

Statutory and Policy Limits

18 U.S.C. § 3582(b) – Effect of Finality of Judgment

Notwithstanding the fact that a sentence to imprisonment can subsequently be:

- (1) modified pursuant to the provisions of subsection (c);
 - (2) corrected pursuant to Fed. R. Crim. P. 35 or § 3742; or
 - (3) appealed and modified, if outside the guideline range, pursuant to the provisions of § 3742;
- a judgment of conviction that includes such a sentence *constitutes a final judgment* for all other purposes.

18 U.S.C. § 3582(c) – Modification of Imprisonment.

The court may not modify a term of imprisonment once it has been imposed except that:

- (2) 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), ... 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.*

Commission Policy Excerpt. Amendment 782 reduced by two levels the offense levels assigned to the quantities that trigger the statutory mandatory minimum penalties in §2D1.1.... The Commission determined that public safety, among other factors, requires a limitation on retroactive application of Amendment 782.

USSG § 1B1.10 – Reduction in Imprisonment (Policy Statement)

(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.*

(d) Covered Amendments. Amendments covered by this policy statement are listed in Appendix C as follows: 126 ..., and 782 (*subject to subsection (e)(1)*).

(e) Special Instruction:

(1) The court shall not order a reduced term of imprisonment based on Amendment 782 *unless the effective date of the court's order is Nov. 1, 2015, or later.* [Nov 1 is a Sunday, so use Nov 2.]

Limits on Applying a Reduction

(a) Authority

(2) Exclusions. A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2) if:

- (A) None of the amendments listed in subsection (d) is applicable to the defendant [i.e., not a drug-related offense]; or
- (B) An amendment listed in subsection (d) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation. Consistent with subsection (b), proceedings under 18 U.S.C. 3582(c)(2) and this policy statement *do not constitute a full resentencing of the defendant.*

(b) Determination of Reduction in Term of Imprisonment:

(1) In General. In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, ... 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.

(2) Limitation and Prohibition on Extent of Reduction:

(A) Limitation. Except as provided [for substantial assistance], the court shall not reduce the defendant's term of imprisonment ... that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

Steps Used in the District

Step 1: Determine whether defendant is *statutorily eligible* for relief. Factors considered:

- **Release date.** After November 1, 2015 (§ 1B1.10(e)(1)). (Use Nov. 2, which is a Monday)
- **Not Career Offender. *But*** eligible if the § 2D1.1 offense level was higher than career offender offense level.
- **Not Armed Career Criminal.** 18 U.S.C. § 924(e), even if § 4B1.4(b)(3) applied for a departure.
- **Not Continuing Criminal Enterprise.** 21 U.S.C. § 848; § 2D1.5.
- **No Minimum Guideline Level.** E.g., §§ 2D1.1(a); 2D1.1(b)(3); 2D1.1(b)(13)(C); 2D.1.(d); 2D1.2(a)(3); 2D1.10(a).
- **Non-drug Counts *Not* Controlling.** The sentence as a result of grouping with more serious offenses.
- **No Mandatory Minimum Sentence. *But*** eligible if § 5K applied, see below.
- **Not Supervised Release.** The term of imprisonment now being served was *not* the result of a SR violation.
- **Not “Based on” Rule 11(c)(1)(C) Express Stipulation. *But*** eligible if agreed-to term was “based on” the Guidelines (*Freeman*, 131 S. Ct. 2685, 2695-98) (the concurrence is the controlling view).
- **Term of Imposed *Not* Below the New Low End.** § 1B1.10(b)(2)(A).
- **Drug Quantity Table Applied.** Directly or as a cross-reference (§ 2D1.1).
- **No Change in Low End.** E.g., § 2D1.1(a)(5) auto-departure (OL 38 & 32), acceptance of responsibility

If substantial assistance applied, additional calculations (if § 5K1.1 applied, § 1B1.10(b)(2)(B) exception).

A. If the original range was *above* a mandatory minimum sentence:

Step A1: (Term of imprisonment imposed) \square (Low end of Original range) = (Percentage of reduction)

Step A2: (Percentage of reduction) \square (Low end of Amended range) = (New *recommended* sentence)

B. If the original range was *at or below* a mandatory minimum sentence:

Step B1: (Term of imprisonment imposed) \square (Mandatory minimum) = (Percentage of reduction)

Step B2: (Percentage of reduction) \square (Low end of Amended range) = (New *recommended* sentence)

Step 2: Review BOP SENTRY disciplinary records for bad conduct. USAO assess as either none/minor, noteworthy, or disqualifying. BOP offense codes in the Sentry Disciplinary Report establish severity: 100-level are “greatest severity” (killing, rioting); 200-level are “high severity”; 300-level are “moderate severity”; and 400-level are “low severity” (interfering, profanity). Derogatory info may be challenged.

- If noteworthy, USAO will file a notice expressing concern and why but still agreeing the court may reduce the sentence.
- If “disqualifying,” USAO will argue under § 3553(a) that the sentence should not be reduced

Step 3: Apply 18 U.S.C. § 3553(a) sentencing factors. Court exercises its discretion within new sentencing range.

Anomaly - Eligible but only -1:
OL 38
OL 17 (acceptance)
OL 16 (acceptance)
Anomaly – Not eligible:
OL 32 (no reduction)

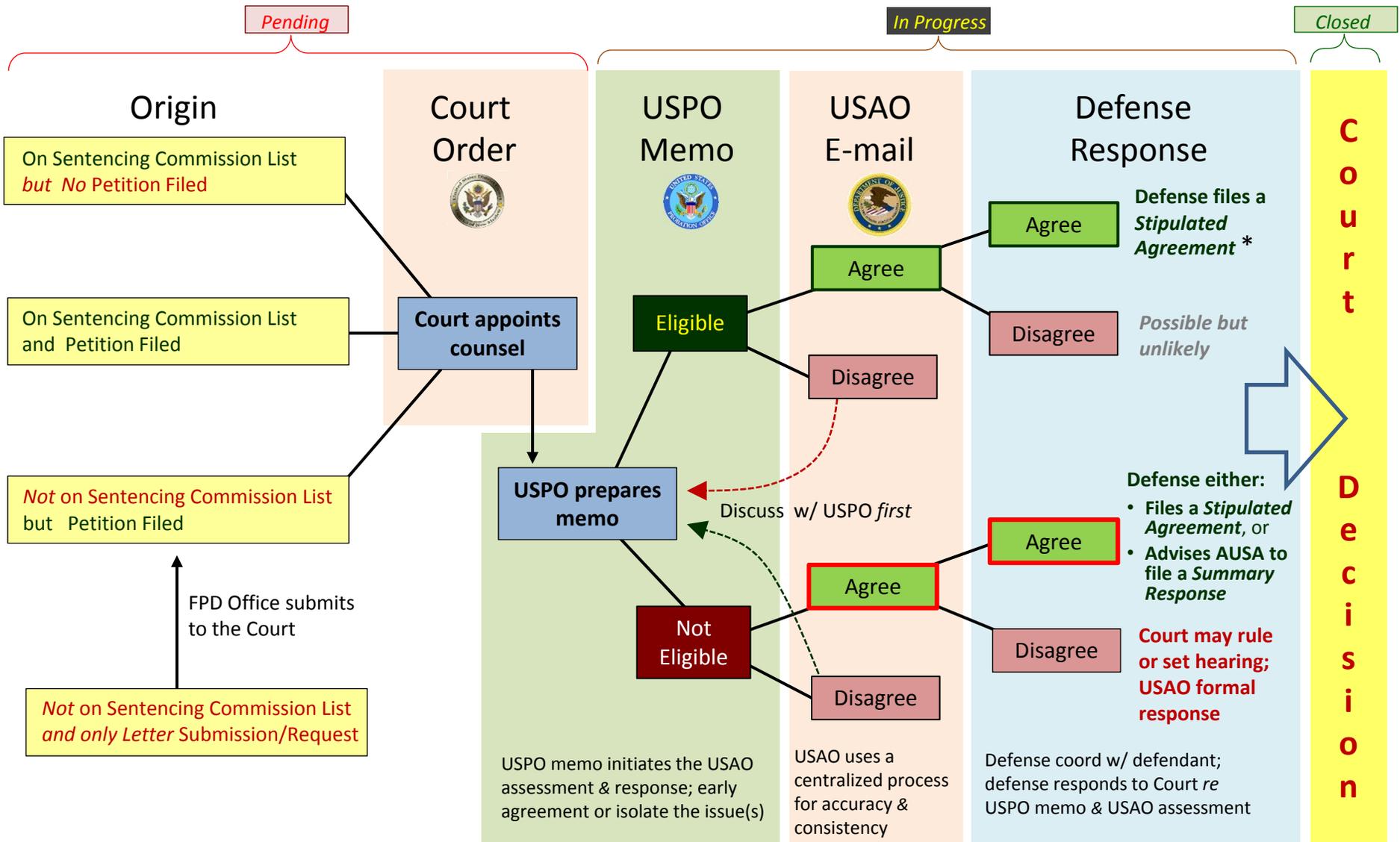
See BOP 5270.09
(Inmate Discipline
Program)

Proposed Order Language: AND NOW, this ____ day of _____, 2015, upon consideration of the defendant’s motion under 18 U.S.C. § 3582(c)(2) for a reduction of sentence pursuant to Amendment 782 to the Sentencing Guidelines, and taking into account the policy statement set forth at USSG § 1B1.10 and the sentencing factors set forth in 18 U.S.C. § 3553(a), it is ORDERED that the defendant’s sentence is reduced to a term of ____ months. All other terms of the judgment in this case shall remain unchanged. This order is effective on November 2, 2015.

If the amount of time the defendant has served as of November 2, 2015, exceeds the reduced sentence stated in this Order, the sentence is instead reduced to a sentence of time served as of November 2, 2015.

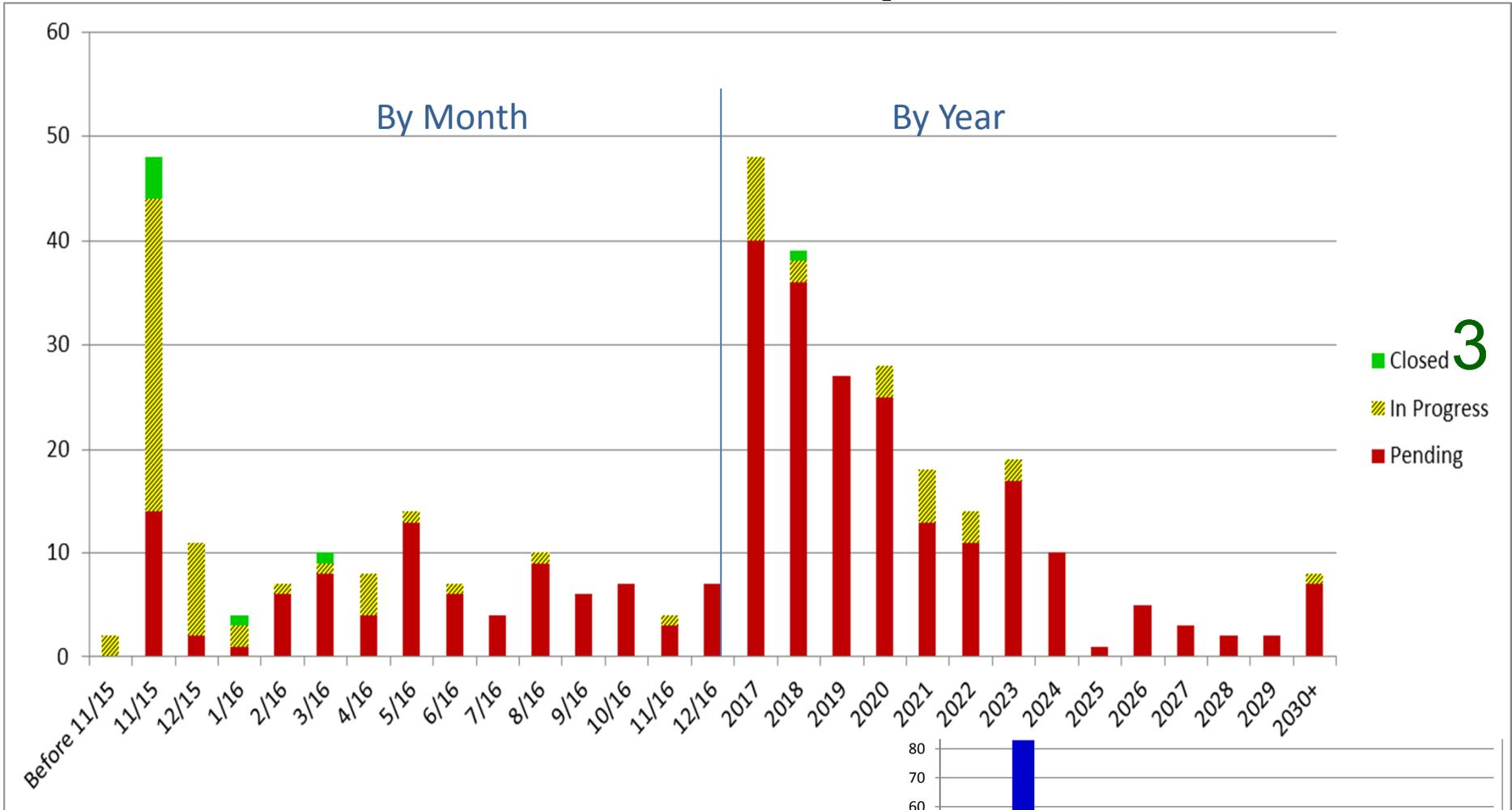
Flow Diagram for Processing Petitions

18 U.S.C. § 3582(c)(2) Petitions for Reduced Sentence



* Court applies USSG § 1.B1.10 sentencing policies & 18 USC § 3553 sentencing factors

District Status as of April 22, 2015

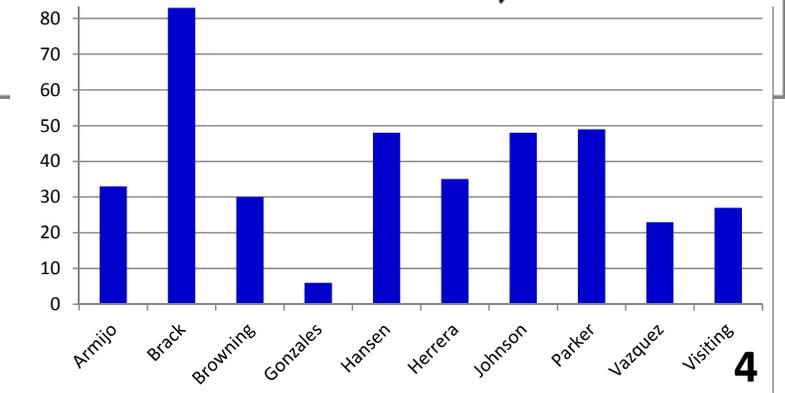


D.NM Status – 382 cases:

| | |
|-------------|-----|
| Pending | 298 |
| In Progress | 77 |
| Closed | 7 |

TBD – 8

- Begins when USPO memo is issued
- Ends with the court's decision



Assessment

- BOP will take no action on a defendant until it receives an amended sentence from a court; delay may impact community transition
- **60%** of defendants have been *eligible* for some reduction, so far
- Common *ineligibility* reasons:
 - Sentencing range not lowered by Amendment 782
 - Sentence was not based on Drug Quantity Table
 - Mandatory minimum

| As of April 22, 2015 | | | | |
|----------------------|--------------|------------------|-------------|------------|
| Period | Pending | In Progress | Closed | Total |
| Before 11/1 | 0 | 2 | 0 | 2 |
| Nov 15 | 14 | 30 | 4 | 48 |
| Dec 15 | 2 | 9 | 0 | 11 |
| Jan 16 | 1 | 2 | 1 | 4 |
| Feb 16 | 6 | 1 | 0 | 7 |
| Mar 16 | 8 | 1 | 1 | 10 |
| Apr 16 | 4 | 4 | 0 | 8 |
| May 16 | 13 | 1 | 0 | 14 |
| Jun 16 | 6 | 1 | 0 | 7 |
| Jul 16 | 4 | 0 | 0 | 4 |
| Aug 16 | 9 | 1 | 0 | 10 |
| Sept 16 | 6 | 0 | 0 | 6 |
| Oct 16 | 7 | 0 | 0 | 7 |
| Nov 16 | 3 | 1 | 0 | 4 |
| Dec 16 | 7 | 0 | 0 | 7 |
| 2017 | 40 | 8 | 0 | 48 |
| 2018 | 36 | 2 | 1 | 39 |
| 2019 | 27 | 0 | 0 | 27 |
| 2020 | 25 | 3 | 0 | 28 |
| 2021 | 13 | 5 | 0 | 18 |
| 2022 | 11 | 3 | 0 | 14 |
| 2023 | 17 | 2 | 0 | 19 |
| 2024 | 10 | 0 | 0 | 10 |
| 2025 | 1 | 0 | 0 | 1 |
| 2026 | 5 | 0 | 0 | 5 |
| 2027 | 3 | 0 | 0 | 3 |
| 2028 | 2 | 0 | 0 | 2 |
| 2029 | 2 | 0 | 0 | 2 |
| 2030 + | 8 | 1 | 0 | 9 |
| TBD | 8 | New & no PSR yet | | 8 |
| Total | 298 | 77 | 7 | 382 |
| Percent | 78.0% | 20.2% | 1.8% | |

End