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Crack Retroactivity Amendment Case Law

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I. Overview

On November 1, 2007 an amendment to the Guidelines took effect which reduced the base offense levels applicable to crack cocaine offenses by two levels. *See* USSG Supp. to App. C, Amend. 706. The amendment is only a "partial" remedy to the problems associated with the disparate treatment of crack cocaine offenses, as the Guidelines still advance a "crack/powder ratio that varies (at different offense levels) between 25 to1 and 80 to1." *Kimbrough v. United States*, 128 S.Ct. 558, 569 (2007). Effective March 3, 2008 the Commission made Amendment 706 retroactive, allowing individuals who had been sentenced for crack offenses under the pre-amendment version of the Guidelines to seek a sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). *See* § 1B1.10, USSG Supp. to App.C, Amendment 713. Section 3582(c)(2) provides that in the case of a defendant who was sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Commission,[2] the court may reduce

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[2] Under § 3582(c)(2), a defendant's sentence may be reduced where he or she was sentenced to a term of imprisonment *based on a sentencing range that has subsequently been lowered* by the Sentencing Commission. A sentence is "based on a sentencing range" if the defendant was sentenced "pursuant" to the subsequently lowered sentencing range, *United States v. Mullanix*, 99 F.3d 323, 324 (9th Cir. 1996), if the sentencing range was "relied upon by the district court in determining [the defendant's] sentence," *United States v. Moore*, 541 F.3d 1323 (11th Cir.

the term of imprisonment, after considering the factors set forth in 18 U.S.C.§ 3553(a), if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. 18 U.S.C. § 3582(c)(2).

The Commission has attempted to limit § 3582(c)(2) resentencings by amending the policy statement and commentary on retroactivity effective March 3, 2008. The amended version now excludes a sentence reduction in cases where the amended crack guideline "does not have the effect of lowering the defendant's applicable guideline range" because of another guideline or statutory mandatory minimum. *See* USSG § 1B1.10(a)(2)(B) and comment, n.1(A). In addition, the policy statement now provides that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range unless the defendant originally received a below-guidelines sentence.[3] USSG § 1B1.10(b)(2)(AA). The policy statement further declares that § 3582(c)(2) proceedings are not "full" resentencing hearings. § 1B1.10(a)(3). In determining whether and to what extent to grant a reduction, courts shall consider the § 3553(a) factors and public safety implications, and may also consider any post-sentencing conduct. See § 1B1.10(b)(2), comment, n.1(B)(i)-(iii).

Since the passage of these amendments, numerous issues have arisen regarding the scope of § 3582(c)(2) resentencing proceedings. These issues are discussed in Crack Retroactivity: Questions, Answers, Caselaw, Argument Outlines (February 18, 2008). The following update reviews the current state of the law with respect to these issues.[4]

2008), if the recommended range "played a role" in the guideline calculation, *United States v. Poindexter*, 550 F.Supp.2d 575, 581 (E.D. Pa. 2008), or if the sentence imposed was "influenced by and based in part on" a subsequently lowered sentencing range." *United States v. Herron*, 2008 WL 2986804, at *1 (W.D.N.C. 2008).

[3] Where the original prison term imposed was a non-guideline sentence pursuant to 18 U.S.C. § 3553(a) and *Booker*, the policy statement states that a further reduction generally would not be appropriate. § 1B1.10(b)(2)(BA). However, the Commission subsequently explained at two national Crack Summits that this limitation applies only if the original sentencing judge completely failed to consider the Guidelines. In light of *Booker* and its progeny, there should be no instances in which judges ignored the guidelines, as doing so would be reversible error. *Gall v. United States*, 128 S.Ct. 586, 596 (2007); *Kimbrough*, 128 S.Ct. at 564, 570; *Rita v. United States*, 127 S.Ct. 2456, 2465, 2468 (2007); *United States v. Booker*, 543 U.S. 220, 245-46 (2005). For comments relevant to this issue made at the St. Louis Crack Summit, view the Transcript of Portions of the Crack Amendment Retroactivity Summit.

[4] Disclaimer: Please do not rely on this memo as a substitute for your own thorough legal research. Although every effort has been made to identify the important issues and update the relevant case law, this memo does not include all potential arguments and every decided case. Attorneys should review the cases in their own jurisdictions and examine the courts' reasoning to determine whether a viable argument for § 3582(c)(2) relief remains, whether that reasoning suggests other arguments, and whether a circuit split exists on a given issue such that preservation would be warranted.

II. Does *Booker's* holding that the Guidelines are only advisory mandate that district courts have discretion to reduce a sentence below the bottom of the new Guideline range in a § 3582(c)(2) proceeding?

The circuits are split as to whether *Booker* and its progeny require district courts to treat policy statement § 1B1.10 and the amended guideline range as advisory and allow judges to impose a sentence below the new guideline range (that is, by more than the two-levels identified by the crack amendment) in a § 3582(c)(2) proceeding. You should preserve the issue and advocate for a sentence below the bottom of the amended range.

In *United States v. Hicks*, 472 F.3d 1167, 1171-72 (9th Cir. 2007), the Ninth Circuit held that, under *Booker*, courts must treat all guidelines as advisory, even in a § 3582(c)(2) resentencing proceeding. Consequently, when a Guideline amendment prompts a court to recalculate a sentence under § 3582(c)(2), the new calculation is non-binding. *Id. Hicks* rejected attempts to differentiate § 3582(c)(2) motions from traditional resentencings and initial sentencings, reasoning that under *Booker* mandatory guidelines no longer exist in any context. *See id*. When issuing new sentences under § 3582(c)(2), courts that follow *Hicks* are free to impose any sentence based on the § 3553(a) factors, even if it is below the amended guideline range.[5] *Id.* at 1171 ("Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others[.]") (quoting *Booker*, 543 U.S. at 266).

Rejecting *Hicks*, the First, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits have held that *Booker* does not apply to § 3582(c)(2) and that the restrictions in § 1B1.10 are binding. *See United States v. Starks*, 551 F.3d 839, 840-43 (8th Cir. 2009) (holding that *Booker* only applies to full sentencing and re-sentencing proceedings and § 3582(c)(2) proceedings are not full re-sentencing hearings), *cert. denied*, 129 S. Ct. 2746 (2009); *United States v. Fanfan*, 558 F.3d 105, 110 (1st Cir. 2009) (holding the same and also noting that *Booker*'s Sixth Amendment analysis was not concerned with downward adjustments), *petition for cert. filed*, (May 15, 2009); *United States v. Doe*, 564 F.3d 305, 312-13 (3d Cir. 2009) (same); *United States v. Rhodes*, 549 F.3d 833, 837-841 (10th Cir. 2008) (same), *cert. denied*, 129 S. Ct. 2052 (2009); *United States v. Dunphy*, 551 F.3d 247, 252-56 (4th Cir. 2009) (reasoning along the same lines and observing that the Guidelines are already advisory in a § 3582(c)(2) proceeding because courts have no obligation to reduce a sentence), *cert. denied*, 129 S. Ct. 2401 (2009); *United States v. Cunningham*, 554 F.3d 703, 708 (7th Cir. 2009) (discussing the same points and reasoning that Congress intended § 3582(c)(2) to comport with the Guidelines' policy statements and did not want § 3582(c)(2) proceedings to be treated like full sentencing proceedings, because that would create undesirable administrative complexities), *cert. denied*, 2009 WL 688846 (U.S. 2009); *United States v. Melvin*, 556 F.3d 1190, 1192-93 (11th Cir. 2009) (holding that *Booker*

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[5] Although Hicks was decided before § 1B1.10 was amended on March 3, 2008, limiting the reduction to two levels and prohibiting any Booker variance, that does not diminish the Hicks holding. As the First Circuit has commented, where the Guidelines' policy statements would have the effect of making the Guidelines mandatory, they are invalid. United States v. Fanfan, 558 F.3d 105, 109 (1st Cir. 2009).

and *Kimbrough* apply only to original sentencing proceedings; *Booker's* Sixth Amendment analysis was not concerned with downward adjustments; *Booker* did not excise § 3582(c)(2), and the Guidelines are already advisory in a 3582(c)(2) proceeding because courts have no obligation to reduce a sentence), *cert. denied*, 129 S. Ct. 2382 (2009).

Some appellate courts have also ruled that § 3582(c)'s requirements are jurisdictional. *See United States v. Williams*, 551 F.3d 182, 186 (2d Cir. 2009), *cert. denied*, 124 S. Ct. 1705 (2009); *Doe*, 564 F.3d at 314; *Dunphy*, 551 F.3d at 252-56; *Cunningham*, 554 F.3d at 708; *Starks*, 551 F.3d at 840-843; *Rhodes*, at 837-41; *Melvin*, 556 F.3d at 1193. They have reasoned that the restrictions in § 1B1.10(b)(2) are mandatory because § 3582(c), as the source of the court's authority to reduce sentences, directs that a sentence reduction must be consistent with the Commission's policy statements. *See Rhodes*, 549 F.3d at 841; *Dunphy*, 551 F.3d at 254; *Melvin*, 556 F.3d at 1192-93.

In circuits that have not yet decided whether *Booker* applies to § 3582 proceedings, several district courts have followed *Hicks* or reached a similar conclusion. In *United States v. Ragland*, 568 F. Supp. 2d 19 (D.D.C. 2008)[6], the district court concluded that courts retain discretion to sentence below the amended Guideline range. *See also United States v. Reid*, 584 F.Supp.2d 187 (D.D.C. Nov. 6, 2008); *U.S. v. Cook*, 2009 WL 186982, *1 (D.D.C. Jan. 23, 2009). At least one district court has recognized that "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." *United States v. Polanco*, 2008 WL 144825, at *2 (S.D.N.Y. Jan 15, 2008).

Similarly, in *U.S.v. Blakely*, 2009 WL 174265, at *5 (N.D.Tex. Jan. 23, 2009) the district court held that it had the discretion to vary downward in resentencing under § 3582(c)(2) and granted a reduction to time served, concluding that lenity was warranted where it was doubtful Congress would have intended § 1B1.10 to be mandatory. *Id.* at *13. The judge observed that while the language of § 3582(c)(2) and 28 U.S.C. § 994(u) may appear to delegate authority to the Commission to make the Guidelines mandatory in a resentencing, *Booker's* remedial opinion prevents the Commission from doing so pursuant to that delegation. *Id*. at *6, *10. The statute cannot trump the Constitution when it comes to the actual reduction granted. *Id*. at *10. The language in § 3582(c)(2) must therefore be read as consistent with advisory policy statements. *See also United States v. Horn*, 2008 U.S. Dist. LEXIS 102604, at *14, 21-22 (M.D. Tenn. Dec. 16, 2008) (holding that *Booker* and its progeny require that district courts retain discretion whether to grant sentence reduction based on criminal history Amendment 709 and, to the extent that § 1B1.10 creates a mandatory scheme, it is unconstitutional).

[6] In *Ragland*, the government moved to dismiss its appeal of the reduction. *See* Order, *United States v. Ragland*, No. 08-3092 (D.C. Cir. Nov. 7, 2008).

By contrast, several district courts have followed the reasoning of those Circuits that have disagreed with *Hicks*. These courts have determined that the requirements in § 3582(c)(2) are jurisdictional and, therefore, mandatory. *See United States v. Cruz*, 560 F. Supp. 2d 198, 202 (E.D.N.Y. 2008)(collecting cases); *United States v. Spencer*, 2009 WL 174112, at *4 (E.D. Mich. Jan. 23, 2009).

For the time being at least, it will be up to the Supreme Court to resolve the circuit split on this issue. Defense counsel should preserve the issue and continue to argue that district courts must treat the guidelines as advisory when determining what sentence to impose in a § 3582(c)(2) proceeding and argue for a sentence below the bottom of the new range.

III. Are sentences imposed pursuant to a binding plea agreement under former Fed. R. Crim. P. 11(e)(1)(c), now Rule 11(c)(1)(c), eligible for reduction under § 3582(c)(2)?

The Circuits disagree as to whether courts may reduce sentences under § 3582(c)(2) for defendants who were sentenced pursuant to binding Rule 11(e)(1)(C) plea agreements. The issue should be preserved and it should continue to be argued that a district court may do so if it finds it appropriate in light of the Guideline amendment and the § 3553(a) factors. Nothing in Rule 11(c)(1)(c) forbids defendants from benefiting from a later retroactive amendment as long as the requirements of § 3582(c)(2) are met.

Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure provides that a "plea agreement may specify that an attorney for the government will … (C) agree that a specific sentence or sentencing range is the appropriate disposition of the case." Fed. R. Crim. P. 11(c)(1)(C). It declares that a sentencing court is bound to impose a sentence consistent with the plea agreement once the court accepts the agreement, and if it does not do so, the parties may withdraw that agreement.[7]

The Third, Fourth, Sixth, Eighth, and Tenth Circuits have addressed the issue. The Fourth Circuit has held that Rule 11(c)(1)(c) plea agreements setting forth even *specific terms* of imprisonment do not foreclose the application of Amendment 706 if the requirements of § 3582(c)(2) are met. *United States v. Dews*, 551 F.3d 204, 208-210 (4th Cir. 2008), *reh'g en banc granted* (Feb. 20, 2009). *Dews* reversed the district court's ruling that defendants were ineligible for reductions. According to the *Dews* Court, "the question whether the sentences imposed were *based on* the guidelines [as required by § 3582(c)(2)] must be answered from the perspective of the sentencing district judge." *Id.* at 208-209 (emphasis added). Here, they clearly were, as the Court emphasized the Guidelines played a central role in the judge's sentencing of both defendants. *Id.* Their plea agreements contemplated that the stipulated sentence would be a guidelines sentence. *Id.* The district court accepted the agreements only

[7] The Federal Rules of Criminal Procedure were amended in 2002, and language similar to that contained in the 1999 version of Rule 11(e)(1)(C) is now found in Fed. R. Crim. P. 11(c)(1)(C)(2007). The 2002 amendment to the provision made only "stylistic" changes. Fed. R. Crim. P. 11 advisory committee's note.

after determining the stipulated sentences were within the applicable Guidelines range and the agreed-on sentence fell within that range. *Id.*

Dews diverged from the approach of the Third, Sixth, Eighth, and Tenth Circuits, which appear to have a *per se* rule against consideration of § 3582(c)(2) motions for sentences imposed under a Rule 11(c)(1)(C) agreement. *See United States v. Sanchez*, 562 F.3d 275, 279 (3d Cir. 2009); *United States v. Peveler*, 359 F.3d 369, 378-79 (6th Cir. 2004); *United States v. Scurlark*, 560 F.3d 839, 843 (8th Cir. 2009); *United States v. Trujeque*, 100 F.3d 869, 871 (10th Cir. 1996); *United States v. Graham*, 304 Fed. App'x 686, 688 (10th Cir. 2008) (unpublished opinion). In *Peveler*, the parties stipulated to a sentence at the low end of the guidelines range in a Rule 11(c)(1)(C) agreement that the district court accepted. *Id.* at 370-71. The Court reasoned that once the district court accepts the agreement and sentences the defendant according to the agreement, it is bound by the bargain and therefore lacks the authority to modify the agreed sentence under § 3582. *Id.* at 375-76; *accord Sanchez*, 562 F.3d 280-82; *Scurlark*, 560 F.3d at 843; *Trujeque*, 100 F.3d at 871. Conversely, the *Dews* Court observed that while a district court is bound by the parties' bargain, "it is free to consider and grant § 3582 motions as long as the parties did not agree that they would not seek relief … in the event the Sentencing Commission retroactively amended a relevant guideline." *Dews*, 551 F. 3d at 210-11.

In Circuits that have yet to address the issue, several district courts have concluded that Rule 11(c)(1)(C) plea agreements are binding for purposes of § 3582(c)(2) resentencing proceedings. *See, e.g., United States v. Arroyo*, 2008 WL 2497430, at *1 (E.D.N.Y. June 18, 2008) (unpublished opinion); *United States v. Clayborn*, 2008 WL 2229531, at *1 n.2 (M.D. Pa. May 28, 2008) (unpublished opinion); *United States v. Johnson*, 2008 WL 4758581, at *1 (D. Kan. Oct. 27, 2008) (unpublished opinion); *United States v. Bride*, 2008 WL 2782688, at *1 (W.D. Wash. July 14, 2008) (unpublished opinion); *United States v. Tindall*, 2008 WL 2518546, at *1 (W.D. Va. June 19, 2008) (unpublished opinion); *United States v. Grigsby*, 560 F. Supp. 2d 1066, 1066 (D. Colo. 2008); *United States v. Gordon*, 2008 WL 901911, at *1 (E.D. Okla. Mar. 31, 2008) (unpublished opinion); *United States v. Bundy*, 613 F. Supp. 2d 35, 37-38 (D.D.C. May 8, 2009) (disagreeing with *Dews* and holding that "a sentence agreed to in a Rule 11(c)(1)(C) agreement is not a sentence 'based upon a sentencing range' that has been set by the Sentencing Commission.").

By contrast, in *United States v. Coleman*, 594 F. Supp. 2d 164, 165-67 (D. Mass. 2009), the district court ruled it had authority to reduce the defendant's 96 month sentence under § 3582 based on Amendment 706. The sentencing judge had accepted the defendant's Rule 11(c)(1)(c) agreement, which provided that the "appropriate disposition" of the case was incarceration for 84 to 96 months only after determining that the stipulated range was within the applicable Guidelines range of 84 to 105 months. *Id.*, at *3. The district court distinguished other cases in which courts concluded they lacked authority to modify the sentence involving plea agreements which set forth a *sentencing range* rather than a specific term of months. *Id.* at *2. *See United States v. Madden*, 2008 WL 4933982 at *1 (W.D. Wash. Nov. 17, 2008) and *United States v. Hines*, 2008 WL 2169516 at *2 (E.D. Tenn. May 22, 2008). Unlike Coleman, the

defendants in the other cases had already received the lowest possible sentences in their respective agreed upon ranges. *Id.* The judge reduced Coleman's sentence to 87 months.

Nothing in Rule 11(c)(1)(c)'s language or its purpose precludes a defendant pleading guilty under that rule from benefiting from a later favorable retroactive amendment to the guidelines, so long as the requirements of § 3582(c)(2) are met. *Dews,* at 209. District courts therefore are free to reduce sentences under § 3582(c)(2) pursuant to subsequent amendments if they find it appropriate in light of the amendment and the § 3553(a) factors.

IV. Do individuals who were sentenced within the USSG § 4B1.1 (career offender) guideline range, or who received departures below that range, qualify for sentence reductions pursuant to § 3582(c)(2)?

The consensus among courts is that a defendant who is sentenced as a career offender, but who does not receive a departure from the career offender guideline range down to the otherwise applicable § 2D1.1 crack cocaine guideline range, does not qualify for a reduced sentence under the crack amendments. Where the departure was not for cooperation but because the career offender range over-represented the seriousness of the defendant's criminal history under § 4A1.3 and the sentence imposed was clearly based on the otherwise applicable guideline range, relief has been granted.

Under § 3582(c)(2), a defendant's sentence may be reduced where he or she was sentenced to a term of imprisonment *based on a sentencing range that has subsequently been lowered* by the Sentencing Commission. A sentence is "based on a sentencing range" if the defendant was sentenced "pursuant" to the subsequently lowered sentencing range, *United States v. Mullanix,* 99 F.3d 323, 324 (9th Cir. 1996), if the sentencing range was "relied upon by the district court in determining [the defendant's] sentence," *United States v. Moore,* 541 F.3d 1323 (11th Cir. 2008), if the recommended range "played a role" in the guideline calculation, *United States v. Poindexter,* 550 F. Supp. 2d 575, 581 (E.D. Pa 2008), or if the sentence imposed was "influenced by and based in part on" a subsequently lowered sentencing range." *United States v. Herron,* 2008 WL 2986804, at *1 (W.D.N.C. 2008).

Every circuit court, and virtually every district court, that has considered the issue has held that a defendant who was sentenced as a career offender under § 4B1.1 is ineligible for a reduction. They have so held on the basis that they lacked authority to grant reductions because, although the amendment reduces the § 2D1.1 offense levels, the defendants' sentences were ultimately determined by the career offender guideline, which was not lowered by the amendments. *See e.g., United States v. Caraballo,* 552 F.3d 6, 10 (1st Cir. 2008); *United States v. McGee,* 553 F.3d 225, 227 (2d Cir. 2009)(collecting cases); *United States v. Thompson, 290* Fed. Appx 519, 520 (3d Cir. 2008); *United States v. Tyler,* 2008 WL 5069532 (5th Cir. 2008); *United States v. Forman,* 553 F.3d 585 (7th Cir. 2009); *United States v. Thomas,* 524 F.3d 889, 890 (8th Cir. 2008)(per curiam); *United States v. Sharkley,* 543 F.3d 1236, 1237 (10th Cir. 2008); *United States v. Moore,* 541 F.3d 1323, 1330 (11th Cir. 2008); *United States v. Jackson,*

2009 WL 101849 (E.D. Pa. Jan. 14, 2009); *United States v. Purdue*, 2008 WL 4404278, at *3 (N.D. Ohio Sept 23, 2008).

This reasoning has also been applied to a defendant sentenced under § 4B1.4, the armed career criminal guideline. See *United States v. Thomas*, 545 F.3d 1300, 1302 (11th Cir. 2008). However, in *United States v. James*, 548 F.3d 983 (11th Cir. 2008), the Court noted that in certain situations Amendment 706 may apply to a defendant sentenced as an armed career criminal. *Id.*, at n.2. The offense level is taken from the *greatest* of several calculations, including "the offense level applicable from Chapters Two [including the drug quantity table in §2D1.1(c)] and Three." See § 4B1.4(b)(1)-(3). For example, if the offense level of 36 under § 2D1.1 was applied at the original sentencing for an armed career criminal because it produced the highest offense level among the relevant calculations in § 4B1.4, that offense level played a role in the calculation of the range. In that situation, the reduced offense level of 34 means that the armed career criminal was sentenced to a "range that has subsequently been lowered" under § 3582(c)(2) and Amendment 706 would apply. Given the similarity in sentencing methodology in § 4B1.1 and § 4B1.4, the same reasoning necessarily applies where § 2D1.1 produced the highest offense level under the career offender guideline.

The overwhelming majority of courts have held that where courts declined to sentence the defendant as a career offender and departed downward to the *otherwise applicable* § 2D1.1 guideline range upon finding that career offender status overstated the defendant's criminal history under § 4A1.3, a reduction is authorized. *See e.g, United States v. McGee*, 553 F.3d 225, 229 (2d Cir. 2009); *United States v. Moore*, 541 F.3d at 1329-30 (11th Cir. 2008); *United States v. Poindexter*, 550 F.Supp.2d 578, 580-581 (E.D. Pa. 2008); *United States v. Ragland*, 568 F.Supp.2d 19, 20 (D.D.C. July 31, 2008); *United States. v. Collier*, 2008 WL 4204976 , *3 (E.D. Mo. Sept. 5, 2008); *United States v. Nigatu*, 2008 WL 926562 (D. Minn. Apr. 7, 2008); *United States v. Willis*, 2008 WL 4793688 (D. Ore. Oct. 30, 2008); *United States v. Clark*, 2008 WL 2705214, *1 (W.D. Pa. July 7, 2008); *United States v. Cornish*, 2008 U.S. Dist. LEXIS 50577, at *7-*8 (D.N.J. June 25, 2008); *Cf. United States v. Boyd*, 2008 WL 2537139, at *3 (W.D. Pa. June 24, 2008) (suggesting reduction would be warranted if § 4A1.3 departure to § 2D1.1 range had been granted). As these courts conclude, it was apparent the sentence was "based on" a sentencing guideline range that has subsequently been lowered because the district court originally premised the ultimate sentence on the § 2D1.1 crack cocaine guidelines. *See McGee*, at 227.

Courts have found that a downward departure for substantial assistance to the government does not render the sentence "based on" § 2D1.1 for the purposes of § 3582(c)(2). *See e.g., United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008)(district court did not provide any indication that it based its sentence on the guideline range that would have applied absent the career offender designation); *Cf. United States v. Williams*, 551 F.3d 182, 186-87 (2d Cir. 2009)(explaining that a defendant whose sentence was based on the mandatory minimum rather than the guidelines range does not become eligible for a reduction when the court grants a § 5K1.1 departure because the original crack cocaine guideline range in § 2D1.1 does not influence the extent of a downward departure for substantial assistance); *United States v. Boyd*,

2008 WL 2537139, at *3 (W.D. Pa. June 24, 2008); *United States v. Clark*, 2008 WL 4966778 (E.D. Ky. Nov. 18, 2008).

These cases confirm that where there is no indication that the district court based the original sentence on anything other than cooperation, § 3582(c)(2) relief will likely be unavailing. Departures under § 4A1.3 for overstated criminal history have rendered a sentence eligible for reduction because in those circumstances, courts have concluded that the judge necessarily looked to § 2D1.1 for guidance on the proper sentence. Where the district court made alternative findings regarding the defendant's offense level or non-career offender guideline range, the sentence was thus "based on" or otherwise tied to crack guidelines and the defendant should qualify for § 3582(c)(2) relief.

V. Are sentencing reductions available to cooperating defendants who received downward departures below the statutory mandatory minimums?

USSG § 5G1.1(b) directs a sentencing court to apply the mandatory minimum sentence rather than the § 5A Guideline range if the former is greater.[8] The Guideline does not address the application of a statutory mandatory minimum that is followed by a substantial assistance departure. The circuits that have considered sentence reductions pursuant to § 3582(c)(2) in this context have reached different conclusions. Where the district court stated that it considered the original crack guidelines in determining the substantial assistance departure from the mandatory minimum, the defendant may be eligible for § 3582 relief outside the Fourth and Eleventh circuits.

In *United States v. Williams*, 551 F.3d 182 (2d Cir. 2008), the Second Circuit held that a defendant subject to a statutory minimum who received a departure for substantial assistance that fell within the § 2D1.1 Guidelines range was ineligible for § 3582(c)(2) relief when the sentencing judge specifically found that he did not consider the crack guidelines in granting the § 3553(e) departure. It emphasized "[t]here [was] no evidence that the Guidelines range calculated under USSG § 2D1.1(c) played any role in the district court's determination of his sentence, and the district court so found." *Id*. at 184. Thus, the clear implication is that whether a defendant is eligible depends on whether the sentencing judge in fact based the sentence on the original guidelines.

The *Williams* Court concluded that "[w]hen…the Guidelines sentence ends up as the statutory minimum, the decision to depart and the extent of the maximum permissible departure below the statutory minimum may be based only on substantial assistance to the government and no other mitigating considerations." *Id.,* at 186, citing *United States v. Richardson*, 521 F.3d 149, 159 (2d Cir. 2008). However, in *Richardson*, the Second Circuit held that in arriving at a final sentence, "…the district court may consider other factors in determining whether to grant

[8] "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." § 5G1.1(b).

the full extent of the departure permitted by § 3553(e)." Thus, once the district judge has determined the lowest point of the substantial assistance departure, the judge may then limit that departure by relying on other factors, such as the original guideline range. By applying this logic to *Williams*, the Second Circuit suggests that judges do have discretion to grant reductions, even where a mandatory minimum originally trumped the guideline range, as long as they state that they considered the guidelines in limiting their substantial assistance departure. *Id.*, at 186.

The Second Circuit's opinion in *United States v. McGee*, 533 F.3d 225 (2d Cir. 2009) supports this view. There the Second Circuit noted that its decision in *Williams* means that consideration of the crack guidelines makes such defendants eligible for a reduced sentence. *Id.*, at 228-229.

In contrast, in *United States v. Hood*, 556 F.3d 226 (4th Cir. 2009), the Fourth Circuit held the defendant's sentence was not eligible for reduction under § 3582(c)(2) even though the district court, in considering the degree of departure from the mandatory minimum, alluded to the § 2D1.1 offense level and guideline range. It reasoned that it does not matter if the sentencing court, when granting the substantial assistance departure, referred to the guidelines altered by Amendment 706 because "the only guideline range applicable" to his sentence was the statutory minimum, which was not lowered by the amendment. *Cf. United States Moore*, 541 F.3d 1323, 1328 (11th Cir. 2008) (same where district court applied career offender guideline).

Similarly, the Eleventh Circuit, in *United States v. Williams*, 549 F.3d 1337 (11th Cir. 2008) upheld the denial of a sentence reduction where the original sentence was a non-Guideline sentence resulting from a departure from a mandatory minimum sentence pursuant to § 3553(e) where there was no evidence that the Guideline range played any role in the district court's determination of the final sentence.

In *United States v. Hedgebeth*, 2008 U.S. Dist. LEXIS 52625 (E.D. Pa. July 10, 2008), the district court granted a § 3582(c)(2) motion despite the fact that the defendant was subject to a mandatory minimum sentence. There the court reasoned that the defendant's reduced sentence based on his substantial assistance was "at least to some extent, influenced by, and therefore 'based [in part] on a sentencing range that has been subsequently lowered' within the meaning of 3582(C)(2)." *Id.*, at *3; *see United States v. Sallis*, 2008 WL 2225613, at *1 (N.D. Iowa May 27, 2008).

Therefore, a defendant who is not in the Fourth or Eleventh Circuits may be eligible for a sentence reduction even where a mandatory minimum originally trumped the guideline range, as long as the district court stated it considered the guidelines in determining the substantial assistance departure.

VI. Are individuals who were held responsible for more than 4.5 kilograms of crack cocaine eligible for § 3582(c)(2) sentence reductions?

With Amendment 706 the Commission chose not to lower the Guideline range for cases involving more than 4.5 kilograms of crack. Prior to the amendment, the Drug Quantity Table in § 2D1.1(c) assigned the highest offense level of 38 to cases involving more than 1.5 kilograms of crack. After the amendment, in cases involving between 1.5 and 4.5 kilograms of crack, the drug quantity table reduces the offense level to 36. Where more than 4.5 kilograms is involved, the base offense level remains at 38. The Commission offered no explanation for maintain the base offense level of 38 in its Reason for Amendment. *See* USSG Supp. to App. Amend. 706.

The circuit courts that have considered the issue have held that a sentence reduction is not authorized to reduce the sentence pursuant to § 3582(c)(2) in such cases because the sentencing range has not been lowered by Amendment 706. *See United States v. Jones*, No. 08-13298, slip op. at 444 (11th Cir. Nov. 19, 2008); *United States v. Childress*, 2009 WL 140502 at *3 (7th Cir. 2009). Section 1B1.10(a)(1)(B) states that 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…(B) an amendment…does not have the effect of lowering the defendant's applicable guideline range." Since the Commission excluded cases involving more than 4.5 kilos of crack, courts have reasoned it would be inconsistent with § 1B1.10 policy statement and therefore inconsistent with § 3582(c)(2) to grant relief. Several district courts in other Circuits have reached the same conclusion. *See United States v. Knight*, 2009 WL 275577 at *3 (W.D. Pa. Feb. 4, 2009); *United States v. Green*, 2009 WL 256576 (W.D. La. Jan. 29, 2009).

Notwithstanding the above cases, it should be argued that, in light of *Booker* and its progeny, excluding from the amendment sentences involving more than 4.5 kilograms of crack is not binding. The court's sentencing discretion includes the power to depart from the Guidelines to the extent that they are found to rest upon "unsound judgment," *Rita v. United States*, 127 S.Ct. 2456, 2468 (2007), or do not exemplify the Commission's exercise of its "characteristic institutional role," *Kimbrough v. United States*, 128 S.Ct. 558, 574, 575 (2007), that is, to issue guidelines that are "the product of careful study based on extensive empirical evidence," *Gall v. United States*, 128 S.Ct. 586, 594 (2007). The Supreme Court has recognized that courts may depart from the Guidelines "based solely on policy considerations, including disagreements with the Guidelines." *Kimbrough*, 128 S.Ct. at 570. When they do so, however, they must provide the basis for their disagreement. *Gall*, 128 S.Ct. at 594.

Notably, in *United States v. Horn*, 2008 U.S. Dist. LEXIS 102604, at *23, 25-26 (M.D. Tenn. Dec. 16, 2008), the district court found the Commission's rationale for declining to designate criminal history Amendment 709 for retroactive application is unsound and not the product of reasoned deliberation or empirical research. Similarly, in *United States v. Grinbergs*, 2008 WL 4191145, at *10 (D. Neb. Sept. 8, 2008), the district court judge found that the Guidelines for possession of child pornography did not "reflect the Sentencing Commission's unique institutional strengths" and therefore afforded them less deference than it would have to "empirically grounded guidelines."

VII. Are defendants entitled to the appointment of counsel in a § 3582(c)(2) proceeding?

A statutory or constitutional right to counsel for § 3582(c)(2) motions has been rejected by all circuits that have addressed the issue. *See United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000); *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999); *United States v. Townsend*, 98 F.3d 510, 512-513 (9th Cir. 1996)(per curiam*); United States v. Whitebird*, 55 F.3d 1007, 1010-11 (5th Cir. 1995); *United States v. Reddick*, 53 F.3d 462, 464-65 (2d Cir. 1995). Courts have the discretion to appoint counsel for a § 3582(c) motion or hearing.

The Eleventh Circuit, in *United States v. Webb*, 2009 WL 973214, at *3 (11th Cir. Apr. 13, 2009) has found that counsel is not required as a matter of fundamental fairness. The Court recognized, however, that "[g]iven the array of factors that courts now must consider in deciding whether to reduce a sentence under § 3582(c)(2), there may be instance in which equitable concerns would make the appointment of counsel appropriate to ensure a just outcome." *See Id.*, at *5 (n.4).

The Fifth Circuit has affirmed the right to counsel on appeal to challenge the denial of counsel on a § 3582(c)(2) motion, especially where there were factual disputes. *United States v. Robinson*, 542 F.3d 1045, 1052(5th Cir. 2008). The Court found it was in the "interest of justice" to appoint counsel, and noted the new complexities created by changes to the Guidelines might necessitate reconsideration of whether there should be a statutory or constitutional right to counsel in all such cases.

For a more thorough discussion of the right to counsel issue, see *Appointment of Counsel in Crack Retroactivity Cases* (June 25, 2008) and other materials available at http://www.fd.org/odstb_CrackCocaine.htm.

VIII. Conclusion

Since the amendments, numerous issues regarding the scope of § 3582(c)(2) resentencing proceedings have been litigated. This memo does not include all possible arguments. Attorneys should review the case law in their circuit and determine whether viable arguments for § 3582(c)(2) sentence reductions exist. You should preserve of course any issue where the circuits are split, and consider challenging the court's reasoning in your case.