in the Drug Quantity Table in section 2D1.1. It is estimated that a significant number of federal drug trafficking defendants would qualify for a reduction in their sentences. The amendment is an effort by the USSC to address issues related to prison costs and capacity, balanced against a continued commitment to public safety.

Subsequently, on July 18, 2014, and pursuant to the authority conferred to the USSC by 28 U.S.C. § 994(u) regarding guideline amendments that may be considered for retroactive application, the Commission voted to make Amendment 782 retroactive effective November 1, 2014. In other words, the USSC voted to make the reduced offense levels under the Drug Quantity Table of USSG § 2D1.1 applicable in a retroactive fashion to individuals serving an imprisonment term and whose sentences were computed using the Drug Quantity Table.

Congress approved the USSC's recommendation on November 1, 2014.

The present directive is intended to set forth a plan under which the District of Puerto Rico

will handle the thousands of petitions that are expected to be filed by defendants pursuant to the retroactive amendment. While this directive intends to be as inclusive as possible, the Court also understands that the process of applying retroactive amendments to the sentencing guidelines is a fluid one that needs to be grounded on principles of flexibility and cooperation among the parties involved. Accordingly, this directive is intended as an outline of the guiding principles that will be followed in processing the reduction of sentence petitions. Nothing set forth in this directive is intended to confer individual rights to litigants, nor limit the discretion of judicial officers.

II. Relevant Statutory Provisions and Eligibility

It must be first noted that the fact that the USSC has made Amendment 782 retroactive does not make a sentencing reduction automatic. There are eligibility requirements that are discussed below. Moreover, even if a particular defendant is eligible, it still remains a decision committed to the sound discretion of the judicial officers whether to grant the requested reduction of sentence under the facts and circumstances of the individual cases and after taking into consideration the safety of the community and other relevant factors.[1] With that clarification, the Court discusses the relevant statutory provisions involved in the process.

Sentencing reductions are authorized by statute pursuant to 18 U.S.C. § 3582,

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

[1] The USPO remains responsible for providing the Court, in such exceptional cases, with relevant information and assessment without being limited by the parties' stipulations or arguments.

18 U.S.C. § 3582(c)(2). This is so because in accordance with Congress' directive, the USSC shall periodically review and revise the guidelines after consulting with all court dependencies, the Federal Public Defenders, the Department of Justice, among others, and suggest to Congress any changes to the guidelines that appear warranted. *See* 28 U.S.C. § 994(o).

On the other hand, Section 994(u) of Title 28, United States Code, specifically provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). To implement the mandate found in section 994(u) once a guideline range has been lowered, the USSC amends the policy statement found at USSG § 1B1.10. Said policy statement outlines the circumstances under which a person may be eligible for a sentencing reduction. In pertinent part, the policy statement, as amended, states:

> (a) Authority.—
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> (1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

USSG § 1B1.10(a)(1). In turn, any reduction that is not consistent with the policy statement is not authorized if "(A) none of the amendments listed in subsection (d) is applicable to the defendant; or (B) an amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2)(A) and (B). It must be noted, and the Court cannot stress this enough, that the proceedings for sentencing reduction under § 3582(c)(2) and the

USSC's policy statement "do not constitute a full re-sentencing of the defendant." USSG § 1B1.10(a)(3).

With respect to eligibility of a particular defendant to a sentencing reduction, and the extent of any such reduction, the Court

> shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

USSG § 1B1.10(b)(1). As outlined above, there are limitations to the Court's authority to reduce a term of imprisonment. For example, a Court cannot reduce a term of imprisonment to a term that is less than any applicable mandatory sentence or if the defendant is a career offender. Moreover, reductions in judgments under the new applicable guideline range should be consistent and mirror the ratio of the sentence originally imposed. USSG § 1B1.10(b)(2)(A).[2] Moreover, in no event can the reduced term of imprisonment be less than the term of imprisonment already served by the defendant.[3] USSG § 1B1.10(b)(2)(C). With respect to defendants who received a sentence below the applicable guideline range after the government certified to the Court through motion his or her substantial assistance, "a reduction comparably less than the amended guideline range determined

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[2] For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months (absent a mandatory minimum term).

[3] The USPO shall be the one certifying the terms of imprisonment served by the particular petitioner.

under subdivision (1) of this subsection may be appropriate." USSG § 1B1.10(b)(2)(B).[4]

The policy statement found at USSG § 1B1.10 is binding on the Court; therefore, proceedings under 18 U.S.C. § 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005). *See Dillon v. United States*, 560 U.S. 817 (2010). Judicial officers are thus precluded from entertaining arguments for a below-the-amended-guideline-range sentence in the context of § 3582(c)(2). That does not mean that the factors found in 18 U.S.C. § 3553(a) cannot be considered. The application notes to USSG § 1B1.10 in fact direct the Court to take the 3553(a) factors into consideration in determining whether a reduction is warranted and the extent of any such reduction. USSG § 1B1.10, note (1)(B)(I). Similarly, in determining whether a reduction is warranted, and if so, how much, the Court may consider the nature and seriousness of the danger to any person or the community if the term of imprisonment is reduced, also known as the public safety considerations. USSG § 1B1.10, note (1)(B)(ii). The Court may also take into account the defendant's post-sentencing conduct on deciding the extent of any reduction or the denial of the petition. USSG § 1B1.10, note (1)(B)(iii).

Further, as stated above, a defendant is not eligible for a sentencing reduction if such reduction is inconsistent with the policy statement found in USSG § 1B1.10. A reduction is inconsistent if, for instance, none of the amendments listed in the new Drug Quantity Table are applicable to the defendant. The simplest examples of this situation are that the defendant was sentenced to the statutory mandatory minimum term of imprisonment or that the defendant was sentenced under the career offender guideline. *See* USSG § 1B1.10, note (1)(A).

Finally, and importantly, the Sentencing Commission has issued a special instruction as

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[4] In this District, under the 2007 and 2010 retroactive amendments to the cocaine base guidelines, the practice was to reduce the term of imprisonment under the newly calculated range based on the same percentage of reduction to the originally calculated range that the defendant received for substantial assistance.

follows: "The Court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the Court's order is November 1, 2015, or later." USSG § 1B1.10(e)(1).

III. Standard Procedure

The Court expects a flood of *pro se* petitions to be filed by November 1, 2014 and thereafter. Even as this directive is drafted, many defendants have already started to file *pro se* petitions for reduction of sentence. The procedure for handling said petitions will be as follows:

A. *Pro se* petitions will be received by the Clerk of Court and filed in the same criminal case under a newly created category "Motion re: Amendment 782". All pleadings related to the issue of a sentencing reduction (filed *pro se* or by retained or pro-bono counsel) should also be filed selecting the "Motion re: Amendment 782" category.[5]

B. The "Motion re: Amendment 782" category must already be linked to the designated parties at the United States Attorney's Office (USAO), the United States Probation Office (USPO), and the Federal Public Defender's Office (FPD) for purposes of electronic notification.

C. The Court hereby appoints the FPD as default counsel to represent all defendants seeking a sentencing reductions under Amendment 782. This appointment is, of course, without prejudice to a defendant seeking to prosecute his or her reduction of sentence petition through pro-bono or retained counsel. Even if counsel is retained, counsel shall abide by the guidelines, the terms and the plan set forth in this directive.

D. The Clerk of Court will automatically refer any *pro se* or original motion for reduction to a United States Magistrate Judge[6] for initial screening. The initial screening entails a general

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[5] No motion or pleading is to be filed under a restriction level unless absolutely necessary and only if the pleading contains sensitive information.

[6] The Court designates Magistrate Judge Justo Arenas to conduct this initial screening. In the absence or unavailability of Magistrate Judge Arenas, the initial screening will be referred to Magistrate

determination as to eligibility. The Magistrate Judge, and the parties, will be provided access to pertinent documentation necessary to make the initial screening such as plea agreement, plea supplement and Pre-sentence Investigation Report ("PSR").

E. The Magistrate Judge will issue his or her initial determination using the form that has been prepared and approved by the Court. *See* Attachment I. The magistrate judge shall identify the case number, the name of the defendant, defendant's number within the indictment, and the docket number of the *pro se* (or otherwise) motion seeking a sentence reduction. The form contains two possible recommendations: (1) that "the defendant is not eligible for a reduction; or (2) that the defendant "may be eligible for a sentence reduction." If the magistrate judge determines that the defendant is not eligible, he or she should check the blank space next to "the defendant is not eligible for a sentence reduction . . ." and one or more of the applicable factors listed thereunder from (A) to (H) that make the defendant ineligible for relief, as per statute or guideline policy. If the magistrate judge determines that the defendant "may be eligible for a sentence reduction" he or she shall check the blank next to that option at the bottom of the form. The initial screening shall be completed within 30 days[7] of the filing of the *pro se* motion. The form shall be filed using the "Report and Recommendation re: Amendment 782" event and under the magistrate judge's electronic signature.

F. If the initial screening results in a determination that "the defendant is not eligible for a sentence reduction", the matter is formally submitted to the presiding District Court Judge. The FPD or defense counsel shall have 14 days to object to the magistrate judge's initial assessment of

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Judge Silvia Carreño-Coll.

[7] As with any other term or instruction contained in this directive, this term is not meant to confer any individual rights to a defendant or litigant.

ineligibility. After that 14 day period, and in the absence of an objection by defense counsel, the presiding District Court Judge may adopt the recommendation of the magistrate judge.

G. On the other hand, should the initial screening yield a determination that the defendant "may be eligible for a sentence reduction", the government, defense counsel and the USPO shall meet to discuss the case. The government and defense counsel shall attempt to reach a stipulation for a reduction of sentence to be filed with the Court. This meeting must occur within 14 days of the issuance of the Report and Recommendation. If a stipulation is not reached, the parties shall have 14 days thereafter to file simultaneous disagreement memoranda with the Court. Only in those cases where no stipulation is reached, the USPO must submit its position and assessment within the same 14-day period. The disagreement memoranda of the parties shall not exceed five (5) pages.

H. To comply with the above-outlined terms and time limits, the representatives from the government, the FPD and the USPO shall meet at least every two weeks to discuss the cases that may be eligible based on the initial screening. The FPD will file any stipulations reached.

I. The Court shall use Form AO 247 (Rev. 11/11), as approved by the US Courts Administrative Office to rule upon any request for reduction of sentence. See, Attachment II. Judicial officers are reminded that the orders issued pursuant to this directive, must have an effective date of November 1, 2015 or later. No defendant is eligible for release before that date.

IV. Effective Date

This Administrative Directive shall enter into effect immediately.

In San Juan, Puerto Rico, this 6th day of November, 2014.

AIDA M. DELGADO-COLON
Chief United States District Judge