**SELECTED RETROACTIVITY CASELAW**
**Federal Public & Community Defenders**
**Crack Retroactivity Summit**
**St. Louis, MO**
**January 24-25, 2008**

***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 is 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 nonetheless 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 should resentence 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).

- 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 pursuant to its power to review and revise the guidelines, if the reduction is consistent with applicable § 3553(a) factors and policy statements).

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

- 28 U.S.C. § 994(a)(2) (policy statements shall "further the purposes set forth in section 3553(a)(2)").

- *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) (noting 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").

***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 conflicts with the policy statement's directives to consider § 3553(a) factors, public safety, and 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. In any situation where new facts have to be marshaled and new arguments have to be 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, U.S.S.G. § 1B1.10, p.s., the policy statement has been revised to require the presentation of new facts and arguments. 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 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 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).

***Does a defendant have the 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 the government's evidence and present his or her own.

- 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?***

Although a defendant's presence at a § 3582(c)(2) is not required, the defendant should be allowed to attend the § 3582(c)(2) hearing, particularly if the court will need to resolve factual disputes.

- *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).

- *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").

- 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), a court may well abuse its discretion by failing to order a new or revised presentence sentence report. The presentence report provides essential notice so that 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 altogether).

- *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)).

***Are courts post-*Booker *still bound by the safety valve requirements in 18 U.S.C. § 3553(f) inasmuch as it requires judicial factfinding?***

After *Booker*, several circuit courts have held that district courts must continue to find each of the five statutory factors (but only by a preponderance of the evidence) before a defendant can receive safety valve relief under § 3553(f). However, courts are no longer bound by the otherwise mandatory language in § 3553(f) that the resulting sentence "shall be" within the applicable guideline range without regard to the statutory minimum. Rather, the guideline range is only advisory after *Booker*, and the district court has the discretion to sentence lower than the guideline range. In addition, a district court may consider eligibility for the safety valve in determining the new sentence under § 3582(c)(2) even when the defendant was not eligible for safety valve relief in the initial sentencing.

- *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. 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").

- *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. 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*'").

- *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)").

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

Rule 11(c)(1)(C) allows for the parties to agree to a specific sentence or a sentencing range. A binding plea agreement that a defendant will be sentenced within a specified sentencing range results in a sentence "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," which can be amended under § 3582(c)(2). In any event, 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.

- 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").

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

***If a defendant was sentenced as a career offender pursuant to § 4B1.1, what impact does Amendment 706 have on his sentence?***

By its terms, § 3582(c)(2) provides that a defendant is eligible for a new sentence if the original sentence was "based on" a sentencing range that has subsequently been lowered. All crack sentences were "based on" the crack guideline's sentencing ranges because those ranges represented the starting point of every sentencing pre- and post-*Booker*, even if the defendant was ultimately sentenced under § 4B1.1, and the difference between

the amended crack guideline sentencing range and the career offender guideline sentencing range is relevant to the district court's determination of whether a career offender sentence is greater than necessary to satisfy the purposes of punishment in any given case.

- 18 U.S.C. § 3582(c)(2) (requiring sentencing courts to consider all applicable § 3553(a) factors).

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

- *Gall v. United States*, 128 S. Ct. 586, 591 (2007) ("[T]he extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant" to a sentencing decision.).

- The Commission has recognized that the recidivism rate for offenders whose career offender status is based on drug offenses "resembles the rates for offenders in lower criminal history categories in which they *would be* placed under the normal criminal history scoring rules." United States Sentencing Comm'n, *Fifteen Years of Guideline Sentencing*, at 134 (Nov. 2004); *id.* at 133-34 (recognizing that the career offender guideline "makes the criminal history category a less perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses," does not serve a deterrent purpose, and has a disproportionate impact on African Americans).

- *United States v. Marshall*, 2008 WL 55989 (7th Cir. Jan. 4, 2008) (acknowledging that defendant who was sentenced as a career offender "may be eligible to petition for resentencing" under § 3582(c)(2) in light of the retroactive crack amendment).

- *United States v. Pruitt*, 502 F.3d 1154, 1168 (10th Cir. 2007) (McConnell, J., concurring) ("This might appear to be an admission by the Commission that this [career offender] guideline, at least as applied to low-level drug sellers like [the defendant], violates the overarching command of § 3553(a) that '[t]the court . . . impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in' § 3553(a)(2).").

- *United States v. Williams*, 435 F.3d 1350, 1355-56 (11th Cir. 2006) (affirming as reasonable a sentence well below the career offender guideline in a case involving crack cocaine where district court "correctly calculated the Guidelines range and gave specific, valid reasons for sentencing lower than the advisory range").

- *United States v. MacKinnon*, 401 F.3d 8, 9 (1st Cir. 2005) (reversing for resentencing after *Booker* where the defendant convicted of a crack offense was

sentenced pre-*Booker* to the guideline minimum of 262 months under the career offender guideline (up from what would have been a sentence of 188 months under the "regular" guideline range), where the sentencing judge described the career offender sentence as "unjust, excessive, and obscene").

***May a court impose a sentence below the minimum of the amended guideline range, or otherwise treat § 1B1.10's limitations as advisory?***

- 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)).

- *United States v. Booker*, 543 U.S. 220, 266 (2005) (this "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. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998) (district court must consider statutory sentencing criteria in existence at time of § 3582(c)(2) resentencing); *United States v. Reynolds*, 111 F.3d 132 (Table) (6th Cir. 1997) (same); *United States v. Williams*, 103 F.3d 57, 58-59 (8th Cir.1996) (same); *Settembrino v. United States*, 125 F.Supp.2d 511, 516 (S.D. Fla. 2000) (it is

within court's discretion to make safety valve relief available to defendants eligible for § 3582(c)(2) resentencing).

- *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".).

- 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, the Commission was not required to and did not seek either congressional approval or public comment on the text of § 1B1.10's new provisions. *See* 28 U.S.C. § 994(p); *United States v. Stinson*, 508 U.S. 36, 40-46 (1993).