How to Deal With the Retroactive Drugs Minus Two Amendment

The Sentencing Commission voted to reduce by two levels the base offense levels for drug offenses subject to the Drug Quantity Table at USSG § 2D1.1(c), and to make parallel changes to the quantity tables at § 2D1.11 for chemical precursors. *See* Amendment 3, Reader Friendly Amendments to the Sentencing Guidelines (eff. Nov. 1, 2014).[1] The amendment will take effect November 1, 2014 unless disapproved by act of Congress.[2] This two-level reduction in the base offense level is one reason that the sentences of many (though not all) drug offenders would be lower if imposed today. *See* How a Sentence for a Drug Offender May Be Lower if Imposed Today.

On July 18, 2014, the Commission voted to make this "drugs minus two" amendment retroactive. Unless Congress disapproves it, beginning November 1, 2014, inmates who were already sentenced can ask courts to retroactively reduce their sentences, and courts can rule on those requests, but no one can be released before November 1, 2015.[3] The Commission estimates that 46,376 inmates could benefit from the retroactive amendment, and that the average reduction will be 25 months.[4]

Thus, your clemency client may be eligible for a retroactive sentence reduction under 18 U.S.C. § 3582(c)(2), which provides that when a defendant was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," "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."

The Office of the Pardon Attorney has a rule advising that a petition "should" not be filed if other forms of relief "are available" except in "exceptional circumstances."[5] As discussed below, some clemency clients will not be eligible for any relief under the retroactive guideline amendment. For most who are eligible, a two-level reduction in the base offense level (or less, if a mandatory minimum stands in the way) would not reduce the sentence to the same extent as

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[1] Available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140430_RF_Amendments.pdf.

[2] 28 U.S.C. § 994(p).

[3] Amendment to the Sentencing Guidelines (Preliminary), July 18, 2014, http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RFP_Amendments_Retroactivity.pdf.

[4] U.S. Sent'g Comm'n, Summary of Key Data Regarding Retroactive Application of the 2014 Drug Guidelines Amendment (July 25, 2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20140725-Drug-Retro-Analysis.pdf.

[5] Rule 1.3 states: "No petition for commutation of sentence…should be filed if other forms of judicial or administrative relief are available, except upon a showing of exceptional circumstances," http://www.justice.gov/pardon/clemency.htm#commutation.

commutation. Thus, a petition for commutation may be filed even though more limited relief may be available under the retroactive guideline amendment.

If one reason the sentence would be lower today is the drugs minus two amendment, you should discuss the effect of retroactivity in the section of the Memorandum analyzing whether the sentence would be lower today: whether retroactive relief is available at all, how much it would reduce the sentence if so, and whether the client will be released if retroactive relief is granted or instead will still be serving a lengthy sentence. *See* How a Sentence for a Drug Offender May Be Lower if Imposed Today, Part IV Examples.

You Must Coordinate with the Lawyer Handling Sentence Reduction, Seek Guidance As Needed.

In order to decide whether and how to address retroactivity in your Memorandum in support of sentence commutation, you must coordinate with the lawyer who has filed, will file, or should file a motion for sentence reduction, if you are not that lawyer. In most cases, this will be the Federal Public Defender office or a Criminal Justice Act panel attorney in the district where the client was sentenced. Unless you are a Federal Public Defender or Criminal Justice Act panel attorney in the district where the client was sentenced, you will not be appointed to file a § 3582(c)(2) motion, and should not attempt to do so if you are not experienced in this area of sentencing law.[6] Contact the Federal Public Defender office in the district where the client was sentenced to determine who is representing the inmate in filing a § 3582(c)(2) motion, and how best to proceed if the inmate is being required to proceed *pro se*.[7] If the district is the Southern District of Georgia or the Eastern District of Kentucky, where there is no Defender office, contact abaronevans@gmail.com or jennifer_coffin@fd.org.

Think Through the Strategy Based on the Circumstances.

Cases should fall into three categories: (1) the client is clearly ineligible for a sentence reduction; (2) the client is clearly eligible for a full or limited reduction; or (3) it is unclear whether a reduction is available.

Client is Ineligible. The client would be ineligible for retroactive relief under § 3582(c)(2) if the base offense level came from USSG § 2D1.1(a)(1)-(4) rather than the Drug Quantity Table at § 2D1.1(c), or the final offense level was based on the career offender guideline or other higher guideline range, or a mandatory minimum trumped the guideline range,

[6] *See* ABA Model Rule of Professional Responsibility 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[7] In most districts, the Federal Defender Office or Criminal Justice Act panel attorneys are appointed to represent inmates in § 3582(c)(2) proceedings, but in a few districts, inmates are required to proceed *pro se*.

or the client received a variance or departure greater than the reduction now authorized (unless it was a substantial assistance departure). *See* USSG § 1B1.10, cmt. (n.1(A)).

In consultation with the client and the lawyer who would file the § 3582(c)(2) motion if the client were eligible (if you are not that lawyer), you may decide to state in the petition that such a motion will not be filed because the client is not eligible. In many cases, in showing how the sentence would be lower today, you will first show that a mandatory minimum would be eliminated or reduced under current law or charging policies, or that the career offender guideline would not apply under current law, and then calculate the guideline range as it would be today, including the drugs minus two amendment. The mandatory minimum or career offender guideline that would not apply if the client were sentenced today will be the very reason that the client is not eligible for a sentence reduction based on the drugs minus two amendment. This would strengthen the petition for sentence commutation.

In some cases, however, the client may want a § 3582(c)(2) motion to be filed even though it appears that she is not eligible. If so, the motion could be filed and a ruling obtained as soon as possible, then you can include the (likely) denial in the commutation submission. Or a commutation petition could be filed first, then a § 3582(c)(2) motion if the commutation petition is denied. There is no time limit on when a § 3582(c)(2) motion may be filed.

Client is Clearly Eligible or May Be Eligible. In many cases, there will be no apparent reason that the district court would not grant a motion for sentence reduction under 18 U.S.C. § 3582(c)(2). In some cases, whether a motion would be granted will be uncertain.[8] Unless it is certain that a motion for sentence reduction would be denied, the motion should be filed. It is far more likely that inmates who are eligible for a sentence reduction under § 3582(c)(2)[9] will receive some relief than that they will receive executive clemency.

But a § 3582(c)(2) motion can be filed at any time, so the only question is timing and what to say in the petition. If the client will not be released for several years if a § 3582(c)(2) motion is granted, it may be difficult to get a ruling quickly because lawyers and courts will be prioritizing cases by release date. You can say that a motion will be filed or is pending but that the client will not be released for another X years if it is granted. If the client will be released within the next couple of years if the § 3582(c)(2) motion is granted, the motion and the commutation petition should both be filed at once.

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[8] For example, at the original sentencing, the PSR alleged that the conspiracy involved 5 kg. of methamphetamine (actual). The defendant objected, arguing that less than 1.5 kg. was involved. Rather than resolve the dispute precisely, the judge found that the quantity was "at least 1.5 kg.," all that was necessary at the time for the highest base offense level of 38. Under the drugs minus two amendment, the base offense level would drop to 36 (making a difference of 3 to 5 years) as long as the quantity of methamphetamine (actual) is less than 4.5 kg. Thus, the quantity will have to be negotiated with the prosecutor or litigated in court to determine whether the defendant is eligible for a sentence reduction.

[9] The Commission estimates that 46,290 inmates would be eligible, but analysis of the Commission's datasets indicates that about 20,000 inmates convicted of drug offenses have served 10 years or more.

The Commission estimates that the average reduction will be about 25 months. The reduction may be to the full extent of the amendment, or it may be cut short by a mandatory minimum. For example, a range of 262-327 months would be reduced to 210-262 months, but if the client is subject to a 20-year mandatory minimum, his sentence could be reduced to only 240 months.

If a § 3582(c)(2) motion is pending, inform OPA of the potential magnitude of the reduction, the new release date if granted, and the eventual ruling. Unless the client is clearly ineligible, do not suggest that there is any doubt that the motion will be granted, as such a statement could be used against the client in the § 3582(c)(2) proceeding.