FAQs: 2014 Amendments to USSG §1B1.10: Retroactivity of "Drugs Minus 2" (Amendment 782) and Sentence Reductions in Cases Involving Mandatory Minimums and Substantial Assistance[1]

In April and July 2014, the U.S. Sentencing Commission made two significant amendments to USSG §1B1.10 that affect motions for sentence reductions filed under 18 U.S.C. § 3582(c)(2). First, the Commission made amendment 782 retroactive. Amendment 782 changed the threshold amounts in the drug quantity tables at USSG §§2D1.1 and 2D1.11, so that many, but not all,[2] drug quantities will have a base offense level that is two levels lower than before the amendment. A special limiting instruction accompanies the amendment: "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." Second, the Commission clarified that the starting point for calculating a reduction comparable to the substantial assistance reduction given at the original sentencing (or Rule 35) is the bottom of the amended guideline range, not the mandatory minimum term of imprisonment. For those seeking relief under the FSA amendment (Amendment 750) or any retroactive amendment other than the 2014 amendment that changed the drug quantity table (Amendment 782), §1B1.10 contains no special instruction that the effective date of release must be Nov 1, 2015 or later.[3] This FAQ answers many of the questions that arise under §1B1.10. It is meant to be a general primer and to provide a "quick start." More extensive research will be required when confronting many of the issues discussed below.

I. GENERAL QUESTIONS

Must a motion be filed to obtain relief? Yes, the governing statute, 18 U.S.C. § 3582(c)(2), requires that a motion be filed seeking a reduction in sentence. The statute permits the motion to be filed by the court, BOP, or the prisoner. BOP does not file motions. Some courts will enter motions sua sponte. Most motions are filed by the prisoner pro se or through counsel. In cases where the defendant has waived the right to file a 3582 motion, counsel may wish to file a "Notice of Eligibility," which would alert the court that a sua sponte motion may be warranted. More information on waivers of 3582 motions is provided below.

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[2] The amendment to §1B1.10(c), which made "drugs minus 2" (Amendment 782) retroactive is available at this url: http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf.

[3] The amendment to §1B1.10 on mandatory minimums and substantial assistance is available at this url: http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20140718_RF_Amendment782.pdf.

When may an order granting a reduction under Amendment 782 be entered? An order may be entered and sent to the Bureau of Prisons on or after November 1, 2014. The special instruction in §1B1.10 states: "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." As the application note explains, courts can start entering orders on or after Nov 1, 2014. Courts will typically use AO form 247 when reducing sentences. The form has a line for "order date" and a line for "effective date." The "effective date" merely specifies the earliest date upon which the person can be released from the custody of the Bureau of Prisons.[4]

When the order is entered, BOP will recalculate the release date and start appropriate reentry planning with Probation. Prisoners nearing release dates will be able to move into community confinement (residential reentry or home detention). This process is similar to what the BOP did in 2008 when it asked for a 10 day delay in the effective date of resentencing. The BOP recalculated the sentence, but the additional time allowed BOP to satisfy certain statutory requirements. Now, the additional time will permit BOP and U.S. Probation to do more reentry planning.

II. ELIGIBILITY

Are inmates who are scheduled to be released before Nov. 1, 2015 eligible to seek a sentencing reduction? Nothing in the amendment prohibits a person who is scheduled to be released before Nov. 1, 2015 from seeking a sentence reduction. For some persons, there may be an advantage to having the sentence reduced so that they can possibly spend more time in a halfway house or home detention than they otherwise might. To avoid confusion and to make sure that a sentence reduction for a person with a pre-reduction release date before November 1, 2015 does not inadvertently delay his or her release, the order should make clear that any earlier release date set irrespective of an Amendment 782 reduction shall control.

While BOP may make efforts to place the person in community confinement earlier than it might otherwise, you may also consider asking for a judicial recommendation for placement in community corrections or home confinement. 18 U.S.C. §§ 3621(b) and 3624(c). *See Rodriguez v. Smith*, 541 F.3d 1180, 1183 (9th Cir. 2008) (rejecting BOP regulation limiting community confinement to the last ten percent of the sentence and instead authorizing placement for the full six-twelve month period).

Are "career offenders" eligible to seek relief? Maybe. Defendants sentenced under the drug guideline range rather than the career offender range (because the drug guideline range is higher) should seek relief because the guideline range upon which they were sentenced has

[4] In some cases, a defendant's pre-reduction release date may be earlier than November 1, 2015. To avoid confusion and to ensure that BOP does not hold a person in custody longer than the pre-reduction sentence permitted, the order should make clear that any earlier release date set irrespective of an Amendment 782 reduction shall control.

been lowered. *See United States v. Jones*, 596 F.3d 273, 276 (5th Cir. 2010) (offense level under §2D1.1 was higher than career offender offense level; defense counsel erroneously agreed with the probation officer that Jones's sentence was not based on his §2D1.1 drug offense level, but no relief on plain error review).

Before 2011, courts were split on whether a person who was originally subject to the career offender guideline but who received a departure and was sentenced within the drug guideline range was entitled to a reduction in sentence. *Compare United States v. Flemming*, 617 F.3d 252, 272 (3d Cir. 2010) (career offender who received pre-2003 departure under §4A1.3 was eligible for sentence reduction); *United States v. Cardosa*, 606 F.3d 16, 18–22 (1st Cir. 2010); *United States v. McGee*, 553 F.3d 225, 229–30 (2d Cir. 2009), *with United States v. Pembrook*, 609 F.3d 381, 384 (6th Cir. 2010); *United States v. Darton*, 595 F.3d 1191, 1197 (10th Cir. 2010); *United States v. Blackmon*, 584 F.3d 1115, 1116–17 (8th Cir. 2009).

The Commission resolved the split by defining "applicable guideline range" as "the guidelines range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance." USSG App.C., amend. 759 (2011). As a result, courts have held that defendants who were subject to the career offender guideline but received a variance or departure are not eligible for a sentence reduction. *See United States v. Montanez*, 717 F.3d 287, 293 (2d Cir.) ("applicable guideline range" refers to range before departures for criminal history), *cert. denied*, *Brantley v. United States*, 134 S. Ct. 447 (2013); *United States v. Flemming*, 723 F.3d 407, 412 (3d Cir. 2013) (must look to applicable guideline range before any departure under §4A1.3); *United States v. Blakeney*, 540 F. App'x. 219, 220 (4th Cir. 2013) (amendment 759 abrogated prior authority that allowed a career offender to receive a reduction when the court had previously obtained a departure based on drug guideline); *United States v. Ramirez*, 541 F. App'x. 485, 486 (5th Cir. 2013) (*Freeman* does not alter holding in *United States v. Anderson*, 591 F.3d 789 (5th Cir. 2009) that retroactive amendments to drug guideline do not apply to defendants sentenced under career offender guideline); *United States v. Webb*, 2014 WL 3702443 (6th Cir. 2014) (career offender not eligible for sentence reduction even though judge rejected guideline and varied downward because the amendment did not change the applicable guideline range – §1B1.10(a)(2)); *United States v. Williams*, 694 F.3d 917, 918 (7th Cir. 2012) (career offender range not reduced by amendment therefore relief not available); *United States v. Harris*, 688 F.3d 950 (8th Cir. 2012) (defendant who received a departure from career offender guideline not eligible for reduction in sentence; *Freeman* did not change circuit precedent); *United States v. Charle*s, 749 F.3d 767 (9th Cir. 2014) (adhering to prior circuit precedent that defendants sentenced as career offenders are not eligible for relief even if court departed downward); *United States v. Pleasant*, 704 F.3d 808, 811 (9th Cir.) (even though defendant's sentence was "based on" §2D1.1, his sentence could not be reduced because the amendment did not change his applicable guideline range under career offender guideline), *cert. denied*, 134 S.Ct. 824 (2013); *United States v. Hodge*, 721 F.3d 1279, 1281 (10th Cir. 2013)

(neither amendment 750 nor 706 changed applicable career offender guideline range); *United States v. Lawson*, 686 F.3d 1317, 1320 (11th Cir. 2012) (*Freeman* did not change the holding in *Moore* that amendment did not change the applicable guideline range for career offenders), *cert. denied*, 133 S.Ct. 568 (2012); *United States v. Berry*, 618 F.3d 13, 19 (D.C. Cir. 2010) (reduction not authorized when amendment did not lower the applicable guideline range for career offender even though parties agreed that defendant should be sentenced within crack guidelines range rather than career offender range), *cert. denied*, 132 S.Ct. 1726 (2012).

Notwithstanding this case law, legal challenges can still be made. Some of those challenges are discussed later in this FAQ.

May a defendant who entered into an 11(c)(1)(C) agreement be eligible for relief under 18 U.S.C. § 3582? Yes. *Freeman v. United States*, 131 S.Ct. 2685, 2697-98 (2011) (Sotomayor, J., concurring in 4-1-4 decision) (defendant who enters into plea agreement recommending a particular sentence as a condition of the guilty plea may be eligible for relief where agreement specifies a guideline range or makes clear that the basis for the agreed term is the guideline sentencing range). Most courts, citing *Marks v. United States*, 430 U.S. 188 (1977) (where decision lacks a majority opinion, the narrowest concurring opinion is considered the Court's holding), have held that Justice Sotomayor's opinion in *Freeman* is controlling. *See United States v. Rivera-Martinez*, 665 F.3d 344, 345 (1st Cir. 2011), *cert. denied*, 133 S.Ct. 212 (2012); *United States v. Thompson*, 682 F.3d 285, 290 (3d Cir. 2012); *United States v. Brown*, 653 F.3d 337, 340 n.1 (4th Cir.), *cert. denied*, 653 F.3d 337 (2011); *United States v. Thompson*, 714 F.3d 946, 949 (6th Cir. 2013); *United States v. Scott*, 711 F.3d 784, 787 (7th Cir. 2013); *United States v. Johnson*, 697 F.3d 1190, 1191 (8th Cir. 2012), *cert. denied*, 133 S.Ct.2014 (2013); *United States v. Austin*, 676 F.3d 924, 927-28 (9th Cir. 2012); *United States v. Graham*, 704 F.3d 1275, 1278 (10th Cir. 2013); *United States v. Lawson*, 686 F.3d 1317, 1321 (11th Cir.), *cert. denied*, 133 S.Ct. 568 (2012). *But see United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013) (finding that *Marks* does not make Justice Sotomayor's opinion the controlling holding in *Freeman* because the plurality and concurring opinions do not share common reasoning; concluding that plurality opinion is more persuasive).

May a court reduce a sentence under 18 U.S.C. § 3582(c)(2) if the defendant waived the right to seek a reduction as part of a plea agreement? Yes, a court may sua sponte reduce a sentence. *See, e.g., United States v. St. James*, 2014 WL 1409995, *2 n.1 (9th Cir. 2014) (declining to address whether defendant waived his right to file a 3582 motion because court expressly invoked its sua sponte authority); *United States v. Malone*, 503 F. App'x. 499 (9th Cir. 2012) (where defendant filed motion for reduction of sentence, court's unexercised sua sponte authority cannot excuse violation of express terms of plea agreement; suggesting that defendant should frame filing as a "notice of eligibility" for sentence reduction rather than a motion); *United States v. Gouseau*, 2014 WL 1328348 (D. Kan. 2014) (finding that defendant waived his right to file 3582 motion, but granting reduction sua sponte); *United States v. Bailey*, 2013 WL 1828669, *8 (S.D.N.Y. 2013) (finding that court has power to sua sponte reduce sentence under

3582 even if defendant expressly waived right to file a motion). *But see United States v. Watson*, 2013 WL 6504393, *1 (S.D. N.Y. 2013) (enforcing waiver of right to file 3582 motion and declining to reduce sentence).

Does a plea agreement waiver of appeal and waiver of the right to collaterally attack a conviction or sentence include a waiver of the right to file a motion under §3582(c)(2)? No. *United States v. Lightfoot*, 626 F.3d 1092, 1094 (9th Cir. 2010); *United States v. Cooley*, 590 F.3d 293, 296-97 (5th Cir. 2009).

III. RDAP

How do I advise clients who may be eligible for a sentence reduction under 18 U.S.C. § 3621(e)(2) because they participated in the Residential Drug Abuse Program (RDAP)?

RDAP is a residential program that provides drug treatment to individuals who meet the diagnostic criteria for a substance use disorder and who volunteer for the program. The program has three phases: (1) at least 6-9 months of residential treatment (500 hours); (2) follow up care in the institution if the person completes the 500 hour program before being transitioned into community confinement; and (3) transitional drug abuse treatment in a halfway house or home detention for a minimum of one hour per month for a minimum of 120 days. Those qualified to participate are admitted into the program based on how close they are to release. Certain "non-violent" inmates may be eligible to receive up to one year off their terms of imprisonment for participating in RDAP. 18 U.S.C. § 3621(e)(2).

The length of your client's sentence may limit the amount of the RDAP reduction: (1) a sentence length of 30 months or less can be reduced no more than 6 months; (2) a sentence length of 31-36 months can be reduced no more than 9 months; and (3) a sentence length of 37 months or more can be reduced no more than 12 months. Because of these rules and BOP's limited treatment capacity, the average reduction in FY 2012 was 9.9 months. Dep't of Justice, *The Federal Bureau of Prisons Annual Report on Substance Abuse Treatment Programs Fiscal Year 2012* 9 (2012).

If the court reduces the term of imprisonment under 18 U.S.C. § 3582(c)(2), the BOP will recalculate the amount of a reduction a person can receive under 18 U.S.C. § 3621(e)(2). The policy statement explains:

> Any change in current offense sentence length as imposed by order of the Court will result in a recalculation of sentence computation and provisional incentive. For example, a 36-month sentence reduced to a 24-month sentence will result in no more than a 6-month early release.

Bureau of Prisons, *Program Statement 533*.

These rules have ramifications for advising clients about how a sentence reduction can affect their release dates. Here are two examples:

(1) Your client was sentenced to 37 months (the low end of offense level 21, CH I). A minus 2 reduction would lower the range to 30-37 months. With a sentence of 37 months and a RDAP reduction, the client could get up to a one year reduction, for a total sentence of 25 months. If the court reduced the sentence to 30 months, the client can only earn a maximum reduction of 6 months under RDAP rules, but the total sentence could be 24 months. Because BOP can delay an early conditional release date in the event the person needs additional time to complete RDAP and a shorter sentence may not give the person sufficient time, which option is better for the client can be a difficult judgment call.

(2) Your client finished phase I of RDAP and is ready to move into transitional treatment in January 2015 with an early conditional release date of May 1, 2015 and presumptive release date (counting full good conduct time) of March 1, 2016. If the client was sentenced to 70 months (low end of 70-87 months), the low end of the amended guideline range would be 57 months – a 13 month reduction. If the court gave the full 13 month reduction, the new presumptive release date would be March 15, 2015, but because the order is not effective until Nov. 1, 2015, the early conditional release date may remain at May 1, 2015 or it could change. How BOP will handle such a scenario remains an open question.

You may want to obtain Sentry data or form BP-A0761, which is the RDAP notice on whether an inmate is eligible for RDAP and early release, as well as information on the client's conditional release date. Bear in mind that you should be looking for clients who may be eligible for a RDAP reduction and file their motions sooner rather than later so that they can get the full benefit of the sentence reduction and the RDAP reduction. In addition, priority for RDAP is determined upon proximity to the presumptive release data (not proximity to the earliest potential release date). Individuals who may qualify for RDAP may have their priority status moved up if they receive a sentence reduction.

IV. APPOINTMENT OF COUNSEL

May the court appoint counsel under the Criminal Justice Act? Yes, the court has discretionary authority to appoint counsel and most districts throughout the country appoint Federal Defenders and CJA lawyers to handle 3582 motions. *See United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (the appointment of counsel rests in the discretion of the court – "apparent merits of the motion will no doubt be a significant factor in the exercise of that discretion"); *United States v. Robinson*, 542 F.3d 1045 (5th Cir. 2008) (court has discretion to appoint counsel in the interest of justice – citing to Judicial Council of the Fifth Circuit Plan for Representation on Appeal Under the Criminal Justice Act, §3(B)); *United States v. Webb*, 565

F.3d 789 (11th Cir. 2009) (decision to appoint an attorney is left to the discretion of the district court); *United States v. Perry*, 2007 WL 2209253 (E.D. Wis. 2007) (court has discretion to appoint counsel under CJA even when not mandated by statute); *Schlussel v. United States*, 2014 WL 1875928 (S.D.N.Y. 2014) (while no statutory right to counsel exists, the provision of counsel in 3582 cases lies within discretion of court). *But see United States v. Foster*, 706 F.3d 887 (7th Cir. 2013) (a 3582(c)(2) motion is not part of a criminal prosecution or a collateral attack; the Criminal Justice Act, 18 U.S.C. § 3006A, does not supply the necessary permission to pay lawyers), *cert. denied*, 134 S.Ct. 249 (2013). Defenders in the Seventh Circuit filed an amicus petition in *Foster*. The petition argued that appointment of counsel fell under the ancillary provisions of the CJA. *Foster's* holding that the CJA does not authorize appointment of counsel in any sentence reduction proceedings under 3582(c) is at odds with the nationwide practice in connection with resentencing under the 2007 and 2010 crack guideline amendments.

Note: The Administrative Office of the U.S. Courts' guidelines for administering the CJA do not prohibit the appointment of counsel in 3582 proceedings, suggesting that the court has discretion to appoint counsel. The guidelines treatment of the appointment of "standby" counsel also offers a basis for the expenditure of CJA funds to help the courts process 3582 motions. Although the Criminal Justice Act does not expressly authorize the appointment of "standby counsel," the judiciary guidelines recognize the court's inherent authority to appoint such counsel, *see* 5 U.S.C. § 3109, and permits the use of CJA funds for such appointments. These appointments are not for the purpose of providing representation to the defendant, but to protect the "integrity and continuity of the court proceedings." *Guide To Judiciary Policies And Procedures, Volume VII, Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes* §220.55; *Guide to Judiciary Policy, Vol. 14, Procurement*, Ch. 5.

Is a 3582 motion considered an "ancillary matter" under the Criminal Justice Act, which would require continued representation following the initial appointment of counsel? Some circuits have said no. *See, e.g., United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (the filing of a motion under 18 U.S.C. § 3582 is not a matter "ancillary" to the original sentencing proceeding, which would entitle the defendant to appointment of counsel under 18 U.S.C. § 3006A(c)); *United States v. Whitebird*, 55 F.3d 1007, 1010 (5th Cir. 1995) (post-conviction motion to reduce sentence in light of amendment to sentencing guideline not an ancillary matter); *United States v. Hereford*, 385 F. App'x. 366, 368 (5th Cir. 2010) (follows *Whitebird*); *United States v. Foster*, 706 F.3d 887,888 (7th Cir.) (CJA provides no authority to appoint counsel for 3582 proceeding), *cert. denied*, 134 S.Ct. 249 (2013); *United States v. Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (3582 is not ancillary, therefore no right to appointed counsel); *United States v. Webb*, 565 F.3d 789, 792 (11th Cir. 2009) (3582 motion is not an ancillary matter, which encompasses solely those proceedings connected to the original criminal action).

Does the Due Process Clause or the Sixth Amendment require appointment of counsel in a 3582 proceeding where the court must make new factual findings?

Courts have not definitively ruled on this issue, but strong arguments exist that the Due Process Clause demands the appointment of counsel in a 3582 proceeding conducted under the post-2011 version of §1B1.10 because the court must consider facts not before it at the time of the original sentencing.[5] In every case, a court must "consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining (I) whether such a reduction is warranted; and (II) the extent of such reduction . . ." USSG §1B1.10 comment. n. (B)(ii). The court may also consider post-sentencing conduct and in some cases may be required to make new factual findings about drug quantity. *See United States v. Robinson*, 542 F.3d 1045, 1052 (5th Cir. 2008) (suggesting, without deciding, that appointment of counsel may be required in 3582 proceedings where the court has to determine if a reduction will present a risk to public safety); *United States v. Mosley*, 2012 WL 2679442*1 (D. Kan. 2012) (suggesting that counsel may be required if the court decides an evidentiary hearing is necessary).

In cases with contested facts, the argument for a due process right to counsel is even stronger. *See Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973) (due process right to counsel in probation revocation proceeding is to be determined on case-by-case basis; counsel should be provided where there is colorable claim defendant did not commit the violation, substantial reasons might mitigate or justify the violation and make revocation inappropriate, and "reasons are complex or otherwise difficult to develop or present"); *Lassiter v. Dep't of Social Services of Durham County, N.C.*, 452 U.S. 18, 32 (1981) (adopting *Scarpelli's* case-by-case approach to deciding whether counsel should be appointed in termination of parental rights proceedings; relevant considerations include the litigant's interest in the outcome of the proceedings; the government's interest in a correct decision; the weakness of the government's pecuniary interest in providing funds for the appointment of counsel; the complexity of the proceeding; and the incapacity of the individual – due to lack of education and difficulties of dealing with life). *Cf. Golberg v. Kelly*, 397 U.S. 254, 268-29 (1970) ("fundamental requisite of due process of law is the opportunity to be heard," which "must be tailored to the capacities and circumstances of those who are to be heard").

Also unresolved is whether the Sixth Amendment requires the appointment of counsel in a 3582 proceeding. While some cases have rejected arguments that the Sixth Amendment requires the appointment of counsel in a 3582 proceeding, none have directly addressed the issue where the court must address public safety issues or analyzed the issue under *Mempa v. Rhay*,

[5] Before the 2011 amendments to §1B1.10, some courts held that a defendant had no constitutional right to counsel in a 3582 proceeding. *See United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (because relevant facts in 3582 proceeding were before the court at original sentencing, the defendant did not have a Sixth Amendment right to counsel).

389 U.S. 128 (1967).[6] In *Mempa*, the Court held that counsel must be appointed in a deferred sentencing/revocation of probation proceeding where the sentencing judge and prosecutor must furnish the parole board "with a recommendation as to the length of time that the person should serve, in addition to supplying it with various information about the circumstances of the crime and the character of the individual" and where the parole board "places considerable weight on these recommendations." *Id*. at 135. The Court found it obvious that " to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent." *Id*. The same can be said for counsel's role in marshaling the facts to support a sentence reduction in a 3582 proceeding and to show that no public safety concerns warrant denial of a full reduction in sentence.

The Court also noted how "certain legal rights [particularly the right to appeal] may be lost if not exercised" after a revocation sentence is imposed in a case where the defendant originally pled guilty but had no right to appeal. *Id*. The Court noted that the "incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as de minimis." *Id*. While not precisely on point, similar reasoning applies to 3582 proceedings. A defendant has the right to appeal a denial of a 3582 reduction; such appeals are not discretionary. The frequency of improper denials of a reduction in sentence and appellate reversals is not so small that the risk of error in a 3582 proceeding can be considered de minimis. [7] That is particularly so in a case where a defendant might be eligible for immediate release from prison.[8]

PROCEDURAL ISSUES

Is a defendant entitled to a hearing or the opportunity to be heard? Maybe. If the question is one of whether the amendment lowered the defendant's sentence, the defendant may be entitled to a hearing, *United States v. Byfield*, 391 F.3d 277, 281 (D.C. Cir. 2004), but where the court denies the motion as a matter of discretion, no hearing is required. *United States. v. Styer*, 573 F.3d 151, 152 (3d Cir. 2009). If the court relies upon new information in deciding a

[6] *See United States v. Richardson*, 2014 WL 1410169, *1 (9th Cir. 2014) (Sixth Amendment right to counsel does not extend beyond defendant's first appeal); *United States v. Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (citing cases from multiple circuits that found no Sixth Amendment right to counsel in proceedings under 3582(c)).

[7] *See, e.g., United States v. Davison*, 2014 WL 3732915 (7th Cir. 2014) (court erroneously applied relevant conduct rules in deciding the amount of drugs for which defendant should be held responsible); *United States v. Garrett*, 2014 WL 3387144 (6th Cir. 2014) (in case involving 11(c)(1)(C) plea, district court erred in finding that reduction in sentence would be inconsistent with applicable policy statements);

[8] *See United States v. Irvin*, 2014 WL 2219168, *3 (6th Cir. 2014) (remanding for expedited consideration where district court used wrong drug quantity in deciding if defendant was eligible for reduction in sentence).

motion, the government and defendant are entitled to notice and an opportunity to respond in a hearing or in writing. *United States v. Jules*, 595 F.3d 1239 (11th Cir. 2010); *United States v. Neal*, 611 F.3d 399, 401-02 (7th Cir. 2010) (defendant entitled under §6A1.3 to opportunity to contest post-sentence facts about his prison conduct); *United States v. Foster*, 575 F.3d 861 (8th Cir. 2009) (defendant is entitled to access material upon which court will base its decision and opportunity to respond to prejudicial information); *United States v. Larry*, 632 F.3d 933, 937 (5th Cir. 2011) (if court "chooses to consider a presentence report addendum or any other matter outside the record, it shall give the parties notice and an opportunity to respond").

Does *Booker v. United States*, 543 U.S. 220 (2005) make §1B1.10 advisory? No. *Dillon v. United States*, 560 U.S. 817 (2010).

May a court make new factual findings in a 3582 proceeding? Maybe. A court is bound by prior rulings, but where it cannot determine the amended guideline range without additional fact-finding, it should do so. *United States v. Wyche*, 741 F.3d 1284, 1293 (D.C. Cir. 2014) (court can make additional fact-finding on drug quantity if it cannot determine amended guideline range without doing so, but it is bound by prior rulings); *United States v. Battle*, 706 F.3d 1313, 1320 (10th Cir. 2013) (supplemental drug quantity findings made in 3582 proceeding were unsupported by record of original sentencing; court double counted certain quantities in the conspiracy); *United States v. Guyton*, 550 F. App'x. 796, 799 (11th Cir. 2013) (original finding that case involved in excess of 1.5 kg was not specific enough to determine if defendant qualified for reduction in sentence where defendant objected to portions of presentence report setting forth drug quantity); *United States v. Hamilton*, 715 F.3d 328, 339-41 (11th Cir. 2013) (where the court originally found that the quantity of drugs was 1.5 kg or more, the court was required to determine amount of drugs; in so doing, the court may not consider evidence or materials that were not before it at original sentencing); *United States v. Davison*, 2014 WL 3732915, *2-3 (7th Cir. 2014) (remanding for court to correctly determine amount of drugs defendant should be held responsible for and rejecting district court's decision to count all drugs in the conspiracy) . Courts do not agree on who bears the burden of showing drug quantity. *Compare United States v. Benson*, 715 F.3d 705, 708 (8th Cir. 2013) (defendant bears burden of showing that the guideline range had been lowered and should have produced evidence that he was responsible for less than 3000 kgs of marijuana equivalent) *with United States v. Sprague*, 135 F.3d 1301, 1307 (9th Cir. 1998) (finding that once defendant shows that retroactive amendment is "applicable," the burden shifts to the government to show the weight of the controlled substance).

Courts have not adopted clear rules on when a defendant's failure to object to the drug quantity set forth in the original presentence report or to object at a sentencing hearing forecloses the court from revisiting drug quantity in a 3582 proceeding. *Compare United States v. Valentine*, 694 F.3d 665, 670 (6th Cir. 2012) ("if the record does not reflect a specific quantity finding but rather a finding or a defendant's admission that the defendant was responsible for 'at least' or 'more than' a certain amount, then the modification court must make supplemental findings based on the available record"), *petition for cert. filed*, 83 U.S.L.W. 3088 (U.S. July 11,

2014) (No. 13A1192, 14-42) ; *United States v. Irvin*, 2014 WL 2219168, *3 (6th Cir. 2014) (defendant's failure to object to drug quantity set forth in PSR did not bind defendant where he stipulated to lesser quantity in plea agreement); *United States v. Mitchell*, 828 F. Supp. 2d 576, 582 (E.D.N.Y. 2011) (finding that evidentiary hearing was necessary to determine drug quantity because defendant at original sentencing withdrew objection to drug quantity finding in PSR because it would not impact his base offense level) *with United States v. Davis*, 587 F.3d 1300, 1304 (11th Cir. 2009) (district court did not make impermissible fact finding by adopting unobjected to statement in presentence report that the offense involved 4.5 kg of cocaine base although court originally sentenced defendant on basis of more than 1.5 kg of cocaine base); *United States v. Wingo*, 429 F. App'x. 549, 550 (6th Cir. 2011) (defendant who waived right to have court calculate drug quantity at original sentencing is not entitled to new hearing to determine drug quantity for purpose of determining eligibility for sentence reduction).

Courts that rely on a defendant's failure to object to a specified amount in a presentence report ignore Rule 32 requirements and the consequences of objecting. Under Rule 32(f)(1) and (i)(3)(B), it would be pointless for a defendant to object to a drug quantity amount in a presentence report if the amount was immaterial to the calculation of the guideline range. An objection to an irrelevant matter would also unnecessarily expose a defendant to the loss of acceptance of responsibility points and an increase for obstruction of justice.

May the court correct other errors in a 3582 proceeding? Errors made at the time of the original sentencing may not be corrected. In *Dillon v. United States*, 560 U.S. 817, 831 (2010), the defendant sought to have his criminal-history category changed, but the Court found that aspect of the sentence was outside the scope of the proceeding authorized under 18 USC § 3582. The Court also declined to correct the *Booker* error that resulted from the district court treating the guidelines as mandatory at the original sentencing.

May a defendant file a second motion for relief based upon the same retroactive amendment? This is an area that may be ripe for litigation depending upon the law in your circuit. Courts do not agree on how motions for reconsideration or a second motion for relief based upon the same retroactive amendment should be treated. Nothing in 18 U.S.C. § 3582(c)(2) limits the number of motions a defendant may file. Nor does it preclude a motion for reconsideration. The Fourth Circuit nonetheless found that a district court lacks authority to reconsider a 3582 motion. *United States v. Goodwyn*, 596 F.3d 233, 236 (4th Cir. 2010) (finding no statute or rule that expressly permits a motion to reconsider and interpreting 18 U.S.C. § 3582 as a constraint on post judgment sentence modifications). The same panel interpreted *Goodywn* in light of *Henderson v. Shinseki*, 131 S.Ct. 1197 (2011), as erecting a jurisdictional bar to a court's ability to reconsider a motion under 18 U.S.C. § 3582. *United States v. Mann*, 435 Fed. Appx. 254, 255 (4th Cir. 2011). Other courts, in contrast, have found that the filing of a second motion or motion to reconsider is not jurisdictional. *See United States v. Trujillo*, 713 F.3d 1003, 1007 (9th Cir. 2013); *United States v. Weatherspoon*, 696 F.3d 416, 421 (3d Cir. 2012), *cert.*

denied, 133 S.Ct. 1301 (2013); *United States v. Beard*, 745 F.3d 288, 292 (7th Cir. 2014) (finding nothing in 3582 that meets the "stringent test" of a jurisdictional bar).

Even in cases where courts find no jurisdictional bar to a second motion, they have used other case processing rules to bar relief. The Seventh Circuit applies Rule 35's limitations on the power of a court to revise a sentence. *See, e.g.*, *United States v. Redd*, 630 F.3d 649, 651 (7th Cir. 2011) ("Once the district judge makes a decision, Rule 35 applies and curtails any further power of revision, unless the Commission again changes the Guidelines and makes that change, too, retroactive."); *United States v. Beard*, 745 F.3d 299, 292 (7th Cir. 2014) ("prisoners have only one bite at the apple per retroactive amendment to the sentencing guidelines"). In contrast, the Eleventh Circuit applied the law of the case doctrine to uphold the denial of a second motion, but noted the well known exception for "an intervening change in controlling law dictating a different result." *United States v. Burgess*, 510 F. App'x 888, 890 (11th Cir.), *cert. denied*, 134 S.Ct. 143 (2013). *See also United States v. Withrow*, 562 F. App'x 906, 907 (11th Cir. 2014).

This case law should not preclude relief from a second motion filed under the clarifying amendment to §1B1.10 on how proportional substantial assistance reductions should be calculated in mandatory minimum cases. The Commission resolved a circuit conflict by amending the policy statement at §1B1.10(c). A motion for reduction of sentence under amendment 750 is now in order because the amendment lowered the applicable guideline range, was made retroactive, and a reduction in sentence is now plainly consistent with the policy statement. 18 U.S.C. § 3582(c)(2).

CALCULATING NEW RANGE

If the defendant received a departure or variance at the original sentencing hearing for reasons other than substantial assistance, does the court calculate the amended guideline range using the departure or variance? Not according to the guidelines, but the provision is subject to legal challenge. Section 1B1.10, comment. n. 1(A) defines the "applicable guideline range" as "the guideline range that corresponds to the offense level and criminal history category determined pursuant to § 1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or variance". The Commission added this language in 2011. Except for substantial assistance cases, §1B1.10(b)(2) prohibits a reduction "to a term that is less than the minimum of the amended guideline range."

How does the new §1B1.10(c) work in mandatory minimum cases where there has been a reduction for substantial assistance? The Commission amended §1B1.10 to resolve a circuit conflict about whether a mandatory minimum sentence limited the court's authority to reduce a sentence where the defendant received a sentence below the mandatory minimum based upon substantial assistance. The new amendment at §1B1.10(c), makes clear that in substantial assistance cases, the mandatory minimum does not limit the permissible reduction. The Commission characterizes this change as a "clarification," which "ensures that defendants who

provide substantial assistance to the government in the investigation and prosecution of others have the opportunity to receive the full benefit of a reduction that accounts for assistance." USSG §1B1.10, Reason for Amendment. Defendants who were previously denied relief because the court believed it had limited authority to grant a reduction below the mandatory minimum sentence for substantial assistance should file another motion under amendment 750. As discussed above, such motions should not be barred.

Is a person who meets the criteria for safety-valve, but was sentenced before the safety-valve statute took effect (Sept. 23, 1994) entitled to relief from the mandatory minimum penalty in a 3582 proceeding? The circuits are split on this issue. The Eighth Circuit ruled in *United States v. Mihm*, 134 F.3d 1353, 1355-56 (8th Cir. 1998), that safety-valve relief should be available under the rule of lenity. This is consistent with the Congressional directive that the safety-valve provision "shall apply to all sentences imposed on or after [September 23, 1994]." Pub. L. 103-322, § 80001(c) (1994). Other courts have disagreed. *United States v. Stockdale*, 129 F.3d 1066, 1069 (9th Cir. 1997), *opinion amended on denial of reh'g*, 139 F.3d 767 (9th Cir. 1998); *United States v. Jackson*, 613 F.3d 1305, 1309 (11th Cir. 2010).

Is a person who would not have been subject to a mandatory minimum sentence because the indictment did not charge drug quantity (*Alleyne*) or who would have been subject to a lesser or no mandatory minimum because he or she was sentenced after the Fair Sentencing Act, but before *Dorsey v United States*, 132 S.Ct. 2321 (2012), entitled to relief from the mandatory minimum penalty in a 3582 proceeding? These issues are unresolved. In a case where a retroactive amendment opens the door to 3582 eligibility, it is worth raising and preserving the issue of whether the old mandatory minimum sentence can continue to apply.

In *Alleyne*, the court held that any fact, other than a prior conviction, that increases a mandatory minimum penalty is an element that must be submitted to a jury and proved beyond a reasonable doubt. *Alleyne v. United States*, 133 S.Ct. 2151(2013). In cases where the defendant was subject to a mandatory minimum sentence and the drug quantity was not set forth in the indictment and proven to the jury to admitted to by the defendant, consider arguing that the mandatory minimum should be revisited in conjunction with the guideline range. While some courts have rejected the argument, *see United States v. Cordell*, 2014 WL 2766627 (6th Cir. 2014) (finding that *Alleyne* argument falls outside limited scope of § 3582(c)(2)), the issue has not been decided in a published circuit decision.

In *Dorsey*, decided on June 21, 2012, the Supreme Court ruled that the more lenient penalties of the Fair Sentencing Act applied to defendants whose crimes preceded the effective date of the Act, but who were sentenced after that date (August 3, 2010). Some courts have rejected arguments that the FSA should apply in 3582 proceedings where the defendants were originally sentenced *before* August 3, 2010. *See United State v. Lucero*, 713 F.3d 1024, 1027

(10th Cir.), *cert. denied*, 134 S.Ct. 287 (2013); *United State v. Charles*, 749 F.3d 767, 770 (9th Cir. 2014); *United States v. Kelly*, 716 F.3d 180 (5th Cir. 2013). The Supreme Court has not yet addressed the issue, however, so it is worth preserving.

In cases where the defendant was sentenced *after* August 3, 2010, the applicability of the FSA should be raised either in a motion under 28 U.S.C. § 2255 or a 3582 motion. Courts have recognized that *Dorsey* retroactively applies to persons sentenced after the effective date of the FSA. *See United States v. Young*, 2014 WL 3766699, *5 (E.D. Mich. 2014) (granting relief under 28 U.S.C. § 2255 to defendant who had been sentenced after *Dorsey* but sentenced based upon pre-FSA mandatory minimum penalty). Even though one year has passed since the Court's decision in *Dorsey*, the government may waive the statute of limitations or other procedural defenses in a 2255 proceeding. *Vick v. United States*, 2014 WL 2808324 *1 (E.D.N.C. 2014) (denying motion to reconsider 3582 motion but granting 2255 relief for defendant sentenced after effective date of FSA and after government waived procedural defense of statute of limitations); *Hughlett v. United States*, 2013 WL 5728733, *3 (E.D. Tenn. 2013) (granting relief under *Dorsey* where government did not contest motion on basis of timeliness or retroactivity). Another option is to pursue relief in a 3582 motion. *See United States v. Bell*, 731 F.3d 552, 555 (6th Cir. 2013) (J. Cole, concurring) (court's earlier decision in *United States v. Hammond*, 712 F.3d 333 (6th Cir. 2013), which precluded retroactive application of FSA to defendants sentenced before the effective date of the Act, "does not foreclose all retroactive applications of the Fair Sentencing Act in § 3582(c)(2) proceedings"), *cert denied*, 134 S.Ct. 1922 (2014).

While §1B1.10(b)(1) does not permit a court to revisit guideline application decisions beyond substituting the amendment listed in §1B1.10(d) and §1B1.10(a)(3) does not permit a full resentencing, whether a court should substitute or remove a mandatory minimum term of imprisonment in light of statutory or constitutional changes is not within the scope of the Commission's authority to revise the guidelines under 28 U.S.C. § 994(u). Moreover, §5G1.1(b) and §5G1.2. comment. n. 3(A) merely refer to "a statutorily required minimum sentence." It does not specify which mandatory minimum. A court in a 3582 proceeding that applies *Dorsey* or *Alleyne* is still abiding by the express instruction in§§5G1.1 and 5G1.2 and is not revisiting previously found facts like prohibited in *Dillon*.

SUPERVISED RELEASE

May a retroactive change in the guideline range permit a court to reduce the term of supervised release when it was unable to give the defendant the full benefit of a sentence reduction? When considering a motion for early termination of supervised release, the court may consider the reduction it was unable to give, but it must have other grounds besides retroactivity to grant a reduction. *See* USSG §1B1.10. comment. n. 7. The Court in *United States v. Johnson*, 529 U.S. 53, 60 (2000), noted "that equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term" and that

the court "as it sees fit, may modify an individual's conditions of supervise release, §3583(e)(2)."

V. CHALLENGES TO LIMITATIONS ON RETROACTIVITY

Is it a violation of equal protection to except only substantial assistance defendants from the rule that prohibits a reduction below the low end of the amended guideline range? The Third Circuit said no. *United States v. Deamues*, 553 F. App'x. 258 (3d Cir. 2014).

Is the 2010 amendment to § 1B1.10 that limited the availability and extent of a reduction, a violation of the ex post facto clause? The Eleventh Circuit has held that it is not. Other courts have also rejected ex post facto challenges, but one district court has held that it is and the matter is pending in the Seventh Circuit. Consider preserving or raising the issue as appropriate.

Yes. *United States v. King*, 2013 WL 4008629 (N.D. Ill. 2013) (finding an ex post facto violation, court severed the amendment to § 1B1.10 that limited the extent of the reduction to the low end of the guideline range; ex post facto clause prohibits application of a law that eliminates or limits potential for freedom that had previously been available). In addition to reviewing favorable law, *King* contains a nice formulation describing § 1B1.10 as a "determinant" of the sentence, since it affects eligibility and extent of reduction. *Id*. at 2013 WL 4008629, at *19 ("[W]hen a 'determinant' of a defendant's 'prison term' is changed and the change produces an alteration in the prisoner's 'effective sentence,' the 'determinant' is considered retrospective and can be deemed an ex post facto law. Section 1B1.10(b) (2)(A) is exactly such a determinant." (quoting *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937)) (internal citations omitted)).

No. *United States v. Colon*, 707 F.3d 1255 (11th Cir. 2013); *United States. v. Adams*, 545 F. App'x. 659 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 1567 (2014); *United States v. Ivory*, 388 F. App'x. 567 (8th Cir. 2010) (no ex post facto violation to apply amendment 715 rather than 706 even though 706 would have resulted in lesser sentence); *United States v. Brown*, 401 F. App'x. 994, 995 (5th Cir. 2010); *United States v. St. James*, 2013 WL 1345152 (N.D. Cal. 2013), *aff'd*, __ F. App'x.___ (9th Cir. 2014), *petition for cert. filed*, (U.S. Aug. 15, 2014) (No. 14-5838); *United States v. Worjloh*, 2014 WL 1893199 (E.D.N.Y. 2014) (no colorable ex post fact claim because law does not act to retrospectively increase punishment).

Declined to decide. *United States v. Henry*, 553 F. App'x. 664 (9th Cir. 2014).

May a court set aside a decision not to make an amendment retroactive on the grounds that the decision was arbitrary and capricious? The Eighth Circuit says No. *United States v. Reeves*, 717 F.3d 647, 649 (8th Cir. 2013).

Do portions of § 1B1.10 violate separation of powers and notice and comment procedures? *Dillon* left open a separation of powers issue raised by Justice Stevens. 560 U.S..

at 826. n5. Many courts, however, have rejected separation of powers challenges as well as arguments that the Commission violated notice and comment procedures in promulgating certain changes to §1B1.10. *See, e.g., United States v. Taylor,* 743 F.3d 876 (D.C. Cir. 2014) (rejects notice and comment and separation of power argument); *United States v. Colon*, 707 F.3d 1255 (11th Cir. 2013) (no violation of separation of powers and no violation of notice and comment procedures); *United States v. McGee,* 615 F.3d 1287 (10th Cir. 2010) (rejecting separation of powers challenge to §1B1.10, provisions are binding as to eligibility and extent of reduction citing *United States v. Dryden*, 563 F.3d 1168, 1171 (10th Cir. 2009) (holding that "the 'lowering' requirement of § 3582(c)(2) is identical to the requirement in USSG §1B1.10(a)(2) that the amendment to the guidelines 'have the effect of lowering the defendant's applicable guideline range'")); *United States v. Davis*, 739 F.3d 1222 (9th Cir. 2014); *United States v. Fox*, 631 F.3d 1128 (9th Cir. 2011) (§1B1.10 does not violate separation of powers; only appropriate use of 3582 proceeding is to adjust sentence in light of amendment; court could not depart farther from amended range); *United States v. Harris*, 688 F.3d 950 (8th Cir. 2012) (no violation of separation of powers; policy statement in §1B1.10 not subject to notice and comment); *United States v. Anderson*, 686 F.3d 585 (8th Cir. 2012) (Commission acted within statutory authority by issuing policy statement; no violation of separation of powers), *cert. denied*, 133 S.Ct. 1275 (2013); *United States v. Horn*, 679 F.3d 397, 404-05 (6th Cir. 2012) (delegation of authority to determine retroactivity was not separation of powers violation; decision not to make amendment retroactive was not arbitrary and capricious), *cert. denied*, 133 S.Ct. 373 (2012); *United States v. Garcia*, 655 F.3d 426 (5th Cir. 2011) (Congress set forth sufficient authority for Commission to determine in what circumstances and by what amount sentenced should be reduced), *cert. denied*, 132 S.Ct. 1124 (2012); *United States v. Berberena*, 694 F.3d 514 (3d Cir. 2012) (rejecting separation of powers and notice and comment challenges), *cert. denied*, *Gayle v. United States*, 133 S.Ct. 1473 (2013); *United States v. Erksine*, 717 F.3d 131 (2d Cir. 2013) (rejecting separation of powers challenge to §1B1.10 policy statement limiting amount of reduction); *United States. v. Montanez*, 717 F.3d 287 (2d Cir. 2013) (rejecting separation of powers and notice and comment challenge to limitation on varying from amended guideline range to depart for criminal history); *United States v. Hogan*, 722 F.3d 55, 62 (1st Cir. 2013) (declines to address separation of powers and notice and comment argument as waived even though addressed in Defender amicus brief). The issues should be raised in circuits that remain undecided and preserved in circuits that have denied such challenges.

VI. APPEALS

If a case is pending appeal when an amendment takes effect, can the appellate court remand the case? Yes. *United States v. Jones*, 567 F.3d 712, 719 (D.C. Cir. 2009) (remand on direct appeal to allow court opportunity to apply retroactive amendment has benefit of administrative efficiency); *United States v. Connell*, 960 F.2d 191, 197 n.10 (1st Cir. 1992) (finding no need for defendant to take additional step of filing 3582 motion when remand permits judge to decide whether to modify the sentence in light of a retroactive amendment);

United States v. Jones, 531 F.3d 163, 182 (2d Cir. 2008) (retroactive change in guidelines during pendency of appeal warranted remand); *United States v. McClain*, 313 F. App'x. 552, 556 (3d Cir. 2009) (remand for court to consider retroactive change to crack cocaine guidelines); *United States v. Park*, 951 F.2d 634, 635 (5th Cir. 1992) (remanding in light of retroactive amendment); *United States v. Whiting*, 522 F.3d 845, 853 (8th Cir. 2008) (remand warranted for court to consider retroactive amendments to guidelines); *United States v. Wales*, 977 F.2d 1323, 1327-28 (9th Cir. 1992) (remanding but not vacating sentence in light of retroactive amendment). *But see United States v. Brewer*, 520 F.3d 367, 373 (4th Cir. 2008) (declining to remand following change in guidelines for crack cocaine because defendant could file 3582 motion); *United States v. Knox*, 573 F.3d 441, 451 (7th Cir. 2009) (same).

What jurisdiction does an appellate court have to review a 3582 motion? May a discretionary decision to reduce the sentence be reviewed for reasonableness? The circuits do not agree on the jurisdictional basis for an appeal from a 3582 motion. Some find that jurisdiction is based on 28 U.S.C. § 1291. *See United States v. Washington*, 2014 WL 3537842 (10th Cir. 2014); *United States v. Dunn*, 728 F.3d 1151, 1152 (9th Cir. 2013) (28 U.S.C. § 1291 provides the court with jurisdiction to review a sentence for reasonableness under § 3553(a)). Others find jurisdiction under 18 U.S.C § 3742(a). *See United States v. Bowers*, 615 F.3d 715 (6th Cir. 2010) (because § 3742 controlled court's jurisdiction, an argument that the sentence was longer than necessary to comply with § 3553(a) (*i.e.*, was unreasonable) did not state a cognizable "violation of law" under § 3742 because *Booker* has no force in § 3582 proceedings); *United States v. Greenwood*, 521 F. App'x. 544 (6th Cir. 2013) (citing *Bowers* as authorizing appellate court to review denial of motion for abuse of discretion because it may review sentences "greater than specified in the applicable guideline range").

Must the district court give an explanation for its decision? Yes, the court must address non-frivolous arguments. *United States v. Douglas*, 576 F.3d 1216, 1220 (11th Cir. 2009) (record must show that court considered 3553(a) factors when ruling on motion; discussion of the factors by the parties may be adequate); *United States v. Frazier*, 502 F. App'x. 863, 866 (11th Cir. 2012) (cursory statement that 3553(a) factors weighed strongly against reduction was insufficient); *United States v. Williams*, 557 F.3d 1254, 1257 (11th Cir. 2009) (remand required where record was silent on whether court considered 3553(a) factors in denying motion for reduction in sentence); *United States v. Trujillo*, 713 F.3d 1003, 1009-1010 (9th Cir. 2013) (court must give sufficient explanation where party gives nonfrivolous reasons for sentence); *United States v. Burrell*, 622 F.3d 961, 964 (8th Cir. 2010); *United States v. Marion*, 590 F.3d 475, 476 (7th Cir. 2009) (some minimal explanation needed; court relied only on form and did not show how it exercised its discretion); *United States v. Howard*, 644 F.3d 455, 460 (6th Cir. 2011) (remand for explanation of why court imposed sentence at middle of the amended guideline range); *United States v. Larry*, 632 F.3d 933, 937 (5th Cir. 2011) (court abused its discretion when it sua sponte made motion for reduction and then denied it without considering statutory factors); *United States v. Jenkins*, 483 F. App'x. 812, 812 (4th Cir. 2012)

(remand required where court offered no explanation for denial of motion); *United States v. McKenzie*, 318 F. App'x. 202, 204 (4th Cir. 2009) (remand required where court originally imposed a sentence at high end of guideline range, reduced it to high end of amended guidelines range, but offered no explanation for rejecting parties agreement that court reduce the sentence to low end of amended range); *United States v. Christie*, 736 F.3d 191, 196 (2d Cir. 2013) (court must give at least a minimal statement of reasons for denying motion to reduce sentence for eligible defendant; "[l]ike the initial sentencing decision, resolution of a sentence reduction motion is a discretionary decision regarding the defendant's fundamental liberty interests, which is subject to appellate review"). In *Christie*, the court remanded for resentencing because the record showed that the court originally sentenced the defendant to the low end of the range, resentenced to the low end for the first sentencing reduction, but there was "no indication in the record as to why an above-Guidelines sentence is now called for, or why a comparable within Guidelines sentence would not be inappropriate." *Id*. at 196-97. *See also United States v. Grant*, 703 F.3d 427, 428 (8th Cir. 2013) (remand required where court did not offer explanation for sentencing defendant to middle of amendment range when first amended sentencing was at bottom of range). *But see United States v. Smalls*, 720 F.3d 193, 197 (4th Cir. 2013) (use of form document stating that court considered statutory sentencing factors was sufficient explanation; following earlier decision in *United States v. Legree*, 205 F.3d 724, 728 (4th Cir. 2000) (absent contrary indication, court presumes district court considered 3553(a) factors and other pertinent matters)). *See generally* Paul Shelton, "*Reasons? We Don't Need No Stinkin' Reasons": Why United States District Courts Should be Required to Explain 18 U.S.C. § 3582(c)(2) Resentencing Decisions*, 87 Tulane L. Rev. 1311 (2013).

Does an appellate waiver in a plea agreement bar an appeal of a court's 3582 order? No, unless the waiver includes an express provision barring the filing of a 3582(c)(2) motion. *United States v. Woods*, 581 F.3d 531, 534 (7th Cir. 2009); *United States v. Chavez-Salais*, 337 F.3d 1170, 1172 (10th Cir. 2003); *United States v. Leniear*, 574 F.3d 668, 672 (9th Cir. 2009) (appeal not barred because defendant was not appealing his sentence but court's conclusion that it lacked jurisdiction to reduce sentence).