

<b>New Limitations on Relief/New Aggravating Factors in 1B1.10</b>	
<b>OLD</b>	<b>NEW</b>
<p>“Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, <b>a reduction</b> in the defendant's term of imprisonment <b>is authorized</b> under 18 U.S.C. § 3582(c)(2).” 1B1.10(a)</p>	<p>“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 (c) below, the court <b>may reduce</b> the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).” 1B1.10(a)(1).</p>
<p>“In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court <b>should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect</b> at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.” 1B1.10(b).</p> <p>“In determining the amended guideline range under subsection (b), the court <b>shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.</b>” 1B1.10, Application Note 2.</p>	<p>“In determining whether, and to what extent, a reduction in the terms of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court <b>shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced.</b></p> <p>In making such determination, the court <b>shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.</b>” 1B1.10(b)(1). See also 1B1.10, Application Note 2 (same).</p>
<p>“<b>Eligibility . . . is triggered only</b> by an amendment listed in subsection (c) <b>that lowers the applicable guideline range.</b>” 1B1.10, Application Note 1.</p>	<p>“A reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore <b>is not authorized</b> under 18 U.S.C. § 3582(c)(2) <b>if . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant’s applicable guideline range.</b>”</p>

	<p>1B1.10(a)(2)(B).</p> <p>“a reduction in the defendant’s term of imprisonment is <b>not authorized [if]</b> an amendment listed in subsection (c) is applicable to the defendant but the amendment <b>does not have the effect of lowering the defendant’s applicable guideline range</b> because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).” 1B1.10, Application Note 1(A).</p>
<p><b>No Counterpart</b></p>	<p>“Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement <b>do not constitute a full resentencing</b> of the defendant.” 1B1.10(a)(3). [This is not quite correct – it is a resentencing, that is, a sentencing involving new facts not necessarily considered or even in existence at the first sentencing, but only to increase the sentence. The court may not go below the “minimum of the amended guideline range,” see 1B1.10(b)(2)(A), except to impose a “comparable” Commission-sanctioned departure, but “generally” not a comparable variance under 3553(a)/Booker, see 1B1.10(b)(2)(B), <u>but</u> is now explicitly invited to consider aggravating circumstances to deny any reduction or to sentence above the “minimum of the amended guideline range.” See 1B1.10, Application Note 1(B). This abrogates old caselaw saying this is not a re-sentencing.]</p>
<p><b>No Counterpart</b></p>	<p>“Except as provided in subdivision (B), the court <b>shall not</b> reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is <b>less than the minimum of the amended guideline range</b> determined under subdivision (1).” 1B1.10(b)(2)(A). See also 1B1.10, Application Note 3.</p>
<p><b>No Counterpart</b></p>	<p>(i) <u>In General</u>. Consistent with 18 U.S.C. § 3582(c)(2), the court <b>shall</b> consider the <b>factors set forth in 18 U.S.C. § 3553(a)</b> in determining: (I) <b>whether a reduction in the defendant’s term of imprisonment is warranted;</b> and (II) <b>the extent of such reduction, but only within the limits described in subsection (b).</b></p> <p>(ii) <u>Public Safety Consideration</u>. The court <b>shall</b> consider the <b>nature and seriousness of the danger to any person or the community that may be posed by a reduction</b> in the defendant’s term of imprisonment in determining: (I) <b>whether a reduction in the defendant’s term of imprisonment is warranted;</b> and (II) <b>the extent of such reduction, but only within the limits described in subsection (b).</b></p> <p>(iii) <u>Post-Sentencing Conduct</u>. The court <b>may</b> consider <b>post-sentencing conduct</b> of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) <b>whether a reduction in the defendant’s term of imprisonment is warranted;</b> and (II) <b>the extent of</b></p>

	<p><b>such reduction, but only within the limits described in subsection (b).</b> 1B1.10, Application Note 1(B).</p>
<p>“When the original sentence represented a downward departure, a <b>comparable reduction below the amended guideline range</b> may be appropriate.” 1B1.10, Application Note 3.</p>	<p>“If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a <b>reduction comparably less than the amended guideline range</b> determined under subdivision (1) may be appropriate.” 1B1.10(b)(2)(B).</p>
<p><b>No Counterpart</b></p>	<p>“However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and <i>United States v. Booker</i>, a <b>further reduction generally would not be appropriate.</b>” 1B1.10(b)(2)(B). (But see 1B1.10, Application Note 3, making no mention of this exception to its exception based on explicit disrespect of the statute and Supreme Court law.)  <b>[At the Crack Summits in January 2008, the Commission was questioned about the obvious import of this provision, and backed away from the plain language. We posted this at <a href="http://www.fd.org/odstb_CrackCocaine.htm">http://www.fd.org/odstb_CrackCocaine.htm</a>: “The amended guideline retroactivity policy statement, USSG §1B1.10, states at §1B1.10(b)(2)(B) that “if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and <i>United States v. Booker</i>, a further reduction generally would not be appropriate.” This appears to suggest that clients are not entitled to relief under the amendment if they received a non-guideline sentence under <i>Booker</i>. However, Sentencing Resource Counsel, as well as many Federal Defenders, report that at the Crack Summits in Charlotte and St. Louis, and at the Defender conference in Seattle, the Commission explained that §1B1.10(b)(2)(B) applies only if the original sentencing judge did not consider the guidelines at all. This acknowledgment is good news because there should be no instances in which judges ignored the guidelines. A sentencing judge must consider the guidelines, even if she then rejects them as unsound policy, and to do otherwise is reversible error under <i>Gall v. United States</i>, 128 S.Ct. 586, 596 (2007); <i>Kimbrough v. United States</i>, 128 S.Ct. 558, 564, 570 (2007); <i>Rita v. United States</i>, 127 S.Ct. 2456, 2465, 2468 (2007); <i>Booker</i>, 543 U.S. 220, 245-46 (2005). For comments relevant to this issue made at the St. Louis Crack Summit, view the <a href="#">Transcript of Portions of the Crack Amendment Retroactivity Summit</a>, <a href="http://www.fd.org/pdf_lib/Transcript%20of%201B1.10b2B%20Excerpt%20of%20Crack%20Retroactivity%20Summit.pdf">http://www.fd.org/pdf_lib/Transcript%20of%201B1.10b2B%20Excerpt%20of%20Crack%20Retroactivity%20Summit.pdf</a>.]</b></p>
<p>“Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. §</p>	<p>“Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.” 1B1.10(b)(2)(C).</p> <p>“In no case, however, shall the term of imprisonment be reduced below time served.” 1B1.10, comment. (n.3).</p>

<p>3582(c)(2). . . Subject to these limitations [including the comparable departure provision], the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.” 1B1.10, Application Note 3.</p>	
<p>Background commentary: “This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”</p>	<p>Background commentary: “This policy statement provides guidance <b>and limitations</b> for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: “If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”</p>