MEMORANDUM

To: All Defenders, CJA Panelists

From: Sentencing Resource Counsel

Re: Sentence Reductions Under the Retroactive Crack Amendment

Date: January 2, 2008

"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), upon motion of the defendant, the director of the Bureau of Prisons, or on its own motion, 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." *See* 18 U.S.C. § 3582(c)(2). 28 U.S.C. § 994(o) requires the Commission to "periodically . . . review and revise . . . the guidelines." The Commission's policy statement on retroactivity is found at USSG § 1B1.10, and the amendments the Commission intends to have retroactive effect are listed in § 1B1.10(c).

On December 11, 2007, the Commission voted to give retroactive effect as of March 3, 2008 to the amendment to the crack guideline, and also voted to amend § 1B1.10 in ways that could be used to deny or reduce the two level reduction and to deny more than the two level reduction. This memo will identify the changes to § 1B1.10 that will go into effect on March 3, 2008 and suggest some arguments to get your clients more appropriate sentences. Although the substantive arguments appear first, you may want to look first at Part IV(A) regarding the right to appointed counsel.

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I. Obtaining Release for Those Eligible for Release Prior to March 3, 2008

Under amended § 1B1.10, any person serving a term of imprisonment for a crack offense will be eligible to file a motion under 18 U.S.C. § 3582(c)(2) on or after March 3, 2008 to have the court reduce his or her sentence.[1] This does not mean, however, that you should wait until March 3, 2008 to file a motion to reduce the sentence if a client is eligible for release before then, as many are. We have identified three arguments – and there may be others – that you can use to move the court to release these clients now.

A. ***Booker* Authority**

A sentencing court's authority to reopen and, if appropriate, reduce a sentence under § 3582(c)(2) is triggered when the sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to" its power to "review and revise . . . the guidelines." The crack amendment clearly fits within that description. Effective November 1, 2007, the Commission lowered sentencing ranges for crack offenses by two offense levels because it found that the crack guideline over-punished crack offenders and created unwarranted disparity between them and other drug offenders. On December 11, 2007, the Commission voted to make that amended guideline retroactive. Nothing more is needed to trigger the court's authority to revisit a sentence under § 3582(c)(2).

[1] Note that although we refer to "amended § 1B1.10" throughout this memorandum, the amendments to § 1B1.10 will not officially go into effect until March 3, 2008.

Once the authority to revisit the sentence has been triggered, the court still needs to ensure that the new sentence is consistent with the § 3553(a) factors and the Commission's policy statements. *See* 18 U.S.C. § 3582(c)(2). But those policy statements – including any suggestion that retroactivity be delayed until March 3, 2008 – must be read as advisory after *Booker*. *See 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)); *United States v. Jones*, 2007 WL 2703122 (D. Kan. Sept. 17, 2007); *United States v. Forty Estremera*, 498 F.Supp.2d 468, 471-72 (D.P.R. 2007). The court is thus free to reject the Commission's "advice" about when to act on a § 3582(c)(2) motion if the court finds that earlier action is appropriate under § 3553(a). For a more complete discussion of the statutory and constitutional bases for treating § 1B1.10 as advisory, see Part II of this memo.

Delaying until March 3, 2008 the release of a defendant who would otherwise be released earlier is inconsistent with § 3553(a), which requires sentencing courts to impose a sentence that is "sufficient *but not greater than necessary* to satisfy the purposes of sentencing," and thus is contrary to § 3582(c)(2)'s requirement to consider the applicable § 3553(a) factors.[2] Support for this comes from the Commission itself, which has repeatedly acknowledged that sentences under the crack guideline "fail to meet the sentencing objectives set forth by Congress" in § 3553(a) and cause unwarranted disparity among drug offenders,[3] even with the two level reduction.[4] Moreover, its decision to give the amended guideline retroactive effect was based on its determination that "the statutory purposes of sentencing are best served by retroactive application of the amendment."[5] In contrast, the Commission's advice that courts delay the effective date of retroactivity until March 3, 2008 was not based on any finding regarding the purposes of sentencing – or any other § 3553(a) factor – but rather was "in order to give the courts sufficient time to prepare for and process these cases."[6] While administrative ease is a

[2] For an excellent discussion of the parsimony principle with numerous citations to helpful authority, see the Brief Amicus Curiae of Families Against Mandatory Minimums filed in *Rita v. United States*, available at http://www.fd.org/odstb_Briefs.htm.

[3] *See Kimbrough v. United States*, 128 S.Ct. 558, 566-69 (2007) (citing numerous Commission reports); *see also* Letter to Chair Hinojosa from Jon Sands, dated October 31, 2007 (*citing* U.S.S.C., *Report to the Congress: Cocaine and Federal Sentencing Policy* at 91 (2002)), available at http://www.fd.org/pdf_lib/defender_crack_CH_retro_comments.pdf.

[4] *Id*. at 7-9, 12 (citing numerous Commission reports); *see also* Part II(A), *infra*.

[5] *See* 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.

[6] *Id*.

laudable goal, it cannot trump the statutory requirement to impose a sentence that is sufficient but not greater than necessary to satisfy sentencing purposes.

Section 3582(c)(2)'s additional requirement that any sentence reduction be "consistent with applicable policy statements issued by the Commission" does not require a different result, first, because giving retroactive effect to the crack amendment is fully consistent with the Commission's unanimous December 11th vote in favor of retroactivity and, second, because the Commission cannot use a policy statement to restrict a court's ability to comply with its statutory or constitutional sentencing obligations.[7] After *Booker*, *Gall*, and *Kimbrough*, this means that any statement on how courts should retroactively apply the crack amendment – including any date limitations – must be treated as merely advisory, and the sentencing court must have the discretion to reject that advice.[8]

The government will no doubt argue that a § 3582(c)(2) proceeding is not a full re-sentencing to which sentencing protections (such as those established by *Booker*) apply and will rely for support on two unpublished opinions: *United States v Swint*, 2007 WL 2745767 (3d. Cir. Sept. 21, 2007) and *United States v. Hudson*, 242 Fed. Appx. 16 (4th Cir. 2007).[9] Neither is persuasive. In *Swint*, the Third Circuit found that no retroactive amendment was applicable to the defendant who had already made repeated attempts to revisit his sentence via numerous procedural mechanisms. *See Swint* at *2. In a footnote, the court also rejected the defendant's argument that he had a separate right to a § 3582(c)(2) re-sentencing under *Apprendi* and *Booker*. *Id.* at *2 n.1. There, the court tossed out in dicta that "[m]oreover, the scope of a sentencing court's inquiry under section 3582(c)(2) is limited to consideration of a retroactive amendment to the Sentencing Guidelines; section 3582(c)(2) does not entitle a defendant to a full de novo resentencing." For support, the *Swint* court cited to *United States v. McBride*, 283 F.3d 612 (3rd Cir. 2002), a pre-*Booker* and pre-*Blakely* case that relied on the then-mandatory § 1B1.10 to hold that a § 3582(c)(2) sentence reduction did not permit the court to revisit drug quantity under *Apprendi*. *See McBride*, 283 F.3d at 614-15. *McBride*'s holding, which refused to extend *Apprendi* to a § 3582(c)(2) re-sentencing, was not surprising given that the Third Circuit had already (and, as it turned out, erroneously) held that

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[7] *Stinson v. United States*, 508 U.S. 36, 38 (1993) ("commentary in the Guidelines Manual that interprets or explains a Guideline is authoritative *unless it violates the Constitution*") (emphasis added); *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").

[8] The original purpose behind the requirement that sentence reductions be consistent with Commission policy statements was to override the court's more general authority to depart from the guidelines under § 3553(b). *See* Hutchinson, Sent'g Law & Pract. § 1B1.10, n. 2 (2007). Given that § 3553(b) was excised because it made the guidelines mandatory in all cases except those involving a circumstance of a kind or to a degree not adequately taken into consideration by the Commission, *Booker*, 542 U.S. at 234-35, 245-46, 259, it is unlikely that § 3582(c)(2) could be interpreted to require even stricter limitations on judicial discretion after *Booker*. *See Booker*, 543 U.S. at 265 (a "mandatory Guidelines system . . . is not a choice that remains open").

[9] *See also* amended U.S.S.G. § 1B1.10(a)(3) ("proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant").

Apprendi did not affect the federal sentencing guidelines in any respect. *See United States v. Williams*, 235 F.3d 858, 862-63 (3rd Cir. 2000). Given that *McBride* addressed a different issue, and was following circuit precedent that did not anticipate either *Blakely* or *Booker*, the *Swint* court's reliance on it should not be persuasive.

The Fourth Circuit's decision in *Hudson* is equally unpersuasive. It is an unpublished table case that merely finds that the district court did not abuse its discretion or commit reversible error in failing to apply the guidelines as advisory under *Booker* to a § 3582(c)(2) re-sentencing, without any discussion or citation to any authority whatsoever.[10]

In contrast, the Ninth Circuit has held, and you should argue:

> While § 3582(c)(2) proceedings do not constitute full resentencings, their purpose *is* to give defendants a new sentence. This resentencing, while limited in certain respects, still results in the judge calculating a new Guideline range, considering the § 3553(a) factors, and issuing a new sentence based on the Guidelines. The dichotomy drawn by the government, where full re-sentencings are performed under an advisory system while "reduction proceedings," or "modifications," rely on a mandatory Guideline system, is false. . . . *Booker* excised the statutes that made the Guidelines mandatory and rejected the argument that the Guidelines might remain mandatory in some cases but not in others.

See Hicks, 472 F.3d at 1171-71 (citing *Booker*, 543 U.S. at 263-66).

Regardless of whether § 3582(c)(2) re-sentencings constitute full *de novo* sentencings, they clearly require the court to impose a sentence based upon its evaluation of the § 3553(a) factors, a process that cannot be circumscribed by a policy statement. The issue is analogous to pre-*Booker* cases in which courts held that once the authority to reduce a sentence under § 3582(c)(2) is triggered by a retroactive guideline, the sentencing court must consider *all* relevant statutory sentencing criteria currently in existence, even if such criteria did not exist at the time of the original sentencing and is otherwise unrelated to the triggering amendment.[11] Thus, defendants who were initially

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[10] The government may also rely on *United States v. Moreno*, 421 F.3d 1217 (11th Cir. 2005), in which the 11th Circuit affirmed the district court's finding that the defendant was ineligible for a sentence reduction under § 3582(c)(2) because the amendment only potentially affected the selection of the applicable guideline and not the base offense level. It then also found that the court did not plainly err in refusing to reduce the defendant's sentence based on his post-sentencing conduct, in part, because it found that *Booker* did not provide a jurisdictional basis for or otherwise apply to a § 3582(c)(2) proceeding. *Id.* at 1220-21. Like the Third Circuit, the Eleventh Circuit simply found support for its proposition in pre-*Booker* circuit case law which had relied on then-mandatory § 1B1.10 to hold that "a district court's discretion has, therefore, clearly been cabined in the context of a § 3582(c)(2) sentencing reconsideration." *United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000). *Moreno* should not be persuasive for the same reasons that the Third Circuit's opinion in *Swint* is not – it relies on pre-*Booker* case law that itself was based on the language of a then-mandatory policy statement.

[11] *See United States v. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998) (in a § 3582(c) resentencing, district court can apply § 3553(f)'s safety valve to reduce sentence below the mandatory minimum because § 3553(f) is a general sentencing consideration that the district court must take into account in exercising its

sentenced before Congress enacted § 3553(f)'s safety valve were able to benefit from that statute during a § 3582(c)(2) re-sentencing for an unrelated retroactive amendment.[12] Similarly, the government has been allowed to move under § 3553(e) for a sentence reduction for substantial assistance in a § 3582(c)(2) re-sentencing, even though § 3553(e) did not exist at the time of the defendant's initial sentencing and had nothing to do with the retroactive amendment giving rise to the § 3582(c)(2) jurisdiction.[13] Like the defendants in those cases, defendants being resentenced under the crack amendment receive their new sentences in the context of revised statutory requirements, in which § 3553(b) has been excised and § 3553(a) is the governing law, and they must have the benefit of the statutory sentencing criteria in effect at the time of the § 3582(c)(2) re-sentencing.

Importantly, crack defendants are not seeking an *extension* of a Supreme Court decision, like those who argued for *Apprendi* rights at a § 3582(c)(2) hearing in cases like *McBride*. Rather, they are seeking to be sentenced under § 3553(a) as required by Supreme Court law. For this reason, it does not matter that the Commission's new policy statement purports to limit judicial discretion in various ways because the Commission "does not have the authority to amend" § 3553(a) or any other statute or to "interpret" such statutes in ways contrary to Supreme Court precedent.[14] In fact, the need for courts to apply § 3553 as interpreted by the Supreme Court is even more important than in the prior cases addressing substantial assistance and safety valve departures, because the *Booker* remedy was itself designed to avoid a Sixth Amendment violation: "*Booker* was not a mere statutory change which can be set aside to allow us to pretend it is [some other year] for the purpose of modifying [a] sentence; rather, it provides a constitutional standard which courts may not ignore by treating Guidelines ranges as mandatory in any context." *Hicks*, 472 F.3d at 1173.

In short, whether or not § 3582(c)(2) re-sentencings constitute full re-sentencings, equitable proceedings, or something in between, the district court must still treat a

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present discretion to resentence under § 3582(c)(2)); *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. 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) to further reduce sentence for defendant's substantial assistance); *Settembrino v. United States*, 125 F.Supp.2d 511, 517 (S.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)"); *but see United States v. Stockdale*, 129 F.3d 1066, 1068-69 (9th Cir. 1997) (district court cannot apply § 3553(f) to defendant being resentenced under § 3582(c)(2)).

[12] *United States v. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998); *United States v. Reynolds*, 111 F.3d 132 (Table) (6th Cir. 1997); *Settembrino v. United States*, 125 F.Supp.2d 511, 517 (S.D. Fla. 2000).

[13] *United States v. Williams*, 103 F.3d 57, 58-59 (8th Cir.1996).

[14] *See 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").

Commission policy statement as advisory or violate *Booker*. And, if § 1B1.10 is itself advisory, so too is its "advice" that district courts wait until March 3, 2008 to reduce a defendant's sentence under § 3582(c)(2).

B. Equitable Authority

If the court will not act on a § 3582(c)(2) motion until March 3, 2008, you can still file a § 3582(c)(2) motion now along with a motion for conditional release pending final disposition, on the basis that the court has inherent equitable power to protect the defendant from irreparable harm and to ensure that s/he obtains the benefit of the retroactive amendment.

Equity powers can be invoked in aid of the court's exercise of its jurisdiction. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts in equity. . . . Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . ." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Such powers can be invoked in any matter over which the court clearly has jurisdiction, or in any ancillary matter, or in any case in which the court's jurisdiction is arguable and has not yet been decided. [15]

Here, there is no question that a federal district court has jurisdiction to reduce crack sentences and order the immediate release of crack offenders as of March 3, 2008. For those with earlier release dates, the court can order that release through its equitable powers pending a final adjudication on the defendant's § 3582(c)(2) motion (which can be entered on March 3, 2008), either as an inherent part of its § 3582(c)(2) jurisdiction or as a matter ancillary to the exercise of that jurisdiction.

Courts have long exercised ancillary jurisdiction in criminal cases. *See Garcia v. Teitler*, 443 F.3d 202, 207-08 (2nd Cir. 2006). Although the precise boundaries of ancillary jurisdiction have never been fixed, "[a]t its heart, ancillary jurisdiction is aimed at enabling a court to administer justice within the scope of its jurisdiction." *Id.* at 208 (citations and internal punctuation omitted). The DC Circuit has held that ancillary jurisdiction attaches where: "(1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated."[16]

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[15] *See United Mine Workers*, 330 U.S. at 291; *Morrow v. District of Columbia*, 417 F.2d 728, 739-40 (D.C. Cir. 1969).

[16] *See Morrow*, 417 F.2d at 739-40.

The power to order release pending adjudication on the merits of a § 3582(c)(2) motion clearly fits within that test: timely release is an integral part of reducing a person's sentence, the release can be accomplished with no fact finding beyond that required to adjudicate the § 3582(c)(2) motion, it would not deprive any party of any rights (i.e., the government has neither a "right" nor an interest in over-punishing defendants), and the matter of timely release would need to be settled so as not to frustrate the defendant's ability to obtain the full benefit of retroactive application of the crack amendment.[17] Thus, even if the power to order release pending adjudication on the merits is not itself considered part of the power to adjudicate a § 3582(c)(2) motion, it is at least ancillary to that power.

Once jurisdiction (whether direct or ancillary) is shown, the court has the power to issue whatever order is necessary to ensure that justice is done.[18] Here, the court's power to release a defendant pending adjudication of a § 3582(c)(2) motion is most analogous to cases permitting a defendant to be released on bail pending adjudication of a habeas petition, which courts have found is an inherent aspect of the power to issue the writ.[19] As in those cases, a defendant seeking release pending adjudication on the § 3582(c)(2) motion would have to show both special circumstances and a high probability of success.[20] Any defendant who can demonstrate that simply applying the Commission-approved two level reduction would result in a release date before March 3, 2008 should easily be able to meet this standard, particularly given the Commission's stated reasons for retroactive application of the reduction (to ameliorate overly harsh punishment and unwarranted disparity and to better serve § 3553(a) factors), its relatively unimportant reason for delaying retroactivity (administrative ease), and the statutory and constitutional implications of failing to act.[21]

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[17] *Accord Garcia*, 443 F.3d at 208 (court with jurisdiction over criminal case has ancillary jurisdiction to resolve fee dispute between defendant and former attorney); *Morrison*, 417 F.2d at 740 (court with jurisdiction over criminal case has ancillary jurisdiction to order arrest records sealed).

[18] *See United Mine Workers*, 330 U.S. at 291.

[19] *See, e.g., Levy v. Parker*, 396 U.S. 1204 (1969); *Mapp v. Reno*, 241 F.3d 221, 226 (2nd Cir. 2001); *Landano v. Rafferty*, 970 F.2d 1230, 1239 (3rd Cir. 1992) *Marino v. Vasquez*, 812 F.2d 499 (9th Cir. 1987); *In Re Wainwright*, 518 F.2d 173, 175 (5th Cir. 1975); *United States v. Stewart*, 127 F.Supp.2d 670, 671-72 (E.D. Penn. 2001).

[20] *See, e.g., Land v. Deeds*, 878 F.2d 318, 319 (9th Cir. 1989); *Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986); *Calley v. Calloway*, 496 F.2d 701, 702 (5th Cir. 1974); *Glynn v. Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972); *Stewart*, 127 F.Supp.2d at 672.

[21] *Levy*, 396 U.S. at 1205 (Douglas, J.) (granting bail pending review on merits of habeas petition where substantial issues where presented and defendant's sentence was due to expire in 12 days); *Marino*, 812 F.2d at 509 (approving bail where defendant did not pose risk of flight or danger to community, and where denial of bail could leave defendant without a remedy given the minimal time left on his sentence); *Calley v. Calloway*, 497 F.2d 1384, 1385 (5th Cir. 1974) (district court "did not remotely abuse his discretion" in granting bail pending habeas hearing where defendant had raised substantial issues and already served a substantial portion of his sentence); *Boyer v. City of Orlando*, 402 F.2d 966, 968 (5th Cir. 1968) (ordering

C. Authority under 28 U.S.C. §§ 2255 and 1651(a)

If the court refuses to act on a § 3582(c)(2) motion before March 3, 2008 pursuant to either its *Booker* authority or its equitable authority, you could argue that it has the power to vacate the sentence now under 28 U.S.C. § 2255 or to issue a writ of *corum* nobis under 28 U.S.C. § 1651(a), although this course may be difficult.

Under 28 U.S.C. § 2255, a person in federal custody can petition the court to vacate, set aside or correct a judgment if the sentence was imposed in violation of the Constitution or federal law, the sentencing court was without jurisdiction to impose the sentence, or the sentence imposed exceeded the statutory maximum or is otherwise subject to collateral attack. Although most courts have held that motions to vacate a sentence on the basis of a subsequent amendment to the guidelines must be brought under § 3582(c)(2), you could try to raise a § 2255 claim on the ground that the court's unwillingness to rule on a § 3582(c)(2) motion prior to March 3, 2008 somehow renders the original sentence illegal.[22]

However, in addition to substantive limitations, there are procedural barriers to § 2255 motions. Such a motion must be brought within one year from the latest of (1) the date on which judgment becomes final, (2) any impediment to making the motion that was created by governmental action was removed, (3) a new right was recognized by the Supreme Court and made retroactive, or (4) the date on which the facts supporting the claim could have been discovered through the exercise of reasonable diligence. A second or subsequent § 2255 petition is permitted only upon certification by a panel of the court of appeals that the motion contains either newly discovered evidence that would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense or a new rule of constitutional law that

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defendant serving a relatively short sentence to be released on bail pending review of his habeas petition in state court "in order to render [his] State remedies truly effective," and extending release throughout further federal habeas proceedings if state should rule against him); *Stewart*, 127 F.Supp.2d at 672 (noting that "extraordinary circumstances have been found only in cases of ill health or *the near-term completion of a sentence*") (emphasis added); *Cary v. Ricks*, 2001 WL 314654, *3 (S.D. N.Y. Mar. 30, 2001) (noting that if defendant's habeas claims were more substantial, release on bail pending adjudication would likely be appropriate given that he has already served almost 4 years of a 4 ½ to 9 year sentence); *see also LaFrance v. Bohlinger*, 487 F.2d 506, 507-08 (1st Cir. 1973) (approving district court decision to release habeas defendant, in part, because defendant had already served much of his sentence and court may properly have found that requiring him to serve months more of an unconstitutional sentence pending appeal would be "too harsh," particularly since defendant is always subject to re-imprisonment should writ's issuance be reversed on appeal).

[22] *But see United States v. Carter*, 500 F.3d 486, 489-90 (6th Cir. 2007) (regardless of labels, when a motion attacks a conviction or sentence, it is to be construed as a § 2255 motion, but when it argues that the sentencing guidelines have been modified to change the applicable guideline, it should be treated as a § 3582(c)(2) motion). Examples of sentencing arguments that have been construed as attacking the validity of the sentence under § 2255 include claims that the guidelines were miscalculated at sentencing, *United States v. McNeil*, 17 Fed. Appx. 383, 384-85 (6th Cir. 2001), and that the defendant is entitled to resentencing under *Booker*, *United States v Burkins*, 157 Fed. Appx. 55, 55-56 (10th Cir. 2005),

was previously unavailable and that the Supreme Court made retroactive to cases on collateral review. Thus, even if the court would otherwise be willing to release your client before March 3, 2008 on a § 2255 motion, the motion may be procedurally barred.

Finally, if § 2255 relief is unavailable, federal courts have power under the All Writs Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *See* 28 U.S.C. § 1651(a).[23] Section 1651(a) has been applied in myriad situations to ensure that justice is done, usually through the writ of *coram nobis* to correct error.[24] Although *coram nobis* relief is typically available only to defendants who have finished serving their sentences and are no longer in custody, it has been invoked to permit a court to modify a sentence in circumstances where the defendant is still in custody, § 2255 relief is unavailable, and manifest injustice would otherwise attach.[25] Citing these cases, you can seek *coram nobis* relief for any client who would be entitled to release before March 3, 2008, and for whom § 2255 relief is unavailable, arguing the same grounds as those justifying release under the court's inherent equitable authority discussed above.

II. Obtaining a Sentence Reduction Greater than the Two Levels Advised by the Sentencing Commission

The Commission has made some heavy handed changes to § 1B1.10 intended to limit a court's ability to reduce sentences by more than two offense levels, begging the question of the extent to which the Commission can limit a court's sentencing discretion under § 3582(c)(2).[26]

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[23] *See also Morrow*, 417 F.2d at 734 (All Writs Act provides a basis for exercise of equitable power separate from inherent authority); *Texaco, Inc. v. Chandler*, 354 F.2d 655, 657 (10th Cir.1965) (court has the "power and inescapable duty, whether under the all-writs statute, 28 U.S.C. § 1651, or under its inherent powers of appellate jurisdiction, to effectuate what seems to [the court] to be the manifest ends of justice") (internal quotation marks omitted).

[24] *United States v. Morgan*, 346 U.S. 502, 505 (1954) ("In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief."); *United States v. Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988) (granting *coram nobis* relief under § 1651(a) in light of retroactive change in mail fraud law and to "achieve justice").

[25] *See United States v. Golden*, 854 F.2d 31, 32-33 (2nd Cir. 1988) (defendant in custody alleging ineffective assistance of counsel for failing to timely file Rule 35 motion to reduce sentence may be entitled to *coram nobis* relief under § 1651(a) even if he is barred from proceeding under § 2255); *United States v. Ko*, 1999 WL 1216730 (S.D.N.Y. 1999) (unpub.) (exercising jurisdiction under § 1561(a) to reduce defendant's sentence so as to avoid effects of changes in immigration law that would otherwise cause miscarriage of justice); *United States v. Nunez*, 1989 WL 59609, *2 (S.D. N.Y. May 30, 1989); *accord Mandarino v. Ashcroft*, 290 F.Supp.2d 253, 258 n.3 (D. Conn. 2002) (noting court "would be inclined to grant the petition for writ of error coram nobis . . . if the claim were deemed procedurally barred for purposes of a § 2255 petition").

[26] A redlined version of § 1B1.10 that shows the changes is attached to this memorandum.

Taken together, revised §§ 1B1.10(b)(1) and (b)(2) state that the court "shall not" reduce the defendant's term of imprisonment to a term that is less than the minimum of the recalculated guideline range, which can only be determined by substituting the amended guideline for the prior version and leaving all other guideline decisions the same as before. In other words, if the defendant did not get a guideline departure before, according to the Commission, s/he can't get one now.[27] For those who received a departure the first time around, the Commission suggests that a "comparable" reduction to the amended guideline range "may be appropriate," meaning that if the defendant received a sentence that was approximately 20% less than the bottom of the guideline range at the original sentencing, s/he may be eligible for a 20% reduction from the bottom of the amended guideline range – a percentage-based test like that expressly rejected by the Supreme Court in *Gall*.[28] Finally, in an act of supreme irony, the Commission mentions *Booker* for the first time ever – but does so in the context of advising courts *not* to reduce a non-guideline sentence (i.e., a variance) any more than the proportional reduction approved for guideline departure cases.[29]

This amended commentary should not be followed (unless beneficial under the circumstances) for at least three reasons. First, it limits the sentencing court's ability to consider the § 3553(a) factors in imposing a new sentence in violation of the court's duty under § 3582(c)(2). Second, it instructs courts to treat § 1B1.10 as mandatory – which in turn makes § 2D1.1 mandatory in the context of a § 3582(c)(2) re-sentencing – in violation of *Booker* and *Kimbrough*. And third, it violates the Commission's own statutory obligations under its enabling statutes, 28 U.S.C. §§ 991 & 994.

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[27] *See* amended USSG § 1B1.10, comment. (n.3) ("if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range").

[28] *Compare* amended USSG § 1B1.10(b)(2)(B) and n.3 (advising sentence reductions based solely on percentages of departures) *with Gall v. United States*, 128 S.Ct. 586, 595-96 (2007) ("We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence. . . . [because it] comes too close to creating an impermissible presumption of unreasonableness for sentences outside the Guideline range . . . [and] suffers from infirmities of application. . . . The formula is a classic example of attempting to measure an inventory of apples by counting oranges.").

[29] *See* amended USSG § 1B1.10(b)(1)(B). The language of amended § 1B1.10(b)(1)(B), which states that for non-guideline sentences "any *further* reduction would not be appropriate," is ambiguous because it is not clear to what "reduction" the Commission intended to refer. It could mean the two level reduction authorized by the amended guideline, the two level reduction plus the proportional reduction authorized for departure cases, or the reduction from the guideline range granted at the initial sentencing when the non-guideline sentence was originally imposed. We read § 1B1.10(b)(1)(B) to allow for a two level reduction plus a proportional reduction for non-guideline sentences, the same as for guideline departure sentences. Such a reading is supported by Advisory Note 3, which discusses how courts should apply the policy statement to cases where the original term of imprisonment was less than the term authorized by the applicable guideline range and does not distinguish between departures and non-guideline sentences, thereby suggesting that the Commission's intent in § 1B1.10(b)(1)(B) was to focus on proportional reductions and not to draw substantive distinctions between types of below-guideline sentences.

A. Treating amended §§ 1B1.10 and 2D1.1 as mandatory violates §3582(c)(2).

The first problem with the changes to § 1B1.10 is that they are designed to limit a court's ability to resentence a crack defendant in accord with the applicable § 3553(a) factors, thereby requiring the court to violate its obligations under § 3582(c)(2) to "consider the factors set forth in § 3553(a) to the extent that they are applicable" when reducing the sentence. In particular, amended § 1B1.10 would require the district court to grant, at most, a two level reduction in every case even if the resulting sentence would still be greater than necessary to serve the purposes of sentencing or create unwarranted disparity or otherwise contradict an applicable § 3553(a) factor.

The crack guideline's § 3553(a)-related problems are well known and well documented. In *Kimbrough*, the Supreme Court identified three major issues associated with the differential treatment of crack and powder offenders, which under the old guideline "yield[ed] sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs":[30] (1) the disparity was based on "assumptions about the relative harmfulness of the two drugs" that "more recent research and data no longer support;"[31] (2) the disparity "leads to the anomalous result that retail crack dealers get longer sentences than the wholesale drug distributors who supply them with powder cocaine from which their crack is produced," and thus "is inconsistent with" congressional policy to punish major drug dealers more severely than low-level dealers;[32] and (3) the disparity "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race."[33] The Court also cited the Commission's own conclusions that this disparate treatment of crack offenders was "generally unwarranted" and "fail[ed] to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act."[34]

Importantly, the amended guideline does *not* fully rectify these problems. Quoting the Commission, the Supreme Court wrote that the "modest amendment [still] yields sentences for crack offenses between two and five times longer than sentences for

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[30] *Kimbrough v. United States*, 128 S.Ct. 558, 566 (2007).

[31] *Id.* at 568 (*citing* U.S.S.C. *Report to Congress: Cocaine and Federal Sentencing Policy* at 91 (May 2002) ("2002 Crack Report") & U.S.S.C., *Report to Congress: Cocaine and Federal Sentencing Policy* at 8 (May 2007) ("2007 Crack Report")) (internal quotation marks omitted).

[32] *Id.* (*citing* U.S.S.C., *Special Report to Congress: Cocaine and Federal Sentencing Policy* at 66-67, 174 (Feb. 1995)("1995 Crack Report")) (internal quotation marks omitted).

[33] *Id.* (*citing* 2002 Crack Report at 103) (internal quotation marks omitted).

[34] *Id.* at * 567-68 (*citing* 1995 Crack Report at 1 & 2002 Crack Report at iv, 91) (internal quotation marks omitted).

equal amounts of powder,"[35] and the Commission has recommended that the ratio be "'substantially' reduced."[36] It also noted that the Commission has described the amendment as "'only . . . a partial remedy' for the problems generated by the crack/powder disparity."[37] And the Court found that "[t]he amended Guidelines still produce sentencing ranges keyed to the mandatory minimums in the 1986 Act," which was the source of the problems associated with the crack guideline in the first place.[38] The guideline as amended "now advances a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1," and the Commission has recommended a ratio of, at most, 20 to 1.[39]

Because the amended guideline still results in sentences that are based on an unwarranted disparity and fails to serve the purposes of sentencing, a district court cannot automatically assume – as the Commission would have it – that a sentence under the amended guideline satisfies § 3553(a). And because the court has a statutory obligation to consider the applicable § 3553(a) factors when imposing a new sentence under § 3582(c)(2), the Commission's policy statement to the contrary is invalid.[40]

B. Treating amended §§ 1B1.10 and 2D1.1 as mandatory violates *Booker* and *Kimbrough*.

Even if the crack amendment did resolve the § 3553(a) problems with the crack guideline (which it clearly did not), revised § 1B1.10 would still violate *Booker* insofar as it renders any part of the guidelines mandatory. *Booker* made clear that the right to have a jury find facts that are essential to the punishment "is implicated *whenever* a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant."[41] Many of the defendants who will be resentenced under § 3582(c)(2) were initially sentenced on the basis of facts that were neither found by the jury nor admitted by the defendant. Requiring a court to impose a new sentence based on facts that were initially found in violation of the Sixth Amendment would import that Sixth Amendment violation into the new sentence.

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[35] *Id.* at 569 (*citing* Amendments to the Sentencing Guidelines for U.S. Courts, 72 Fed. Reg. 29571-72 (2007)).

[36] *Id.* at 568 (*citing* 2002 Crack Report at viii).

[37] *Id.* at 569 (*citing* 2007 Crack Report at 10).

[38] *Id.* at 569 n.10; *see also id.* at 566-67 (noting that the Commission "did not use . . . [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses" but rather "employed the 1986 Act's weight-driven scheme" and adopted the crack/powder disparity "in line with the 1986 Act").

[39] *Id.* at 573; *see also id.* at 569 (*citing* recommendations from 1995 Crack Report (1 to 1 ratio), 1997 Crack Report (5 to 1 ratio), and 2002 Crack Report (20 to 1 ratio)).

[40] 18 U.S.C. § 3582(c)(2); *see also Stinson*, 508 U.S. at 38.

[41] *Booker*, 543 U.S. at 232 (citation and internal punctuation marks omitted) (emphasis added).

Booker also made clear that the guidelines cannot be applied as mandatory in some circumstances and not others. The Court rejected the government's suggestion that it "render the Guidelines as advisory in any case in which the Constitution prohibits judicial factfinding" but "leave them as binding in all other cases. . . . [W]e do not see how it is possible to leave the Guidelines as binding in other cases. For one thing, the Government's proposal 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."[42] Again in *Kimbrough*, the Court rejected the government's argument that § 2D1.1 and, more specifically, the crack guideline, can be interpreted in any way that renders it effectively mandatory: "[U]nder *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only; and . . . the Court of Appeals erred in holding the crack/powder disparity effectively mandatory."[43] Those portions of amended § 1B1.10 that "would impose mandatory Guidelines-type limits upon a judge's ability to reduce sentences" and would render § 2D1.1 "effectively mandatory" for crack defendants being resentenced under § 3582(c)(2) violate *Booker* and *Kimbrough* and are void as a matter of law.[44]

Requiring the guidelines to be treated as advisory in a § 3582(c)(2) re-sentencing does not run afoul of cases holding that *Booker* is not retroactive. The limitations on giving retroactive effect to new constitutional rules were designed to protect the system's interest in finality. *See, e.g., Teague v. Lane*, 489 U.S. 288, 309 (1989) ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."). In contrast, a § 3582(c)(2) proceeding renders the judgment no longer final for the limited purpose of imposing a reduced sentence. *See* 18 U.S.C. § 3582(b) ("Notwithstanding the fact that a sentence to imprisonment can subsequently be modified pursuant to the provisions of subsection (c) . . . a judgment of conviction that includes such a sentence constitutes a final judgment for all *other* purposes") (emphasis added). Put another way, a judgment of conviction does *not* constitute a final judgment for purposes of modifying the sentence pursuant to § 3582(c)(2) and thus the finality concerns against applying *Booker* retroactively do not exist in that limited context.[45]

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[42] *Booker*, 543 U.S. at 266 (internal punctuation marks and citation omitted) (emphasis in original).

[43] *Id.* at 5.

[44] *See Neal*, 516 U.S. at 290, 295 (Commission "does not have the authority to [effectively] amend [a] statute" by "interpreting" it in ways contrary to the construction given it by the Supreme Court and the Court will "reject [the Commission's] alleged contrary interpretation"); *Stinson*, 508 U.S. at 38 ("commentary in the Guidelines Manual that interprets or explains a Guideline is authoritative *unless it violates the Constitution*") (emphasis added); *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").

[45] *See also United States v. Goines*, 357 F.3d 469, 478 (4th Cir. 2004) ("the disruption of finality engendered by a broad interpretation of § 3582(c)(2) is consistent with the legislative design," which anticipates that sentences will be reopened whenever a guideline amendment is given retroactive effect).

Nor does permitting those resentenced under § 3582(c)(2) to obtain the benefit of *Booker* result in disparate treatment vis a vis other inmates who do not have a right to a § 3582(c)(2) re-sentencing. If the government argues that it does, you can cite the Fourth Circuit's response to a similar concern raised in a case where a defendant won his habeas petition and was thus entitled to re-sentencing post-*Booker*:

> It could certainly be said that Butler was fortunate that the district court twice sentenced him incorrectly, thus continuing his case long enough for *Booker* to be decided before the latest sentence was imposed. But, it is not unusual for temporal happenstance to control whether a criminal defendant receives the benefit of a Supreme Court decision. And, Butler is no less "deserving" of benefiting from *Booker* than are any of the other defendants who happened to have been sentenced after *Booker* was decided. The fact is that when Butler was sentenced, *Booker* had already been decided, and that is all that matters.

United States v. Butler, 139 Fed. Appx. 510, 512 (4th Cir. 2005). Since January 12, 2005, anytime a defendant gets a new sentence, that sentence must comply with *Booker*.[46] The same is true here.

C. The revisions to § 1B1.10 violate the Commission's statutory obligations under its enabling statute.

The third problem with revised § 1B1.10 is that it violates the Commission's obligations under its enabling statute. The Commission has already acknowledged that the crack amendment represents only a modest interim measure that does not fully rectify the problems with crack sentences, including that they "fail[] to meet the sentencing objectives set forth by Congress" in § 3553(a)(2). In revising § 1B1.10 to restrict a court's ability to even consider this acknowledged failure of the guideline *as amended* to satisfy § 3553(a) when imposing a new sentence under § 3582(c)(2), the Commission has violated its obligation under 28 U.S.C. § 994(a)(2) to write policy statements that "further the purposes set forth in section 3553(a)(2)."[47] It has also violated its obligation to establish sentencing policies and practices that assure that the purposes of § 3553(a)(2) are met, avoid unwarranted sentencing disparities, maintain sufficient flexibility to permit individualized sentences, and reflect advancement in the knowledge of human behavior

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[46] *See, e.g., United States v. Gutierrez-Ramirez*, 405 F.3d 352, 359 n.14 (5th Cir. 2005) (where sentence is vacated for error in applying guidelines, court must correct error and also apply guidelines as advisory at resentencing); *United States v. Doe*, 398 F.3d 1254, 1261 n.9 (10th Cir. 2005) (on remand for resentencing following error in applying guidelines, court no longer needs to credit defendant for his assistance under *Booker*); *United States v. Gleich*, 397 F.3d 608, 615 (8th Cir. 2005) (remanding case for resentencing following guideline application error, at which "the district court shall apply the advisory guideline regime").

[47] 28 U.S.C. § 994(a)(2).

as it relates to the criminal justice process.[48] If guideline commentary "is at odds with" the plain language of 28 U.S.C. § 994, the guideline commentary "must give way." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). The amendments are thus void as an improper exercise of Commission authority, in addition to violating the remedial holding in *Booker*, and should be rejected.[49]

To the extent that revised § 1B1.10 purports to interpret § 3582(c)(2), it is also void under *Stinson*, which rejected the notion that policy statements and other commentary should be viewed as construing the statutes the Commission administers.[50] Instead, *Stinson* held that "the functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of" the guidelines.[51] In contrast, the clear intent of the proposed revisions to § 1B1.10 is to cabin and control judicial interpretation of § 3582(c)(2), which in turn violates separation of powers principles because it is a judicial function to interpret and apply laws.[52]

III. Special Issues

A. Career Offenders and Armed Career Criminals

The Commission has made an additional revision to § 1B1.10 that purports to render any sentence reduction "unauthorized" under § 3582(c)(2) if an amendment listed in § 1B1.10(c) "does not have the effect of lowering the defendant's applicable guideline range."[53] For the same reasons discussed above, this policy statement should be treated

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[48] 28 U.S.C. § 991(b)(1)(A)-(C).

[49] The government will no doubt point to the language of § 3582(c)(2) to argue that the court does not have *jurisdiction* to reduce a sentence unless that reduction is "consistent with" the Commission's advice in § 1B1.10. *See, e.g.*, Testimony of Steven L. Chanenson Before the U.S. Sentencing Commission, Public Hearing on Retroactivity at 7-8 (Nov. 13, 2007) (relying on § 3582(c)(2)'s language to posit that Congress intended district courts to have "no authority" to reduce a term of imprisonment unless the reduction is consistent with Commission policy statements), available at http://www.ussc.gov/hearings/11_13_07/Chanenson_testimony.pdf. Our response should be, first, that this is a misreading of the plan language of the statute, *see* pp. 2-3, *supra*, and, second, even if Congress did intend to limit courts' ability to disagree with the guidelines in this context (as it surely did back in 1984 when § 3582(c)(2) and the rest of the Sentencing Reform Act was passed), that approach is no longer permissible after *Booker*. *See Booker*, 543 U.S. at 265 ("We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. But, we repeat, given today's constitutional holding, that is not a choice that remains open.").

[50] *Stinson*, 508 U.S. at 44.

[51] *Id.* at 45.

[52] *Marbury v. Madison*, 5 U.S. 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.").

[53] *See* amended U.S.S.G. § 1B1.10(a)(2)(B). The application note gives as an example a case where the defendant is subject to a mandatory minimum sentence, *see id.* at n.1(A), but it likely also reaches people

as advisory. Therefore, if you have a crack offender who was sentenced under §§ 4B1.1 (career offender) or 4B1.4 (armed career criminal), or whose sentence is not necessarily automatically affected by the crack guideline amendment for any other reason, you should still file a § 3582(c)(2) motion.

Nothing in the statutory language requires that the guideline amendment actually have the effect of lowering a defendant's guideline range before the sentencing court can revisit the sentence. Rather, the statute requires that the defendant's sentence was "based on" a sentencing range that has subsequently been lowered.[54] 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 or 4B1.4.[55]

In addition, § 3582(c)(2) requires sentencing courts to consider all applicable § 3553(a) factors. The Supreme Court recently said that "the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant" to a sentencing decision. *Gall v. United States*, 128 S.Ct. 586, 591 (2007). Given this relevance, the sentencing court is free under § 3582(c)(2) to consider the retroactive crack amendment in deciding, for example, whether the advisory sentence under the career offender guideline is "sufficient but not greater than necessary to satisfy the purposes of sentencing," now that the difference between that sentencing range and the non-career offender guideline sentencing range for the same crime is even greater than before.

B. Multi-Drug Cases That Result in No Change Or A Higher Guideline Range

As explained in Applying the Crack Amendments 101, November 1, 2007, posted or soon to be posted on the crack page at www.fd.org, unintended anomalies result in some cases involving crack and other drugs. For example, an offense involving 12 grams of crack and 6 grams of powder gets a combined base offense level of 26, whereas if the offense had involved 18 grams of crack only, the base offense level would be 24. yet this falls within the literal language of § 1B1.10(c), as it "does not have the effect of lowering the defendant's applicable guideline range." However, the defendant was originally sentenced to a term of imprisonment that was "based on" a sentencing range that has otherwise subsequently been lowered. The court should consider the purposes and

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who were sentenced as career offenders or armed career criminals, and possibly others (such as those sentenced to a non-guideline sentence under *Booker*).

[54] *See, e.g., United States v. LaBonte*, 70 F.3d 1396, 1412 (1st Cir. 1995) (rejecting government's argument that § 3582(c)(2) resentencing is inappropriate where defendant's original sentence falls within the amended guideline range because "we cannot be confident that, faced with a different range of options, the district court's choice will remain the same") (*overruled on other grounds* 520 U.S. 751 (1997)).

[55] *See Gall*, 128 S.Ct. at 596 ("[A] district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range . . . the Guidelines should be the starting point and the initial benchmark. They are *not* the only consideration, however. . . . [T]he judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.") (emphases added).

factors set forth in § 3553(a) – the same reasons for the crack amendment – to grant the defendant at least the two-level reduction.

C. Mandatory Minimums

You can seek relief from a mandatory minimum under §§ 3553(e) or 3553(f) in the context of a § 3582(c)(2) re-sentencing, even if the defendant was originally sentenced before those sections were enacted.[56] And the reasoning of the cases cited in the footnote is not limited to cases in which the defendant was originally sentenced before §§ 3553(e) or 3553(f) were enacted. In a § 3582(c) re-sentencing, the judge first determines what the guideline sentence would have been at the time of the original sentencing if the amended guideline applied, then determines whether to exercise her discretion under "all relevant statutory sentencing factors" that exist at the time of re-sentencing, whether they existed at the original sentencing or not.[57]

D. Supervised Releasees

Application Note 4 of revised § 1B1.10 still prohibits courts from reducing the term of imprisonment for those incarcerated on a supervised release revocation.[58] This advice is contrary to an earlier Ninth Circuit case, which interpreted "term of imprisonment" as used in § 3582(c)(2) to encompass periods of incarceration for supervised release revocations because the supervised release term itself is part of the punishment imposed for the defendant's original crime. *See United States v. Etherton*, 101 F.3d 80, 81-82 (9th Cir. 1996). After *Booker, Etherton* can be cited in support of a § 3582(c)(2) motion to reduce the term of imprisonment they are currently serving on the basis that the policy statement's commentary is advisory only.

Non-incarcerated supervised releasees who wound up serving more time than their amended crack guidelines would have required can move pursuant to 18 U.S.C. §§ 3583(e)(1) and (e)(2) to reduce their term of supervised release or modify release

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[56] *United States v. Mihm*, 134 F.3d 1353, 1355 (8th Cir. 1998) (in a § 3582(c) resentencing, district court can apply § 3553(f)'s safety valve to reduce sentence below the mandatory minimum because § 3553(f) 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. 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. 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) to further reduce sentence for defendant's substantial assistance); *Settembrino v. United States*, 125 F.Supp.2d 511, 517 (S.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)"); *but see United States v. Stockdale*, 129 F.3d 1066, 1068-69 (9th Cir. 1997) (district court cannot apply § 3553(f) to defendant being resentenced under § 3582(c)(2)).

[57] *See Mihm*, 134 F.3d at 1355.

[58] *See* amended U.S.S.G. § 1B1.10, p.s. comment. (n. 4(A)).

conditions on the basis of the amended guideline.[59] The Commission takes the position that the fact that the defendant may have served a longer term of imprisonment than appropriate in view of the amended guideline range "shall not, without more, provide a basis for early termination of supervised release." In contrast, the Supreme Court has recognized that "equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term," and that those considerations can properly be addressed by modifying release conditions under § 3583(e)(2) or terminating supervised release at any time after the expiration of one year under § 3583(e)(1)).[60] Here, too, the Commission's commentary to a policy statement is advisory only and can be rejected.

IV. Procedural Rights

A. Right to Counsel

We expect the government to oppose counsel appointments for crack re-sentencings, at least in districts that follow the DOJ party line. While true that every circuit to have reached the issue has held that there is no automatic right to counsel in a § 3582(c)(2) proceeding,[61] those cases were decided prior to *Booker* when sentencing was mechanical and mandatory. They no longer make sense under the Supreme Court's interpretation of the governing sentencing law, or under revised § 1B1.10, both of which require judges to do more than calculate a guideline range; they must evaluate additional facts and exercise discretion in determining the ultimate sentence.

According to the Commission, in determining whether a reduction is warranted at all, and the extent of such reduction, the court "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."[62] Thus, even the courts that decide to strictly follow the

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[59] *See* amended U.S.S.G. § 1B1.10, p.s. comment (n.4(B)) ("the court may consider any such reduction [in the term of imprisonment] that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1)").

[60] *See United States v. Johnson*, 529 U.S. 53, 56 (2000).

[61] *See United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (due process did not require appointment of 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. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999) (district court has discretion to decide whether to appoint counsel in §3582(c)(2) hearing); *United States v. Townsend*, 98 F.3d 510, 512013 (9th Cir. 1996) (decision to appoint counsel in a § 3582(c)(2) motion is discretionary); *United States v. Whitebird*, 55 F.3 1007, 1011 (5th Cir. 1995) (neither Criminal Justice Act nor due process requires appointment of counsel for § 3582(c)(2) motion, at least where no disputed fact issue requires the marshalling of facts and witness examination and defendant risks loss of rights); *United States v. Reddick*, 53 F.3d 462, 465 (2nd Cir. 1995) (Criminal Justice Act permits but does not require appointment of counsel in § 3582(c)(2) resentencing).

[62] *See* amended § 1B1.10, comment. (n.1(B)(i)-(iii)).

policy statement must make three separate factual determinations in addition to those made at the initial sentencing.

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 Sixth Amendment requires the assistance of counsel.[63] *See Mempa v. Rhay*, 389 U.S. 128 (1967). In *Mempa*, the Supreme Court held that the right to counsel attaches to any stage of a criminal proceeding where substantial rights of the defendant may be affected, including a probation revocation hearing. In so holding, the Court rejected the state's argument that Washington's probation revocation hearing was not a "sentencing" at which the right to counsel should attach. The state argued that because the initial sentencing occurred long before any revocation proceeding, and because the imposition of sentence following revocation was "a mere formality" at which the court exercised very little discretion under the state statute, counsel was constitutionally unnecessary. *See id.* at 135. The Court acknowledged that the state statute required the judge to impose the maximum sentence for the offense of which he was convicted, so the judge had no discretion as to sentence imposed. However, the judge and prosecutor were to recommend to the Parole Board the length of the sentence to be served, along with information about the circumstances of the offense and the character of the defendant. "Obviously 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." *Id.*

After *Booker* and amended § 1B1.10, *Mempa* requires counsel in § 3582(c)(2) resentencings.[64] First, there is no question that in a § 3582(c)(2) proceeding, as in *Mempa*, defense counsel is necessary to aid in calculating the revised guideline range, marshal the facts and evidence that pertain to the applicable § 3553(a) factors, defend against any allegation that public safety or post-sentence conduct should result in a denial of the reduction or a lesser reduction, and assist the defendant in presenting his motion.[65] Even if a court does not permit the defendant to argue for more than a two-level reduction, s/he will still have to marshal new fact-based arguments to use or defend

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[63] A number of the courts that have held pre-*Booker* that there is no automatic right to counsel in a § 3582(c)(2) proceeding were careful to limit the holding to situations where there was no need to marshal any facts in addition to those presented at the initial sentencing. *See Legree*, 205 F.3d at 730 (due process did not require appointment of 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); *Whitebird*, 55 F.3 at 1011 (neither Criminal Justice Act nor due process requires appointment of counsel for § 3582(c)(2) motion, at least where no disputed factual issue required the marshaling of facts or witness examination and defendant did not risk loss of rights).

[64] Interestingly, no circuit has distinguished or even cited *Mempa* when finding that due process does not require the appointment of counsel at a § 3582(c)(2) proceeding.

[65] *See Mempa* at 135.

against the three matters listed in Note 1(B) of revised § 1B1.10.[66] Thus, *Mempa* requires counsel.[67]

Second, as in *Mempa*, important legal rights must be raised at the § 3582(c)(2) hearing or they will be lost. *See Mempa*, 389 U.S. at 135. Included are the right to appeal the sentence imposed, and rights that must be raised, litigated and, if necessary, preserved, such as the right to be resentenced under an advisory guideline system. Third and closely related is the concern that, if the district court refuses to treat § 1B1.10 as advisory, the defendant will once again be sentenced on the basis of facts that were not found by a jury or admitted by the defendant. *Cf. Mempa*, 398 U.S. at 136-37 (the ability of defense counsel to assist defendant and potential loss of legal rights "assume increased significance when it is considered that, as happened in these two cases, the eventual imposition of sentence on the prior plea of guilty is based on the alleged commission of offenses for which the accused is never tried").

At the very least, defense counsel can ensure a smoother process for § 3582(c)(2) re-sentencings. Remind the court of the numerous institutional efficiencies furthered by appointing counsel, including the increased likelihood of arriving at a negotiated settlement, since the government cannot negotiate directly with a defendant. It is also worth pointing out to the court that the Department of Justice's major concern in opposing retroactivity was the institutional burden on the courts. If the Department is truly concerned about minimizing that burden and encouraging the efficient resolution of crack resentencings, the best way to do that is to appoint counsel.[68]

The absence of counsel risks constitutional error. The Supreme Court has long recognized the key due process role that defense counsel plays in ensuring the accuracy and reliability of sentencing proceedings. In *Townsend v. Burke*, 334 U.S. 736, 740-41

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[66] *See* amended § 1B1.10, comment. (n.1(B)(i)-(iii). Even if a district court were inclined to follow revised § 1B1.10 to the letter, that would still allow for more sentencing discretion than in *Mempa*, where the judge's role in recommending a certain sentence to the parole board was analogous to the probation officer's role in recommending a sentence to the judge today. The Court in *Mempa* noted that the parole board "places considerable weight on these [judicial] recommendations, although it is in no way bound by them," just as district courts today place considerable weight upon but remain free to reject probation's recommendations. *Mempa*, 398 U.S. at 135.

[67] In *Turnbow v. Estelle*, 510 F.2d 127, 129 (5th Cir. 1975), the Fifth Circuit relied on *Mempa* to find that a defendant who was sentenced outside of counsel's presence was denied his Sixth Amendment right to counsel despite the fact that under state law only the jury could select the sentence, counsel had been present when the jury returned its sentence, and the court's later imposition of the sentence was largely "ministerial and mechanical." *Id.* at 128-29. Key to the court's holding was the fact that although the court had no authority to alter the sentence, it did have the discretion to grant credit for the approximately seven months the defendant spent in jail awaiting trial. *Id.* at 129. "The possibility that this discretion might have been exercised in favor of Turnbow was sufficient to create a situation at the sentencing stage in which his 'substantial rights' might have been affected." *Id.* The same is true in a § 3582(c)(2) resentencing where the district court can exercise discretion in favor of or against the defendant.

[68] *Accord Halbert v. Michigan*, 545 U.S. 605, 623 n.6 ("No one questions . . . that the appointment of appellate counsel at state expense would be more efficient and helpful not only to defendants, but also to the appellate courts.") (citation and internal punctuation omitted).

(1948), the Court found pre-*Gideon* that even though due process did not generally require the state to provide counsel when accepting a guilty plea and imposing sentence in a non-capital case, the absence of counsel *did* violate due process when the defendant was sentenced on the basis of assumptions concerning his criminal record that were materially untrue. The Court made clear that because counsel could have corrected the errors on which the defendant was sentenced, the absence of counsel made the constitutional difference: "In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." *Id.* at 741. The same is true here, where defense counsel will raise and correct errors in reading the record, applying the guideline, or other errors that may otherwise go unnoticed.

Refusing to appoint defense counsel for indigent defendants in § 3582(c)(2) proceedings may raise additional due process and equal protection concerns. Even where a particular avenue for relief is not constitutionally required, if such an avenue is provided by statute, the government may not thereafter "bolt the door to equal justice to indigent defendants."[69] In finding a right to counsel on a discretionary first appeal from a guilty plea, the Supreme Court noted that "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning disabilities and mental impairments."[70] The same is true for those defendants who may be forced to litigate their own § 3582(c)(2) motion, which would entail being conversant not only with the record at sentencing and any intervening aggravating or mitigating factors (including those listed in amended Note 1(B) to revised § 1B1.10) that were never litigated, but also with the effects of *Booker*, *Kimbrough*, and *Gall*.[71] With an average of over two years at stake, and no countervailing legitimate interest in a sloppy and incomplete presentation, the balance of interests requires counsel.

In sum, whether required as a matter of right under *Mempa* or merely advisable in the interest of fairness and efficiency, to ensure an accurate basis for the sentence as required by *Townsend*, and to ensure that indigent defendants are not otherwise denied due process and equal protection of the laws, counsel should be appointed for every indigent defendant who is arguably eligible for a sentence reduction under § 3582(c)(2).

B. Right to a Hearing / to Be Present

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[69] *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (*quoting Griffin v. Illinois*, 351 U.S. 12, 24 (1956)) (internal quotation marks omitted).

[70] *Id.* at 621.

[71] *Cf. Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (no denial of due process or equal protection when state does not appoint counsel to represent defendant on a discretionary appeal to the state's highest court following an appeal of right to the court of appeals, in part, because the defendant had counsel's assistance and briefing at the intermediate appellate level).

As with the right to counsel, most courts to have addressed the issue have held that there is no automatic due process right to a hearing on a § 3582(c)(2) motion, although the court is clearly empowered to order a hearing in any case.[72] The Fifth Circuit has held, however, that "[g]iven the broad discretion the district court has in considering whether resentencing is appropriate 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, such as testimony from other proceedings or an addendum to the PSR.[73] Here, again, defense counsel should cite both the need to marshal the evidence on the § 3553(a) factors and the Commission's suggestion that the court consider the nature and seriousness of the danger to any person or the community and post-sentencing conduct of the defendant as grounds for ordering a hearing.

The same types of issues apply to the defendant's right to be present at a § 3582(c)(2) hearing,[74] and the same types of discretionary and constitutional arguments should be made in support of that right.

[72] *Restrepo-Contreras v. United States*, 99 F.3d 1128, *2 (Table) (1st Cir. 1996) (affirming that defendant has no right to hearing in § 3582(c)(2) proceeding where court finds none of defendant's issues would have been availing); *United States v. Simkins*, 91 F.3d 141 (5th Cir. 1996); *Townsend*, 55 F.3d at 171-72.

[73] *See United States v. Mueller*, 168 F.3d 186, 189-90 (5th Cir. 1999); *Townsend*, 55 F.3d at 171-72. In the Fifth Circuit, "[t]o be entitled to an evidentiary hearing, a defendant must demonstrate that: 1. a fact issue material to his sentence is reasonably in dispute; and 2. the court cannot resolve it without a full hearing." *See Simkins*, 91 F.3d 141; *accord United States v. Edwards*, 156 F.3d 182 (5th Cir. 1998) ("general rule" requiring a factual dispute before an evidentiary hearing is required applies to § 3582(c)(2) resentencings).

[74] *See* Fed. R. Crim. P. 43(b)(4) ("A defendant need not be present . . . [when t]he proceeding involves the correction or reduction of sentence under . . . 18 U.S.C. § 3582(c)(2).").