

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	
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	:	
v.	:	<b>No. 2:97-0026</b>
	:	
	:	
<b>EDWARD RIVERA</b>	:	

**EDWARD RIVERA’S REPLY TO GOVERNMENT’S RESPONSE  
TO MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)**

In its response to Mr. Rivera’s motion for a reduction of his sentence, the government raises three points, each of which is struck through with this fatal flaw: the government sees distinctions where there are none, and overlooks them where there are. Its first argument, that Mr. Rivera’s sentence was not “based on” his pre-enhancement Guidelines calculation, is premised on an illusory firewall between the calculation of a defendant’s underlying Guidelines range and his career offender range. The government’s remaining substantive arguments – that the Sentencing Commission has the sole authority to set a mandatory range of a sentence reduction under § 3582(c), and that that the Court lacks the power to order Mr. Rivera’s immediate release prior to March 3, 2008 – arise from a failure to distinguish between the creation of *authority* and the conferral of *discretion*.<sup>1</sup>

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<sup>1</sup> Mr. Rivera requests to be present at any hearing because the government will presumably argue there, as it does here, (Response at 13 n.3), that his original sentence should remain unchanged based on the facts and circumstances that the government considers pertinent. As the government itself has conceded, where “the government [is] intending to present evidence suggesting that the defendant was not entitled to the full benefit of the available reduction, then the Court might have reason to order the defendant’s appearance in order that he or she could refute the government’s evidence.” See Letter from Assistant U.S. Attorney Jonathon Chapman to J. Martin Wahrer, U.S. Probation Officer (Jan. 18, 2008) at 5 n.3, redacted letter on file with Sentencing Resource Counsel to the Federal Public & Community Defenders.

**A. Because Mr. Rivera’s Bottom-of-the-Career Offender-Guidelines Sentence was Based On his Underlying, U.S.S.G. § 2D1.1 Guideline, he is Entitled to a Reduction in his Sentence Pursuant to § 3582(c).**

The government premises its argument that Mr. Rivera’s “sentence did not rest on the provision regarding crack cocaine in Section 2D1.1” on a falsely compartmentalized conception of how the sentence for a defendant subject to the career offender guideline is created. In the government’s view, the calculation of such a sentence starts with the pointless, *pro forma* exercise of calculating his § 2D1.1 Guidelines range, and then moves to the only meaningful step, the calculation of his career offender Guidelines range. (Response at 7) (“[T]he defendant’s sentence did not rest on the provision regarding crack cocaine . . . [t]he defendant was sentenced as a career offender.”).

In addition to overlooking the fact that sentencing courts, as a matter of course, consider the difference between the original and enhanced sentencing ranges when choosing a defendant’s ultimate sentence, *see, e.g.*, U.S.S.G. § 4A1.3(b)(3); *United States v. Shoupe*, 988 F.2d 440, 447 (3d Cir. 1993); *see generally* 18 U.S.C. § 3553(a), this argument ignores entirely the crucial facts of this case, in which the court actually did so.

Mr. Rivera’s § 2D1.1 sentencing range was a substantial consideration in, and partial basis for, the sentence imposed on him. At the initial sentencing, counsel for Mr. Rivera argued that the career offender guideline overrepresented the seriousness of Mr. Rivera’s offense and criminal history. Counsel specifically argued that this Court should consider the difference between Mr. Rivera’s otherwise applicable guideline sentence and his career offender-enhanced sentence in deciding the appropriate Guidelines range. After consideration of these arguments, and pursuant to its obligation under U.S.S.G. § 4A1.3, the district court sentenced Mr. Rivera at the bottom of the enhanced Guidelines range. Thus, Mr. Rivera’s sentence was “based on” both

the career offender guideline and the otherwise applicable Guidelines range under § 2D1.1, which has now been lowered. Under § 3582(c), Mr. Rivera is entitled to consideration of this even greater difference between his otherwise applicable range and his career offender range.

The cases on which the government relies to support the contention that “where . . . application of a pertinent retroactive amendment does not result in a different sentencing range, no reduction of the sentence may occur,” do not stand for that proposition. First, the cases it cites demonstrate only that sentence reductions are committed to the sentencing court’s discretion and *need not* occur, not that they *may not* occur. *See, e.g., United States v. Allison*, 63 F.3d 350, 352 (5th Cir. 1995) (district court did not abuse its discretion by denying § 3582(c) motion where original sentencing range was 360 months to life, but defendant received statutory maximum sentence of 240 months’ imprisonment, which statutory maximum remained near the bottom of the defendant’s revised Guidelines range). In fact, none of the cases prohibits the relief that Mr. Rivera seeks here.

Second, the cases cited by the government are distinguishable from this case. In each one, the amendment at issue either resulted in an identical underlying Guidelines range; there was a previously-known; substitute justification for the original sentence; or the amended guideline had played no role whatsoever in the creation of the defendant’s sentence.<sup>2</sup> Here, by contrast, the

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<sup>2</sup> *See United States v. Gonzalez-Balderas*, 105 F.3d 981, 984 (5th Cir. 1997) (defendant not entitled to reduction in sentence where both original and reduced guideline ranges mandated life imprisonment); *Allison*, 63 F.3d at 352-54 (5th Cir. 1995) (detailed above); *United States v. Townsend*, 92 F.3d 510, 513 (9th Cir. 1996) (defendant not entitled to relief under § 3582(c) where guideline definition of “offense statutory maximum” changed to exclude any recidivist enhancement, but statute on which defendant originally was sentenced itself dictated that its statutory maximum was not susceptible to enhancement); *United States v. Dorrough*, 84 F.3d 1309, 1311-12 (10th Cir. 1996) (no abuse of discretion to deny defendant’s motion for a reduction of sentence where the district court applied the amendment, but then found that the facts known at the time of the original sentence created an independent justification for the re-imposition of an identical sentence following the § 3582(c) re-sentencing); *United States v.*

subsequently reduced § 2D1.1 played a role in Mr. Rivera's original sentence (92-115 months, as opposed to 188-235 months) because the Court compared the § 2D1.1 range to the career offender range. Furthermore, there is no previously-known, but unrelieved-on, justification for the original sentence (for example, a concurrent sentence, another count unaffected by § 2D1.1, or an alternative factual basis for the original calculation, as in *Dorrough*). The government's argument that Mr. Rivera is not entitled to move for a reduction in his sentence merely because the Court sentenced him as a career offender therefore must fail.<sup>3</sup>

**B. Post-Booker, the Sentencing Commission Triggers a District Court's Authority to Re-Sentence Pursuant to § 3582(c), but No Longer Limits the District Court's Discretion to Impose a Revised Sentence that Is Sufficient But Not Greater Than Necessary to Satisfy the Purposes Set Forth in Section 3553(a)(2).**

1. *The Court may reduce a sentence below any floor recommended by the Sentencing Commission, where, as here, that reduction would best achieve the § 3553(a) goals of sentencing.*

As stated above, the government's claims that *Booker* "has no impact at all [on] resentencing under Section 3582(c)(2)," and that Mr. Rivera's motion therefore "suffers from an irreparable paradox," arise from the government's failure to appreciate the difference between authority and discretion. Under the mandatory Sentencing Guidelines, the Sentencing Commission previously both conferred re-sentencing authority on district courts *and* set the

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*Young*, 247 F.3d 1247, 1251-53 (D.C. Cir. 2001) (same); *United States v. Armstrong*, 347 F.3d 905, 908 (11th Cir. 2003) (defendant not sentenced under amended guideline (sentenced enhanced for being an organizer or leader, not for gun possession, which was the subject of the amendment)).

<sup>3</sup> Notably, in *Dorrough*, the district court initially denied the defendant's motion for a reduction of sentence without a hearing on whether the retroactive change in the guidelines justified a reduction of his sentence. *See* 84 F.3d at 1310. The defendant appealed, and the Tenth Circuit remanded the case to the district court with instructions to conduct just such a hearing. *See id.* at 1310-11.

bounds of re-sentencing. Now, because the Guidelines are advisory, the Commission can only confer authority. The limitations on discretion that it states in § 1B1.10 are purely advisory.

Section 3582(c)(2) itself illustrates this distinction between authority and discretion. Its language proceeds in stepwise fashion from the creation of authority to the bounds of discretion. First, the statute provides that the Sentencing Commission triggers the sentencing court's authority to re-sentence a defendant by making an amendment retroactive:

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 . . . the court may reduce the term of imprisonment . . .

§ 3582(c). It then moves to discuss the scope of the district court's discretion:

. . . after considering the factors set forth in § 3553(a) to the extent that they are applicable, if such a reduction is consistent with [the now-advisory] applicable policy statements issued by the Sentencing Commission.

*Id.* The sentencing court's discretion accordingly is bounded not by the Commission's policy statement, but by the goals of sentencing set forth in § 3553(a). *See id.*; *United States v. Hicks*, 472 F.3d 1167, 1170 (9th Cir. 2007) (holding that a district court, in re-sentencing a defendant pursuant to § 3582(c), "re-calculate[s] the defendant's sentencing range using the newly-reduced Guideline, and then determine[s] an appropriate sentence *in accordance with the § 3553(a) factors.*" (emphasis added)).

The district court must consider all relevant statutory criteria in existence when a motion under § 3582(c)(2) is filed, no matter whether it was in existence at the time of the original sentencing, or was reflected in a Sentencing Commission policy statement. *See United States v. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998); *United States v. Reynolds*, 111 F.3d 132 (Table) (6th Cir. 1997); *United States v. Williams*, 103 F.3d 57, 58-59 (8th Cir.1996); *Settembrino v. United*

*States*, 125 F.Supp.2d 511, 517 (S.D. Fla. 2000). While § 3553(b) essentially rendered § 3553(a) a nullity at any pre-*Booker* sentencing, § 3553(a) is now the sentencing law, as interpreted by the Supreme Court. Consideration of § 3553(a) includes the amended guideline and the reason for the amendment (*i.e.*, a partial remedy to the fact that crack guideline sentences are greater than necessary to satisfy sentencing purposes and create unwarranted disparity, made retroactive to best serve the statutory purposes of sentencing). See U.S.S.G., App. C, Amend. 706 (Nov. 1, 2007); U.S.S.C., *Report to Congress: Cocaine and Federal Sentencing Policy* at 10 (May 2007), available at [http://www.ussc.gov/r\\_congress/cocaine2007.pdf](http://www.ussc.gov/r_congress/cocaine2007.pdf).<sup>4</sup>

The government nonetheless argues that the advisory Guidelines remain mandatory in re-sentencing proceedings. (Response at 23-25). This is unpersuasive for the simple reason that the plain language of *Booker*'s remedial opinion precludes it. *Booker* makes clear that the Guidelines are advisory in all contexts, including re-sentencing proceedings, and not just in the imposition of an original sentence:

[W]e do not see how it is possible to leave the Guidelines as binding in other cases . . . [W]e believe that Congress would not have authorized a mandatory system in some cases, and a nonmandatory system in others, given the administrative complexities that such a system would create.

*United States v. Booker*, 543 U.S. 220, 263 (2005). The government's assertion to the contrary therefore is meritless. So, too, is the government's further claim that *Booker* is inapplicable to resentencing proceedings because "a sentencing reduction under Section 3582(c)(2) is not a full resentencing proceeding." (Response at 26). The Ninth Circuit rejected precisely this argument in *Hicks* because, whatever one calls the proceeding, a new sentence is being imposed:

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<sup>4</sup> See also U.S.S.C. Press Release, *U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses* (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/rel121107.htm>.

While § 3582(c)(2) proceedings do not constitute full resentencings, their purpose *is* to give defendants a new sentence. This resentencing, while limited in certain respects, still results in the judge calculating a new Guideline range, considering the § 3553(a) factors, and issuing a new sentence based on the Guidelines. The dichotomy drawn by the government, where full re-sentencings are performed under an advisory system while “reduction proceedings,” or “modifications,” rely on a mandatory Guideline system, is false . . . Mandatory guidelines no longer exist, in this context or any other.

472 F.3d at 1171 (emphasis in original). Moreover, as the Ninth Circuit’s holding in *Hicks* suggests, while re-sentencing proceedings may be of more circumspect scope than regular sentencing proceedings, they remain sentencing proceedings that implicate the defendant’s critical rights. *Cf. Mempa v. Ray*, 389 U.S. 128, 135 (1967) (re-sentencing upon probation revocation in which judge must recommend sentence to be served to parole board, is a critical stage to which constitutional protections attach). Re-sentencing proceedings must, at the least, result in a *legal* sentence, imposed pursuant to the advisory Guidelines. Despite any limitation in scope – for example, the defendant may not re-litigate the facts on which the original sentence was based, and the court may not impose a sentence greater than the original sentence – re-sentencing proceedings are now a type of *Booker* sentencing proceeding.

The government’s reliance on *United States v. McBride*, 283 F.3d 612 (3d Cir. 2002), is similarly unavailing. *McBride* involved a wholly distinguishable set of circumstances. There, the defendant raised an argument for a lower sentence that was “independent of and unrelated to any change in the Guidelines.” 283 F.3d at 616. Mr. McBride had moved for a reduction in his sentence based on a retroactive change in a Guideline on which his sentence was based. *See id.* At his § 3582(c) hearing, he made a second request that the district court re-sentence him “in accordance with *Apprendi v. New Jersey*.” *Id.* The district court ultimately denied that second request, because it was not “a motion . . . for a reduction of sentence based on a change in the

Guidelines.” *Id.* Here, however, the change to the modified guideline is at the center of Mr. Rivera’s motion under § 3582(c). Moreover, in *McBride*, the Third Circuit was dealing with a still-mandatory Guidelines system, and it therefore was possible for “the Guidelines in effect at the time of the original sentence” – *i.e.*, the mandatory Guidelines – to apply in § 3582 proceedings. *Id.* Now, however, the Guidelines are advisory in all contexts. *See Booker* at 263; *Hicks* at 1171. The original, mandatory Guidelines simply *cannot* apply.

Finally, the government’s attempted *reductio ad absurdum* that “[i]f the defendant is right [that § 1B1.10 is advisory], then a Court could simply reject Section 1B1.10 altogether, and make its own decision about whether an amendment is retroactive, to the point of deciding that it will not consider any amendment as retroactive . . .”, (Response at 15), misses the point. It, too, is grounded in the government’s failure to distinguish between the conferral of authority and the bounding of discretion. Section 1B1.10 no longer limits a court’s discretion to re-sentence a defendant. Separate and apart from the matter of discretion, the inclusion of an amendment in § 1B1.10 operates through § 3582(c) to create the authority – *i.e.*, subject matter jurisdiction – to re-sentence defendants. And while a court may refuse to reduce a defendant’s sentence based on case-specific facts and circumstances (discretion), it may not ignore its subject matter jurisdiction (authority). *See Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (“[S]ubject matter jurisdiction, because it involves the court’s power to hear a case, can never be forfeited or waived.”). *Cf. United States v. Ruiz*, 536 U.S. 622, 628 (2002).

In sum, the Sentencing Commission triggered this Court’s authority to re-sentence Mr. Rivera by making Amendments 706 and 711 retroactive. Now so authorized, this Court has the discretion to reduce Mr. Rivera’s sentence to achieve the goals of sentencing. And, for the

reasons set forth in Mr. Rivera's opening Memorandum of Law, ordering Mr. Rivera's immediate release will best satisfy the § 3553(a) factors in this case.

2. *The Court may order Mr. Rivera's release prior to March 3, 2008. His sentence has been much "greater than necessary," and his release would best serve the goals of sentencing.*

The government claims that ordering Mr. Rivera's immediate release would be "lawless action." (Response at 27). It cites no authority for this proposition. Instead, and inexplicably, it relies on cases that stand for the innocuous proposition that the Sentencing Commission has the authority to permit resentencing of defendants by making Guidelines retroactive. (Response at 28). But the instant that it decided to make Amendments 706 and 711 retroactive, the Sentencing Commission conferred on this Court the authority to reduce Mr. Rivera's sentence in the manner that will best achieve the goals of § 3553(a). Its further attempts to limit the Court's discretion – including its forward-dating of the amendments' retroactivity – are merely advisory under *Booker* and its progeny. *See* 543 U.S. at 263; *Hicks*, 472 F.3d at 1171.

Finally, as the Court may be aware, the Third Circuit recently decided *United States v. Wise*, No. 06-4926/4928 (3d Cir. Feb. 12, 2008) (Jordon, J.). In the opinion, the Third Circuit suggests that "[d]efendants sentenced for crack cocaine offenses . . . will . . . have to wait to seek the relief provided in § 3582(c)" until March 3, 2008. *Id.* at 25-26. This Court need not follow this statement in *Wise*. It is a non-binding *dictum*, made on an issue not raised by the parties and not briefed to the Third Circuit. Furthermore, it is incorrect because it fails to make the critical distinction between authority and discretion.

This Court may choose to treat Amendment 706 as retroactive immediately, if doing so will ensure that its re-sentencing of Mr. Rivera results in a sentence that is "sufficient, but not greater than necessary" to achieve the goals of sentencing. And, for the reasons set forth in Mr.

Rivera's opening Memorandum of Law, an order granting Mr. Rivera's immediate release best serves those goals.

**CONCLUSION**

For the reasons set forth above and in the opening Memorandum of Law, the Court should adjust Mr. Rivera's sentence downward to 51 months' imprisonment to account for the two-level reduction, correct the unfairness in the new marijuana equivalency tables, and maintain the benefit he received from the government's Rule 35(b) motion. The Court should also hold a hearing, at which Mr. Rivera is present, to consider whether to further reduce his sentence.

Respectfully submitted,



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Research and Writing Attorney

*Counsel for Mr. Edward Rivera*

**CERTIFICATE OF SERVICE**

I, Michael D. Raffaele, Research & Writing Attorney, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have served a copy of the attached Defendant's Reply to Government's Response to Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c), by first class mail, upon Assistant United States Attorney Robert A. Zauzmer, to his office located at 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106.

  
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MICHAEL D. RAFFAELE

DATE: February 14, 2008