CRACK RETROACTIVITY
QUESTIONS, ANSWERS, CASELAW, ARGUMENT OUTLINES
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Is a § 3582(c)(2) proceeding a full resentencing?

- Although revised § 1B1.10(a)(3) asserts that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant," this is not accurate because the policy statement directs courts that they "shall" consider § 3553(a) factors and public safety, and "may" consider post-sentence conduct, with the potential of increasing the sentence above the "minimum of the amended guideline range" or denying relief altogether, *see* U.S.S.G. § 1B1.10(b)(1)(A) & comment. (n.1(B)). Because there was no counterpart to these instructions in the prior version of § 1B1.10, much of the case law describing the procedures required under that prior version is now obsolete.

Does a defendant have a right to counsel under § 3582(c)(2)?

Yes. Whenever new facts have to be marshaled and new arguments made in aid of the court's sentencing decision, the Constitution requires the assistance of counsel. Whereas the former version of § 1B1.10 did not permit courts to make new factual determinations beyond those made at the initial sentencing and application of the amended guideline was fairly mechanical, the policy statement has been revised to require the presentation of new facts and arguments.[1] Revised § 1B1.10 provides that in determining whether a new sentence is warranted at all, and if so, whether it should be higher than the minimum of the amended guideline range, courts "shall consider" the § 3553(a) factors, "shall 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," and "may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment." U.S.S.G. § 1B1.10(b)(2)(A) & comment. (n.1(B)). Under this new rubric, the Sixth Amendment requires defense counsel to marshal the facts and evidence against any allegation that public safety, post-sentence conduct, or any § 3553(a) factor should result in a sentence higher than the bottom of the amended guideline range, and to marshal the facts and evidence of mitigating circumstances under § 3553(a) in support of a sentence no greater than the bottom of the amended guideline range.

- *Mempa v. Rhay*, 389 U.S. 128, 135 (1967) (Sixth Amendment guarantees right to counsel in a proceeding to revise sentence in which judge must recommend sentence to be served to parole board because "to the extent such recommendations are influential in determining the resulting sentence, the

[1] See Chart Comparing Revised 1B1.10 with Previous Version, http://www.fd.org/pdf_lib/comparison%20chart.pdf.

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"); *see also Glover v. United* States, 531 U.S. 198, 203 (2001) ("any amount of actual jail time has Sixth Amendment significance").

- *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (Due Process and Equal Protection clauses require that if an avenue for relief is provided by statute, the government may not "bolt the door to equal justice to indigent defendants").

- *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (holding pre-*Gideon* that absence of counsel to correct inaccurate information in sentencing violated due process); *see also United States v. Davenport*, 200 Fed. Appx. 378, 379 (5th Cir. 2006)(Table) (reversing and remanding new sentence imposed under § 3582(c)(2) where district court erroneously calculated new guideline range applicable to a *pro se* defendant).

- *Turnbow v. Estelle*, 510 F.2d 127, 129 (5th Cir. 1975) (Sixth Amendment requires counsel even where judge has no power to select sentence and only has discretion to credit defendant with time spent in custody because "[t]he possibility that this discretion might have been exercised in favor of [the defendant] was sufficient to create a situation at the sentencing stage in which his 'substantial rights' might have been affected").

- *United States v. DeMott*, __ F.3d __, 2008 WL 124188 (2d Cir. Jan. 15, 2008) ("[D]istrict court violated Day's right to be present at resentencing, his right to counsel at resentencing, and his right to notice that the court intended to impose an adverse non-Guidelines sentence.").

- Because of new Application Note 1(B), cases finding no constitutional right to counsel under old § 1B1.10 are obsolete. *See, e.g., United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (no right to counsel in § 3582(c)(2) proceeding where defendant did not allege ineffective assistance of counsel at or irregularities in original sentencing and pointed to no mitigating evidence that was not put before the sentencing court); *United States v. Whitebird*, 55 F.3 1007, 1011 (5th Cir. 1995) (no right to counsel in § 3582(c)(2) proceeding where no disputed fact issue required the marshalling of facts or witness examination); *see also Quesada-Mosquera v. United States*, 243 F.3d 685, 686 (2d Cir. 2001) (deciding under pre-revised § 1B1.10 that because "post-sentencing efforts at rehabilitation are irrelevant to whether the amendment would have lowered the sentencing range under which the defendant was originally sentenced. . . those efforts could not constitute grounds for asking a court to resentence a defendant under 18 U.S.C. § 3582(c)(2)"); *United States v. Ninemire*, 2000 WL 1389618, *1-2 (D. Kan. May 16, 2000) (same).

- Even if defense counsel were not constitutionally required, counsel should be appointed as a matter of discretion. *See, e.g.*, *Carrington v. United States*, 503 F.3d 888, 889 (9th Cir. 2007) (noting without comment that district court appointed counsel to handle § 3582(c)(2) motions); *United States v. Allison*, 63 F.3d 350, 351 (5th Cir. 1995) (same). Defense counsel screens out cases in which relief is not available, negotiates for agreed upon orders, sensibly litigates issues that need to be litigated, avoids appeals and habeas petitions through sound advice and generally ensures the efficiency and reliability of the process. Most districts appear to be appointing counsel to represent every § 3582(c)(2) movant or potentially eligible inmate. *See, e.g.*, *United States v. Womack*, 2008 WL 78782 (S.D. Ill. Jan. 7, 2008) (discussing local administrative order requiring that counsel be appointed in every § 3582(c)(2) case). Without defense counsel, there can be no joint recommendations, because the government cannot negotiate directly with an inmate. *See* ABA Model Rule of Professional Conduct 4.3 (a lawyer shall not give advice, other than the advice to secure counsel, to an unrepresented person whose interests are adverse); ABA Standards, The Prosecution Function, Std. 3-4.1(b) (prosecutor should not engage in plea discussions directly with an accused who is represented by defense counsel, except with defense counsel's approval).

- Prosecutors have "specific obligations to see that the defendant is accorded procedural justice," ABA Model Rule of Professional Conduct 3.8, comment 1, including to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel." ABA Model Rule of Professional Conduct 3.8(b).

Does a defendant have a right to a § 3582(c)(2) hearing?

Under the guidelines, a defendant has a right to a hearing whenever any factor important to the sentencing determination is "reasonably in dispute." Even under old § 1B1.10, if a court intended to rely upon facts not found at the initial sentencing in deciding a § 3582(c)(2) motion, the defendant was entitled to notice and a hearing. Now that revised § 1B1.10 advises that courts consider such facts in every case, there must also be a hearing at which the defendant can challenge any evidence presented by the government and present his or her own. The defendant may waive a hearing with advice of counsel if nothing is in dispute.

- U.S.S.G. § 6A1.3 ("[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor").

- *United States v. Byfield*, 391 F.3d 277, 280-81 (D.C. Cir. 2004) (court abused its discretion in failing to order evidentiary hearing where defendant's uncontroverted factual assertions in § 3582(c)(2) motion raised "enough of a smidgeon to put the matter 'reasonably in dispute'") (*citing* U.S.S.G. § 6A1.3).

- *United States v. Bergman*, 68 F.3d 471 (5th Cir. 1995) ("[w]here the amount of actual P2P in a mixture is in doubt, and where the amount of P2P was the primary factor in determining the defendant's sentence range, it is an abuse of discretion to deny a § 3582(c)(2) motion without further factual inquiry").

- *United States v. Mueller*, 168 F.3d 186, 189-90 (5th Cir. 1999) ("[g]iven the broad discretion the district court has in considering whether resentencing is appropriate [under § 3582(c)(2)] and given that Congress has dictated that the factors in § 3553(a) apply both to sentencing and resentencing," a district court must provide notice to a defendant and an opportunity to respond if it intends to consider information from sources outside the initial sentencing hearing); *United States v. Townsend*, 55 F.3d 168, 171-72 (5th Cir. 1995) (same).

- *United States v. DeMott*, __ F.3d __, 2008 WL 124188 (2d Cir. Jan. 15, 2008) ("[D]istrict court violated Day's right to be present at resentencing, his right to counsel at resentencing, and his right to notice that the court intended to impose an adverse non-Guidelines sentence").

- Courts routinely ordered hearings to assist in deciding § 3582(c)(2) motions for a new sentence even before § 1B1.10 was revised to invite the presentation of new facts and arguments not considered in the original sentencing to deny or reduce relief. *See, e.g., Quesada-Mosquera v. United States*, 243 F.3d 685, 686 (2d Cir. 2001); *United States v. Etherton*, 101 F.3d 80, 81 (9th Cir. 1996); *United States v. Allison*, 63 F.3d 350, 351 (5th Cir. 1995); *United States v. Mimms*, 43 F.3d 217, 219-20 (5th Cir. 1995); *United States v. Forty Estremera*, 498 F. Supp. 2d 468, 472 (D. P.R. 2007); *Settembrino v. United States*, 125 F. Supp. 2d 511, 517 (S.D. Fla. 2000). At least one has already done so in this context. *See United States v. Moore*, 2008 WL 161668, *2 (S.D. Ohio Jan. 15, 2008) (granting defendant's § 3582(c)(2) motion for resentencing under crack guideline and ordering a hearing to be scheduled following receipt of a new Presentence Investigation Report).

Does a defendant have the right to be present at a § 3582(c)(2) hearing?

A defendant's presence at a § 3582(c)(2) is not required under Fed. R. 43(b)(4), but this rule was written before § 1B1.10 was revised to invite presentation of new facts and arguments. The defendant may well have a constitutional right to be present if dispoitive facts are in dispute. The defendant may not wish to attend if his absence from prison would interfere with housing, work or programs, and can waive his presence.

- *United States v. DeMott*, __ F.3d __, 2008 WL 124188 (2d Cir. Jan. 15, 2008) ("[D]istrict court violated Day's right to be present at resentencing, his right to counsel at resentencing, and his right to notice that the court intended to impose an adverse non-Guidelines sentence").

- *United States v. Forty Estremera*, 498 F. Supp. 2d 468, 472 (D. P.R. 2007) (ordering defendant's transfer to jurisdiction for hearing on § 3582(c)(2) motion after determining defendant's eligibility and that *Booker* advisory regime will apply to the resentencing).

- The government has conceded that the defendant should be present if the government intends to argue that the new sentence should be increased above the bottom of the amended guideline range. *See* Letter from Assistant U.S. Attorney Jonathon Chapman to J. Martin Wahrer, U.S. Probation Officer (Jan. 18, 2008) at 5 n.3 ("If the government were 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"), redacted letter on file with Sentencing Resource Counsel to the Federal Public & Community Defenders.

Does the court have to order a new presentence report on a § 3582(c)(2) motion?

A district court has the discretion to order a new or revised presentence report when considering a § 3582(c)(2) motion. In light of the additional factfinding required under amended § 1B1.10 and the potential need for new calculations resulting from a lowered offense level (such as safety valve eligibility), it can be an abuse of discretion to fail to order a new or revised presentence sentence report if the defendant is thereby deprived of notice and a meaningful opportunity to be heard. The presentence report provides essential notice so the defendant has a meaningful opportunity to respond; Rule 32 and USSG § 6A1.1 both indicate that a presentence report is "essential in determining the facts relevant to sentencing."

- 18 U.S.C. § 3582(c)(2) (court must "consider[] the factors set forth in section 3553(a), to the extent that they are applicable").

- U.S.S.G. § 1B1.10, comment. (n.1(B)), p.s. (revised to invite presentation of new facts and arguments to increase sentence above the minimum of the amended guideline range or deny relief).

- *United States v. Marshall*, 83 F.3d 866 (7th Cir. 1996) (upon the defendant's § 3582(c)(2) motion for a new sentence based on the amendment to the LSD guideline, "[t]he district court ordered an updated presentence report" for recalculation of the guideline range and determination whether the defendant was eligible for safety valve).

- *United States v. Bergman*, 68 F.3d 471 (5th Cir. 1995) (although not directly addressing the need for a new presentence report, "it is an abuse of discretion to deny a § 3582(c)(2) motion without further factual inquiry").

- *United States v. Moore*, 2008 WL 161668, *2 (S.D. Ohio Jan. 15, 2008) (granting defendant's § 3582(c)(2) motion for resentencing under crack guideline and ordering a new presentence investigation report).

- Fed. R. Crim. P. 32(c)(1)(A) ("The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless" a statute requires otherwise or "the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.").

- U.S.S.G. § 6A1.1, p.s. (reiterating Rule 32(c)(1)(A) and adding that the defendant may not waive preparation of a presentence report); *id.* comment. ("A thorough presentence investigation ordinarily is essential in determining the facts relevant to sentencing. Rule 32(c)(1)(A) permits a judge to dispense with a presentence report in certain limited circumstances, as when a specific statute requires or when the court finds sufficient information in the record to enable it to exercise its statutory sentencing authority meaningfully and explains its finding on the record.").

- Fed. R. Crim. P. 32(d)(1) (providing that the presentence report must "identify all applicable guidelines and policy statements," "calculate the defendant's offense level and criminal history category," "state the resulting sentence range," "identify any factor relevant to [] the appropriate kind of sentence, or the appropriate sentence within the applicable sentencing range," and "identify any basis for departing from the applicable sentencing range."); *id.* 32(d)(2) (The presentence report must also contain, *inter alia*, "the defendant's history and characteristics," "any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment," "when appropriate, the nature and extent of nonprison programs and resources available to the defendant," and "any other information that the court requires.").

- *Cf. United States v. Turner*, 905 F.2d 300 (9th Cir. 1990) (where the defendant had been in prison up to and after new offense for walkaway escape, a presentence report was required for the sentencing on the escape offense, relying in part on introductory commentary to chapter 6 of the Guidelines, which states that "[r]eliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing," and further reasoning that strict compliance with Rule 32(c)(1) and U.S.S.G. § 6A1.1 is required "[b]ecause of the importance Congress and the Sentencing Commission have attached to the preparation of presentence reports" and because, without a presentence report, the court did not have any "information about the history and characteristics of the defendant from 1983 to 1988, including 'circumstances affecting [his] behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant,' as required by Rule 32(c)(2)(A)").

May a court amend a sentence pursuant to § 3582(c)(2) where the original sentence was imposed pursuant to a binding plea agreement?

The answer does not appear to be clear in any circuit, perhaps because of the iterations of Rule 11(e)(1)(C) and (c)(1)(C) over the years.[2] Because there is a risk, this issue should be approached with care. To obtain a memorandum discussing this issue in more detail, contact your Defender or Amy Baron-Evans at abaronevans@gmail.com. Briefly here, the current version of Rule 11(c)(1)(C) allows for the parties to agree to a specific sentence or a sentencing range. Read literally, a binding plea agreement to a specified sentencing range results in a sentence "based on a sentencing range that has subsequently been lowered by the Sentencing Commission" as described in § 3582(c)(2). A binding plea agreement, even to a specific sentence, should not control the outcome where the district court would not have accepted the plea agreement had the amendment been in effect at the time of sentencing. And, the parties' litigation conduct with respect to procedural rules, such as entering into a Rule 11 plea bargain, whether to a specific sentence or a sentencing range, cannot strip a court of subject matter jurisdiction.

- Fed. R. Crim. P. 11(c)(1)(C) (providing that the parties can enter into a binding plea agreement that "a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or a policy statement, or sentencing factor does or does not apply").

- Note that defendants are free to *appeal* if a Rule 11(c)(1)(C) agreement was to a guideline range or a particular guideline provision, or to a specific sentence if the sentence imposed was greater than that agreed upon. *See* 18 U.S.C. § 3742(c).

- *Melendez-Perez v. United States*, 467 F. Supp. 2d 169, 175-76 (D.P.R. 2006) (holding that § 3582(c)(2) empowered the court to modify the defendant's sentence in a case where neither the parties nor the court was aware of an amendment to the Guidelines in effect two weeks before sentencing pursuant to a Rule 11(c)(1)(C) agreement; rejecting the government's argument that application of the amendment was foreclosed by the binding plea agreement; concluding that "in this rare and unusual situation" and because it "mistakenly believed that the agreed-upon sentence was within the established sentencing range in effect at the time of sentence, the court was "convinced that it would have assuredly rejected

[2] Before 1999, Rule 11(e)(1)(C) provided only that the government could "(C) agree that a specific sentence is the appropriate disposition of the case." Subsection (C) did not explicitly say that such agreements were binding on the court, in contrast to agreements under subsection (B) which were explicitly not binding on the court. In 1999, Rule 11(e)(1)(C) was amended to provide that the government could "(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement or sentencing factor is or is not applicable to the case. Such a plea agreement is binding on the court once it is accepted by the court." In 2002, subsection (e)(1)(C) was moved to subsection (c)(1)(C).

the plea agreement at sentencing if it had been aware of" the guideline amendment).

- The parties' litigation conduct under rules of procedure, such as entering into a plea bargain whether to a specific sentence or a sentencing range, cannot strip a court of subject matter jurisdiction. *See, e.g., Kontrick v. Ryan*, 540 U.S. 4443, 456 (2004) ("a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct"); *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case"); *United States v. Castillo*, 496 F.3d 947, 954 (9th Cir. 2007) ("the action or inaction of parties neither confers jurisdiction nor deprives us of the power to adjudicate a case").

Can a defendant whose guideline range is unchanged because of the new drug equivalency table obtain relief under § 3582(c)(2)?

It appears that a defendant can obtain relief under § 3582(c)(2) within the confines of USSG § 1B1.10 and principles of interpretation of Guideline policy statements.

- The new table for conversion of crack to marijuana in multi-drug cases in revised USSG § 2D1.1, comment. (n. 10(D)) results in no change in the guideline range in some cases. The effect of the new table is arbitrary; there is no discernible pattern or purpose. *See* Egan, *Faulty Math In New Cocaine Base Equivalency Table* (Jan. 18, 2008); Egan & Roth, *Good Math to Fight the Bad Math*, available at http://www.fd.org/odstb_CrackCocaine.htm.

- The Commission is aware of the problem, but has not yet fixed it.

- Because of this "bad math," the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. § 3582(c)(2), but the policy statement precludes relief because the amendment does not have the effect of lowering the range. USSG § 1B1.10(a)(2)(B). For example, if the case involves 94 grams of crack and 77 grams of powder, the BOL under the old and new guideline is 32, but the BOL for 94 grams of crack "has been lowered" from 32 to 30.

- The simplest solution would be to simply hold that the statute trumps the policy statement. *Stinson v. United States*, 508 US 36, 38 (1993).

- If more is needed, policy statements implementing § 3582(c) must be "consistent with all pertinent provisions of any Federal statute," and "further the purposes of sentencing set forth in section 3553(a)(2)." 28 USC § 994(a)(2)(C). And all policy statements must meet the purposes of § 3553(a)(2), avoid unwarranted disparities, and provide certainty and fairness. 28 USC § 991(b)(1). The court must consider the purposes of sentencing set forth in section 3553(a)(2) to the extent they are applicable. 18 USC § 3582(c)(2). The "bad math" undermines the

purposes of sentencing and creates unwarranted disparities and is therefore not consistent with pertinent Federal statutes. Thus, USSG § 1B1.10(a)(2)(B) is invalid in this context.

- If still more is needed, applying USSG § 1B1.10(a)(2)(B) to preclude relief due to the Commission's failure to correct a known problem exemplifies why the policy statement must be treated as advisory only. The guidelines are now advisory. *United States v. Booker*, 543 U.S. 220 (2005). The court may conclude that in this context, the drug equivalency table in USSG § 2D1.1 and the purportedly inflexible limitation in USSG § 1B1.10(a)(2)(B) "fail[] properly to reflect the §3553(a) considerations," and thus "reflect an unsound judgment," *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007), because they are not "tied to . . . empirical evidence." *Gall v. United States*, 128 S. Ct. 586, 594 n.2 (2007). Because the guideline and the policy statement are not the product of "empirical data and national experience," the court is free to reject them. *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007).

- Note that there are the same and other mathematical problems in applying the amendment prospectively. The "Guidelines as written produced an irrational result" where converting crack quantity to marijuana under new table produced a higher sentence than if the same quantity of crack was simply calculated as crack, and would punish the defendant more severely than one with substantially more crack. *United States v. Watkins*, __ F.Supp.2d __, 2008 WL 152901 (E.D. Tenn. Jan. 14, 2008). *See also Applying the Crack Amendments 101*, http://www.fd.org/pdf_lib/crack.pdf.

Can a defendant who was originally sentenced at level 12 or 38 obtain relief under § 3582(c)(2)?

The Commission gave no explanation for not reducing the guideline range at level 12 or level 38 in its Reason for Amendment. *See* USSG App. C, Amend. 706. Thus, the same solutions outlined above would apply.

Can a defendant who was originally sentenced to a non-guideline sentence pursuant to 18 U.S.C. § 3553(a) and Booker obtain relief under § 3582(c)(2)?

- U.S.S.G. § 1B1.10(b)(2)(B) states:

  If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, a further reduction would not generally be appropriate.

- The Commission explained at the Crack Summits in Charlotte and St. Louis and at a Defender Conference in Seattle that the second sentence of revised § 1B1.10(b)(2)(B) means only that if the judge did not consider the Guidelines *at all* in the original sentencing, the prisoner would not be entitled to relief. This should apply to no cases because judges must consider the Guidelines, and to do otherwise is reversible error. *Gall v. United States*, 128 S. Ct. 586, 596 (2007); *Kimbrough v. United States*, 128 S. Ct. 558, 564, 570 (2007); *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007); *Booker v. United States*, 543 U.S. 220, 245-46 (2005).

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- Moreover, the second sentence, read literally, is inconsistent with the first sentence, which allows a "reduction comparably less than the amended guideline range" where original sentence was "less than" the guideline range, and Application Note 3 does not distinguish between guideline sanctioned departures and below-guideline sentences pursuant to § 3553(a).

- A literal reading that relief is precluded if the court followed the law at the original sentencing directly conflicts with the Supreme Court's Sixth Amendment holding and remedial interpretation of statutory law. A policy statement cannot conflict with the Constitution. *Stinson v. United States*, 508 U.S. 36 (1993). The Commission cannot interpret a statute contrary to the construction given it by the Supreme Court. *Neal v. United States*, 516 U.S. 284 (1996). A literal reading to preclude relief if the court followed the law at the original sentencing must be rejected.

Can a defendant sentenced to a mandatory minimum obtain relief under § 3582(c)(2) under the safety valve statute, 18 U.S.C. § 3553(f), or the substantial assistance statute, 18 U.S.C. § 3553(e)?

A defendant who was originally sentenced to a mandatory minimum was "sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered." 18 U.S.C. § 3582(c)(2). This is because, under USSG § 1B1.1, each Chapter of the Guidelines is applied in order. The guideline range under USSG § 2D1.1 is determined in steps (a)-(g) before it is enhanced in step (h) under USSG § 5G1.1 or 5G1.2. *See* USSG § 1B1.1.

If USSG § 1B1.10 were interpreted to mean that if the defendant was "sentenced to a term of imprisonment *solely because of* a sentencing range that has subsequently been lowered," the court "may reduce the term of imprisonment," this would conflict with § 3582(c)(2) itself, which provides that if the defendant was "sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered," it "may reduce the term of imprisonment." The statute trumps the policy statement. *Stinson v. United States*, 508 US 36, 38 (1993). Any policy statements regarding § 3582(c) must be "consistent with all pertinent provisions of any Federal statute," which certainly includes the statute it is implementing. 28 USC § 994(a)(2)(C).

Even if the safety valve or substantial assistance statutes were not invoked (or in the case of safety valve, not yet enacted) at the original sentencing, the court may consider eligibility for the safety valve or substantial assistance in determining the new sentence under § 3582(c)(2). And, in applying § 3553(f), courts are no longer bound by the mandatory language that the resulting sentence "shall be" within the applicable guideline range.

- *United States v. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998) ("[w]hen a defendant is eligible for a § 3582(c)(2) reduction, the district court must consider all relevant statutory sentencing factors," including safety valve relief under § 3553(f)" even in case where original sentence preceded effective date of safety valve statute, because, "[l]ike § 3553(e), the § 3553(f) safety valve is a general sentencing consideration that the district court must take into account in exercising its present discretion to resentence under § 3582(c)(2)").

- *United States v. Williams*, 103 F.3d 57, 58-59 (8th Cir.1996) (in a § 3582(c)(2) resentencing, court can consider government's motion under § 3553(e) even though no such motion was made at original sentencing).

- *United States v. Reynolds*, 111 F.3d 132 (Table) (6th Cir. 1997) (defendant eligible for § 3582(c)(2) resentencing is also eligible for reduction based on § 3553(f) because it applies "to all sentences that are imposed" after the statute's effective date).

- *United States v. Clark*, 110 F.3d 15 (6th Cir. 1997) ("appellate courts may take the safety valve statute into account in pending sentencing cases and . . . district courts may consider the safety valve statute" in a § 3582(c)(2) proceeding even when the safety valve was not available at the initial sentencing, concluding that because the "situation raises the possibility that resentencing will lower the defendant's unrestricted guideline range below the statutory minimum," "consideration of the safety valve [is made] relevant").

- *Settembrino v. United States*, 125 F. Supp. 2d 511, 517 (D. Fla. 2000) ("when faced with a Section 3582(c)(2) resentencing, a district court may consider grounds for departure unavailable to a defendant at the original sentencing, including safety valve relief of Section 3553(f)").

- *United States v. Cardenas-Juarez*, 469 F.3d 1331 (9th Cir. 2006) (although defendants may not rely on *Booker* to avoid the statutory requirements for safety valve relief, once a defendant has been found statutorily eligible, the resulting guideline range is advisory only).

- *United States v. Boyd*, 496 F.Supp.2d 977, 980 (D. Ark. 2007) (government agreed with defendant "that the Guidelines are advisory in the safety valve setting, just as they are in all other sentencing settings, and that the safety valve

provision does not mandate a sentence within the [guidelines] range," and court held that eligible defendant can be sentenced below the advisory guideline range that is "sufficient but not greater than necessary to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2)").

- *United States v. Duran*, 383 F. Supp. 2d 1345, 1349 (D. Utah 2005) (holding that "the safety valve provision, 18 U.S.C. § 3553(f), once satisfied, incorporates advisory Guidelines that give the court discretion to impose any appropriate punishment" and noting that the government "filed a new pleading confessing error" and "now agrees that an interpretation of the safety valve 'that treats the Guidelines as mandatory cannot be reconciled with *Booker*'").

- *United States v. Bolano*, 409 F.3d 1045, 1047 (8th Cir. 2005) (same); *United States v. Cherry*, 366 F. Supp.2d 372, 376 (E.D. Va. 2005) (same).

May a defendant sentenced as a career offender obtain relief under § 3582(c)(2)?

It appears that a defendant can obtain relief under § 3582(c)(2) within the confines of USSG § 1B1.10 and the principles of interpretation of Guideline policy statements.

- According to 18 USC 3582(c)(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 they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

- According to 28 USC 994(a)(2)(C):
  "The Commission . . . consistent with all pertinent provisions of any Federal statute shall promulgate . . . general policy statements [that] would further the purposes of sentencing set forth in section 3553(a)(2) . . . including the appropriate use of . . . the sentence modification provisions set forth in section[] 3582(c)."

- According to USSG § 1B1.10(a)(2)(B), a reduction is not authorized if the amendment "does not have the effect of lowering the defendant's applicable guideline range." As an example, only defendants sentenced "because of the operation of . . . a statutory mandatory minimum" are mentioned. *See* USSG § 1B1.10, comment. (n.1(A)).

- A defendant sentenced as a career offender was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered."

    - Under USSG § 1B1.1, at steps (a)-(e), the court determined the offense level under Chapters Two and Three, including USSG § 2D1.1.

- At step (f), the court applied Chapter Four, and under USSG § 4B1.1(b), compared the career offender offense level with the USSG § 2D1.1 offense level to determine which was greater.

- At step (i), the court referred to any policy statements or commentary regarding departure, and if post-*Booker*, referred to § 3553(a) regarding a non-guideline sentence, which again involved a comparison of the USSG § 2D1.1 offense level and the career offender offense level.

- Only the court can determine whether it would have imposed a lower term of imprisonment had the amended sentencing range been in effect.

    - The court may determine that at step (i), it would have lowered the sentence based on the increased differential between the amended USSG § 2D1.1 sentencing range and the career offender sentencing range due to the two-level reduction in the USSG § 2D1.1 sentencing range.

- "A federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

- This procedure follows the statutory language, which trumps any inconsistent interpretation of a policy statement. If USSG § 1B1.10 were interpreted to mean that if the defendant was "sentenced to a term of imprisonment *solely because of* a sentencing range that has subsequently been lowered," the court "may reduce the term of imprisonment," this would conflict with § 3582(c)(2) itself, which provides that if the defendant was "sentenced to a term of imprisonment *based on* a sentencing range that has subsequently been lowered," it "may reduce the term of imprisonment."

    - The statute trumps the policy statement. *Stinson v. United States*, 508 US 36, 38 (1993).
    - Policy statements regarding § 3582(c) must be "consistent with all pertinent provisions of any Federal statute," which certainly includes the statute it is implementing. 28 USC § 994(a)(2)(C).

May a court grant a § 3582(c)(2) motion based on the new crack amendments prior to March 3, 2008, the effective date of the amendment to § 1B1.10?

This should be a matter of judicial discretion because the March 3, 2008 date was selected in order to give judges time to prepare. Where a two-level change in the offense level would result in a release date earlier than March 3, 2008, and the court determines that requiring that defendant to remain incarcerated until March 3, 2008 would cause the defendant to serve a sentence that is greater than necessary to satisfy the purposes of sentencing, the court may release the defendant prior to March 3, 2008.

- 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 ("the statutory purposes of sentencing are best served by retroactive application of the amendment," but effective date delayed "to give the courts sufficient time to prepare for and process these cases," which is not one of the statutory purposes of sentencing). Note that of all retroactive amendments, only this one was given a delayed effective date by the Commission.

- As a policy statement and not a "guideline," § 1B1.10 is not subject to congressional approval by silence, consultation with experts, or public comment. 28 USC 994(o), (p), (x). In any event, the March 3 effective date is not in the policy statement itself, but only in a federal register notice. 73 FR 217-01 (Jan. 2, 2008).

- 18 U.S.C. § 3582(c)(2) (court may reduce sentence for any defendant sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission after consideration of the factors set forth in § 3553(a)).

- 18 U.S.C. § 3553(a) (district court "shall impose a sentence sufficient, but not greater than necessary, to satisfy the purposes" of sentencing).

- Consideration of factors set forth in § 3553(a) includes the reasons for the amendment, *i.e.*, as "partial remedy" to address sentences far greater than necessary and unwarranted disparity, and the reason it was made retroactive, *i.e.*, to best serve the purposes of sentencing.

- 28 U.S.C. § 994(a)(2)(C) (policy statements implementing § 3582(c)(2) must be "consistent with all pertinent provisions of any Federal statute," and "further the purposes set forth in section 3553(a)(2)").

It is probably unnecessary to argue that the delayed date itself conflicts with *Booker*'s remedial interpretation of the governing sentencing law but if so:

- *Neal v. United States*, 516 U.S. 284, 290, 295 (1996) (Commission "does not have the authority to amend [a] statute" by purporting to interpret it in ways contrary to the construction given it by the Supreme Court, and the Court will "reject [the Commission's] alleged contrary interpretation").

- *Kimbrough v. United States*, 128 S.Ct. 558, 570 (2007) (section 3553(a) "as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing").

- *United States v. Hicks*, 472 F.3d 1167, 1172-73 (9th Cir. 2007) ("to the extent that policy statements are inconsistent with *Booker* by requiring that the Guidelines be treated as mandatory, the policy statements must give way").

- *United States v. Jones*, 2007 WL 2703122 (D. Kan. Sept. 17, 2007) ("section 3582(c) can be invoked to grant the court the authority to resentence using the guidelines as advisory").

- *United States v. Forty Estremera*, 498 F.Supp.2d 468, 471-72 (D.P.R. 2007) (proper procedure in a post-*Booker* § 3582(c)(2) resentencing is to first calculate the amended guideline range and then "evaluate the factors set forth in 18 § 3553(a) to determine whether or not a guideline or non-guideline sentence is warranted").

- *United States v. Polanco*, 2008 WL 144825, *2 (S.D. N.Y. Jan. 15, 2008) ("it would be, to say no more, ironic if the relief available to a defendant who received a sentence that is now recognized to have been unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guideline under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline").

What can be done if the defendant was incarcerated beyond the expiration of his sentence under the amended guideline range?

You can move for early termination of supervised release under 18 USC 3583(e)(1) or reduced conditions under 3583(e)(2). *See* 1B1.10, App. Note 4(B). "Equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term," properly addressed by terminating supervised release after one year under 3583(e)(1) or modifying release conditions under 3583(e)(2). *United States v. Johnson*, 529 U.S. 53, 56 (2000).

May a court impose a sentence below the minimum of the amended guideline range?

- Section 3582(c)(2) provides that the court may reduce the term of imprisonment after considering 3553(a) factors to extent they are applicable and if the reduction is consistent with applicable policy statements. 18 USC § 3582(c)(2).

- Revised U.S.S.G. § 1B1.10 states that the court shall not impose a term of imprisonment "less than the minimum of the amended guideline range," U.S.S.G. § 1B1.10(b)(2)(A), but that it must consider the § 3553(a) factors and public safety, and may consider post-sentence conduct, in determining whether to deny relief or to sentence at or above the "minimum of the amended guideline range," U.S.S.G. § 1B1.10, comment. (n.1(B)).

- Congress directed the Commission to "specify in what circumstances and by what amount" sentences should be reduced. 28 USC § 994(u). But Congress also directed that the "Commission . . . consistent with all pertinent provisions of any Federal statute shall promulgate . . . general policy statements [that] would further the purposes of sentencing set forth in section 3553(a)(2) . . . including the appropriate use of . . . the sentence modification provisions set forth in section[] 3582(c)." 28 U.S.C. § 994(a)(2)(C).

- If the Guidelines are advisory in all contexts and whether they purport to raise a sentencing floor or ceiling, a reduction is consistent with both the advisory policy statement and § 3553(a).

- *United States v. Booker*, 543 U.S. 220, 266 (2005) (rejecting proposal that "would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences. We do not believe that such one-way levers are compatible with Congress' intent.").

- *Kimbrough v. United States*, 128 S.Ct. 558, 570 (2007) (section 3553(a) "as modified by *Booker*, contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary' to accomplish the goals of sentencing"); *see also id.* at 568-69, 573 (crack amendment represents only "modest" change that still yields higher sentences than for powder offenses, is "only . . . a partial remedy" for overly harsh crack sentences, and creates crack to powder ratios that vary from 25 to 1 for some defendants to 80 to 1 for others, despite Commission's recommendation to Congress that the ratio should be no more than 20 to 1 for all defendants) (citing various Sentencing Commission reports).

- *United States v. Hicks*, 472 F.3d 1167, 1170 (9th Cir. 2007) ("[b]ecause a 'mandatory system is no longer an open choice,' district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2)") (citing *Booker v. United States*, 543 U.S. 220, 263 (2005)).

- *Hicks*, 472 F.3d at 1172-73 ("to the extent that policy statements are inconsistent with *Booker* by requiring that the Guidelines be treated as mandatory, the policy statements must give way").

- *United States v. Forty Estremera*, 498 F.Supp.2d 468, 471-72 (D.P.R. 2007) (proper procedure in a post-*Booker* § 3582(c)(2) resentencing is to first calculate the amended guideline range and then "evaluate the factors set forth in 18 § 3553(a) to determine whether or not a guideline or non-guideline sentence is warranted").

- *United States v. Jones*, 2007 WL 2703122 (D. Kan. Sept. 17, 2007) ("section 3582(c) can be invoked to grant the court the authority to resentence using the guidelines as advisory").

- *United States v. Polanco*, 2008 WL 144825, *2 (S.D. N.Y. Jan. 15, 2008) ("The Sentencing Commission has purported to limit the sentencing court's authority to reduce a sentence . . . [I]t would be, to say no more, ironic if the relief available to a defendant who received a sentence that is now recognized to have been unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guideline under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline".).

- The district court must or may consider all statutory sentencing criteria in existence at the time of a § 3582(c)(2) resentencing. *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); *see also Settembrino v. United States*, 125 F.Supp.2d 511, 516 (S.D. Fla. 2000).

- The government has argued that the phrase, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," in 18 U.S.C. § 3582(c)(2) makes all limitations in USSG § 1B1.10 mandatory because that phrase was not at issue in *Booker* and was not stricken. After *Booker*, however, the courts have held that mandatory language in other statutory provisions that were not at issue in *Booker* and were not stricken was nonetheless rendered advisory. *See, e.g., United States v. Yazzie*, 407 F.3rd 1139, 1145 (10th Cir. 2005) (3553(b)(2) re child sex offenses); *United States v. Sharpley*, 399 F.3d 123, 127 n.3 (2d Cir. 2005) (same); *United States v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005) (same); *United States v. Bolano*, 409 F.3d 1045, 1047 (8th Cir. 2005) (safety valve); *United States v. Cherry*, 366 F. Supp.2d 372, 376 (E.D. Va. 2005) (same); *United States v. Duran*, 383 F. Supp. 2d 1345, 1349 (D. Utah 2005) (same).

- Letter from Criminal Law Committee to U.S. Sentencing Commission at 5-6 (Nov. 2, 2007) ("sentencing guidelines should not deprive a judge of the discretion to reach an appropriate sentence"), available at http://www.ussc.gov./pubcom_Retro/PC200711_004.pdf.

- Because § 1B1.10 is a policy statement and not a guideline, its revised text was not subject to congressional approval by silence, consultation with representatives of the criminal justice system, or public comment. *See* 28 U.S.C. § 994(o), (p), (x); *United States v. Stinson*, 508 U.S. 36, 40-46 (1993).