08-1619-cr

To Be Argued By:
SANDRA S. GLOVER

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-1619-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

DARIUS DURAND MCGEE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

NORA R. DANNEHY
Acting United States Attorney
District of Connecticut

SANDRA S. GLOVER
Assistant United States Attorney
MICHAEL J. GUSTAFSON
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment on May 2, 2002. Appendix ("App.") 5. On January 8, 2008, this Court affirmed the defendant's conviction and sentence in a summary order. *United States v. McGee*, 259 Fed. Appx. 380 (2d Cir.), *cert. denied*, 128 S. Ct. 2455 (2008). On March 5, 2008, the defendant filed a motion under 18 U.S.C. § 3582(c)(2) seeking a modification of his sentence. App. 8. The district court denied the motion in a ruling filed March 28, 2008; that ruling was entered on the docket March 31, 2008. App. 9, 53. On April 3, 2008, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). App. 9, 56. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

The defendant was properly categorized a career offender under U.S.S.G. § 4B1.1, but at sentencing, the court granted a downward departure under § 4A1.3 and sentenced him within the range that would have been applicable but for the career offender guidelines, *i.e.*, the drug quantity guideline in § 2D1.1.

I. After the Sentencing Commission amended the drug quantity guideline to reduce offense levels for crack cocaine offenses, the defendant moved for a sentence reduction under 18 U.S.C. § 3582(c)(2). Did the district court properly deny this motion when the defendant's pre-departure guidelines range was unaffected by the Sentencing Commission's amendment?

II. In ruling on the § 3582(c)(2) motion, was it plain error for the district court not to reconsider the defendant's sentence in light of *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam) when a proceeding under § 3582(c)(2) is not a full resentencing and when this Court has held that a defendant sentenced as a career offender is not entitled to a *Regalado* remand?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-1619-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

DARIUS DURAND MCGEE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This appeal challenges the district court's denial of the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). The defendant moved for a sentence reduction claiming that the Sentencing Commission's recent reduction of the sentencing guidelines for crack cocaine offenses entitled him to a reduced sentence. The district court denied the motion because the defendant's

sentencing range was set by the career offender guidelines, not the crack guidelines.

The district court's decision should be affirmed. The defendant was a career offender and thus he was ineligible for a sentence reduction based on the recent changes to the crack cocaine guidelines. In addition, there is no basis for remanding this case for further proceedings under *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam). This Court has already held that a defendant sentenced as a career offender is not entitled to a *Regalado* remand.

Statement of the Case

On September 19, 2001, a federal grand jury in Bridgeport, Connecticut returned an indictment against the defendant, Darius McGee, charging him with three counts of possession with intent to distribute and distribution of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). App. 3, 10-11. The defendant pleaded guilty to Count One of the indictment on January 18, 2002. App. 5, 12.

On April 25, 2002, the district court (Janet C. Hall, J.) sentenced the defendant to 115 months of imprisonment and five years of supervised release. App. 5, 48-49, 55. The defendant appealed and on January 8, 2008, this Court affirmed his sentence. *United States v. McGee*, 259 Fed. Appx. 380 (2d Cir.), *cert. denied*, 128 S. Ct. 2455 (2008).

On March 5, 2008, the defendant filed a motion for a reduction of sentence under 18 U.S.C. § 3582(c)(2). App. 8. The district court denied that motion in a ruling dated March 28, 2008. App. 9, 53-54. The ruling entered March 31, 2008, App. 9, and the defendant filed a timely notice of appeal on April 3, 2008, App. 56.

The defendant is in custody serving the sentence imposed.

Statement of Facts and Proceedings Relevant to this Appeal

A. The defendant's plea and sentencing

On January 19, 2001, a federal grand jury returned a three-count indictment against the defendant charging him with violating 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (possession with intent to distribute and distribution of cocaine base) on three separate occasions. App. 3, 10-11. The defendant pleaded guilty to Count One of the indictment on January 18, 2002. App. 5.

In preparation for sentencing, the United States Probation Office prepared a Pre-Sentence Report ("PSR"). The PSR concluded that the defendant had sold 6.7 grams of crack cocaine and, using the 2001 Sentencing Guidelines manual, set his base offense level at 26. *See* U.S.S.G. § 2D1.1(c)(7) (2001) (base offense level of 26 for offenses involving at least 5 grams, but less than 20 grams, of crack cocaine). PSR ¶ 15.

The PSR also detailed the defendant's lengthy criminal history and concluded, as relevant here, that because of the defendant's prior convictions, he qualified as a career offender under sentencing guideline § 4B1.1. PSR ¶¶ 21, 24-33. This conclusion raised his offense level from 26 to 32 under § 4B1.1(C) and thus resulted in a total offense level of 29 after a three-level reduction for acceptance of responsibility. PSR ¶¶ 21-23. The defendant's criminal history placed him in criminal history category VI (a conclusion also required by his career offender designation), resulting in a sentencing guidelines range of 151-188 months. PSR ¶ 33; Sentencing Table.

At sentencing, the defendant raised no objections to the facts and findings as presented in the PSR, and the district court thus adopted those findings. App. 23. The district court also adopted the guidelines calculation set forth in the PSR, again, without objection from the defendant. App. 23-24.

The only contested issue at sentencing was the defendant's request for a downward departure. The defendant argued that his guidelines calculation, based on his designation as a career offender, overstated the seriousness of his criminal history and accordingly asked for a downward departure under sentencing guideline § 4A1.3 and *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001). App. 22, 27-36.

The district court recognized that it had authority to grant a downward departure when a criminal history calculation overstated the seriousness of the defendant's

criminal history and identified the factors it could consider in making a decision on the departure, including the amount of drugs involved in prior offenses, the defendant's role in prior offenses, the sentences for prior offenses, and the amount of time the defendant served for prior offenses as compared to the sentencing range calculated for the instant offense. App. 39-41.

As applied in this case, the district court concluded that these factors warranted a downward departure. As an initial matter, the court noted that the defendant had 22 criminal history points, suggesting "that category VI doesn't begin to overstate his criminal history." App. 41-42. However, the court further noted that the career offender guideline increased his base offense level by six levels, thus "changing a guideline range from 92 to 115 into 151 to 188 months." App. 42. The court reviewed the defendant's criminal history and observed that while he had numerous prior convictions, they involved relatively small quantities of drugs and resulted in relatively short sentences as compared to the sentence he faced under the career offender guidelines. App. 42-44. Finally, the court noted that the defendant's prior convictions arose from his role as a "street dealer." App. 44. Considering these factors together, the court "exercise[d] its discretion to depart and . . . depart[ed] to the level that the defendant would have been in absent the career offender status calculation . . . ." App. 45. In other words, the court departed downward to a guidelines range of 92 to 115 months. App. 45.

The district court sentenced the defendant to 115 months' imprisonment, the top of the post-departure guidelines range. App. 48. The defendant appealed,[1] and on January 8, 2008, this Court affirmed the district court's judgment. *McGee*, 259 Fed. Appx. 380.

B. The defendant's motion under 18 U.S.C. § 3582(c)(2)

On March 5, 2008, the defendant, through counsel, filed a motion under 18 U.S.C. § 3582(c)(2). He sought a reduction in his sentence based upon a change to the crack cocaine guidelines that were passed by the Sentencing Commission on November 1, 2007 and made retroactive for all defendants as of March 3, 2008. App. 8.

The district court denied the defendant's motion in a ruling filed March 28, 2008. App. 9, 53-54. The court noted that a "defendant's sentence may only be reduced if he was 'sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission,'" App. 53 (quoting 18

---

[1] The defendant did not file a notice of appeal after entry of judgment, but nearly one year later, he filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255 claiming, *inter alia*, that he had received ineffective assistance of counsel because his lawyer had failed to file an appeal on his behalf. App. 6. On May 16, 2006, the district court granted the defendant's motion to vacate, and as a remedy ordered that the sentence be vacated and judgment re-entered to allow the filing of a notice of appeal. App. 8. The defendant filed a timely notice of appeal on May 26, 2006. App. 8.

U.S.C.§ 3582(c)(2)), and further that any reduction "must be consistent with the applicable Policy Statements in the Guidelines." *Id.* With this background, the court observed that the relevant policy statement provided that "'[a] reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.'" App. 53-54 (quoting U.S.S.G. § 1B1.10(a)(2)(B)). Applying this policy statement to this case, the court found that the defendant was ineligible for a sentence reduction because "[h]is guideline calculation is unchanged by the Amendment." App. 54. Accordingly, the court denied the defendant's motion. *Id.*

Summary of Argument

I. The defendant is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Under that section, a sentence may be reduced only when it was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." Here, the Sentencing Commission amended the crack cocaine sentencing guidelines to reduce offense levels for crack cocaine offenses and accordingly the defendant's *base* offense level was reduced. But that is of no moment here because the defendant was properly – and indisputably – categorized as a career offender. Because of that designation, the defendant's "sentencing range" was set by the career offender guidelines in § 4B1.1, not the crack

guidelines, and thus the new crack guidelines have no impact on his sentencing range.

That the district court granted a departure under § 4A1.3 from the career offender guidelines down to the crack guidelines does not change this conclusion. Although several district courts have held that under this scenario a defendant is entitled to a sentence reduction, those courts have uniformly failed to note that this conclusion is inconsistent with the Sentencing Commission's policy statement and hence unauthorized by the statute. *See* 18 U.S.C. § 3582(c)(2) (permitting a sentencing reduction based on subsequent amendments to the sentencing guidelines only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission").

II. There is no basis for remanding this case to the district court to allow reconsideration of the defendant's sentence under *Kimbrough v. United States*, 128 S. Ct. 558 (2007), *Gall v. United States*, 128 S. Ct. 586 (2007), and *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam). The defendant never argued to the district court that it should reconsider his sentence in light of this Court's decision in *Regalado*, and hence this issue is reviewed in this Court for plain error. And there was no error, much less plain error, here. *First*, this is an appeal from the denial of the defendant's § 3582(c)(2) motion. As the Sentencing Commission's policy statement makes clear, a proceeding under § 3582(c)(2) is a not a full re-sentencing of the defendant. The only issue in a § 3582(c)(2) proceeding is the application of the new

sentencing guideline; all other guideline and sentencing decisions remain the same. *Second*, even if the defendant could raise issues unrelated to his § 3582(c)(2) motion, this Court has already decided that defendants sentenced under the career offender guidelines are not entitled to *Regalado* remands. *United States v. Ogman*, 535 F.3d 108 (2d Cir. 2008) (per curiam).

Argument

I. The district court properly denied the defendant's motion for a reduced sentence under 18 U.S.C. § 3582.

A. Governing law and standard of review

1. Section 3582(c)(2) and the new crack guidelines

"A district court may not generally modify a term of imprisonment once it has been imposed." *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam). However, under 18 U.S.C. § 3582(c)(2), a district court may reduce a defendant's sentence under very limited circumstances:

> [I]n 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 or 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 that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(2).

In § 1B1.10 of the guidelines, the Sentencing Commission has identified the amendments that may be applied retroactively pursuant to this authority and articulated the proper procedure for implementing the amendment in a concluded case.[2] On December 11, 2007, the Commission issued a revised version of § 1B1.10, which emphasizes the limited nature of relief available under 18 U.S.C. § 3582(c).[3] *See* U.S.S.G. App. C, Amend.

---

[2] Section 1B1.10 is based on 18 U.S.C. § 3582(c)(2), and also implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

A guideline amendment may be applied retroactively only when expressly listed in § 1B1.10(c). *See*, *e.g.*, *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997); *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995) (per curiam).

[3] In April, the Commission further revised § 1B1.10(c) to reflect that a subsequent Amendment to the crack guidelines (continued...)

712. Revised § 1B1.10(a), which became effective on March 3, 2008, provides, in relevant part:

> (1) *In General.*—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
>
> (2) *Exclusions.*—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

---

[3] (...continued)
(changing the way combined offense levels are determined in cases involving crack and one or more other drugs), effective May 1, 2008, would be applied retroactively. U.S.S.G. App. C, Amend. 715. Although this change has no impact on the current case, the current version of § 1B1.10 incorporating this change, is reproduced in the Addendum.

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) *Limitation.*—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

The amendment in question in this case is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.[4] On December 11, 2007, the Commission added Amendment 706 to the list of amendments identified in § 1B1.10(c) that may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713.

In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine offenses. The Commission reasoned that, putting aside its stated criticism of the 100:1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory mandatory minimum penalties, the Commission could respect those mandatory penalties

---

[4] Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

while still reducing the offense levels for crack offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706.

Previously, the Commission had set the crack offense levels in § 2D1.1 above the range that included the mandatory minimum sentence. Under the amendment, the Commission has set the offense levels so that the resulting guideline range includes the mandatory minimum penalty triggered by that amount, and then set corresponding offense levels for quantities that fall below, between, or above quantities which trigger statutory mandatory minimum penalties. For example, a trafficking offense involving five grams of crack cocaine requires a statutory mandatory minimum sentence of five years imprisonment. *See* 21 U.S.C. § 841(b)(1)(B). Therefore, the revised guideline applies an offense level of 24 to a quantity of cocaine base of at least five grams but less than 20 grams; at criminal history category I, this level produces a range of 51-63 months (encompassing the 60-month mandatory minimum).

The final result of the amendment is a reduction of two levels for each of the ranges set in the guidelines for crack offenses. At the high end, the guideline previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more; a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36. At the low end, the guideline previously assigned level 12 to a quantity of less than 250 milligrams. That offense level now applies to a quantity of less than 500 milligrams.

2. Standard of review

This Court has not yet established the appropriate standard of review for decisions on motions for relief under 18 U.S.C. § 3582(c)(2). *Cortorreal*, 486 F.3d at 743. The Eleventh Circuit, however, has held that in cases reviewing rulings on motions under § 3582(c)(2), it will review *de novo* issues of statutory interpretation and "legal conclusions regarding the scope of [the district court's] authority under the Sentencing Guidelines." *United States v. Moore*, ___ F.3d ___, 2008 WL 4093400, *2 (11th Cir. Sept. 5, 2008) (quoting *United States v. White*, 305 F.3d 1264, 1267 (11th Cir. 2002) (per curiam)). *See also United States v. Young*, 247 F.3d 1247, 1251 (D.C. Cir. 2001) (reviewing *de novo* a legal question presented by motion under § 3582(c)(2)). At the same time, the Eleventh Circuit reviews for abuse of discretion a district court's decision denying a motion for a reduction of sentence under § 3582(c)(2). *United States v. Moreno*, 421 F.3d 1217, 1219 (11th Cir. 2005) (per curiam); *United States v. Vautier*, 144 F.3d 756, 759 n.3 (11th Cir. 1998); *see also Cortorreal*, 486 F.3d at 743 (citing cases applying abuse of discretion standard); *United States v. Rodriguez-Pena*, 470 F.3d 431, 432 (1st Cir. 2006) (per curiam) (reviewing denial of § 3582(c)(2) motion for abuse of discretion).

B. Discussion

1. The defendant is ineligible for a sentence reduction under § 3582(c)(2) because the new crack guidelines do not lower his guidelines range.

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant's sentence may *only* be reduced when he was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." A reduction, moreover, is allowed only when "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.* In its revisions to § 1B1.10, the Commission, consistent with the statutory directive that a reduction should occur only where the defendant's sentencing range was lowered, made clear that a sentencing court is not authorized to reduce a defendant's sentence when a retroactive amendment does not result in lowering the applicable sentencing range for the defendant. Specifically, subsection (a)(2)(B) of the policy statement provides: "A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore *is not authorized under 18 U.S.C. § 3582(c)(2)* if . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range." U.S.S.G. § 1B1.10(a)(2)(B) (emphasis added).

In this case, the defendant's guideline calculation did not rest on the provision regarding crack cocaine in

§ 2D1.1, which has been amended. Under the version of § 2D1.1 in effect at the time of sentencing, the defendant's base offense level for the crack offense was 26; that would be reduced to 24 under Amendment 706. But because the defendant was a career offender, based on his prior convictions for drug trafficking offenses, his base offense level increased to 32 pursuant to § 4B1.1. Stated differently, the defendant's status as a career offender trumped his guidelines as a drug dealer. The career offender enhancement is unaffected by Amendment 706. Accordingly, the defendant's offense level, and resulting applicable sentencing range, remain unchanged from the time of sentencing.

Courts agree that where, as is the case here, application of the pertinent amendment does not result in a different sentencing range, no reduction of sentence may occur. *See, e.g.*, *United States v. McFadden*, 523 F.3d 839, 840-41 (8th Cir. 2008) (per curiam) (upholding denial of motion under crack amendment when amendment would not change defendant's guidelines range); *United States v. Gonzalez-Balderas*, 105 F.3d 981, 984 (5th Cir. 1997) (although a retroactive amendment reduced the defendant's offense level, the new level (44) still required the sentence of life imprisonment which was imposed, and the district court properly denied the motion summarily); *United States v. Townsend*, 98 F.3d 510, 513 (9th Cir. 1996) (per curiam) (although a retroactive amendment to the career offender guideline changed the definition of a statutory maximum, the amendment did not benefit the defendant given that the maximum penalty for his offense was the same under either definition, and thus the

guideline range was the same); *United States v. Dorrough*, 84 F.3d 1309, 1311-12 (10th Cir. 1996) (the district court did not abuse its discretion in denying the § 3582(c)(2) motion, where an alternative means of sentencing permitted by the applicable guideline produced the same offense level that applied earlier); *United States v. Armstrong*, 347 F.3d 905, 908 (11th Cir. 2003) (the district court correctly denied motion, where the defendant's offense level was not altered by the subject of the retroactive amendment); *United States v. Young*, 247 F.3d 1247, 1251-53 (D.C. Cir. 2001) (district court properly denied motion where the sentence was actually based on considerations not affected by the retroactive guideline amendment).

The plain language of § 3582(c)(2) confirms that the defendant, sentenced under the career offender guidelines, is not entitled to a sentence reduction in light of Amendment 706. Section 3582(c)(2) limits relief to cases where the term of imprisonment was "based on" a "sentencing range" that has subsequently been lowered. 18 U.S.C. § 3582(c)(2). Here, although the defendant's *base offense level* in § 2D1.1 was lowered by Amendment 706, his final offense level, and hence his *sentencing range*, was determined by the career offender guideline in § 4B1.1, which was not impacted by Amendment 706. Thus, he was not sentenced based on a sentencing range that was subsequently lowered as required to obtain relief under § 3582(c)(2). *See Moore*, 2008 WL 4093400, *3 ("The defendants' base offense levels under § 2D1.1 played no role in the calculation of these ranges. Thus, Amendment 706's effect on the defendants' base offense

levels would not lower the sentencing ranges upon which their sentences were based.").

In other words, as succinctly explained by the Eighth Circuit:

> [The defendant] was sentenced as a career offender, and his sentencing range was therefore determined by § 4B1.1, not by § 2D1.1. Although the Sentencing Commission lowered the offense levels in USSG § 2D1.1(c) related to crack cocaine drug quantities, it did not lower the sentencing range for career offenders under USSG § 4B1.1, which is what set [the defendant's] sentencing range. [The defendant] has therefore not met the eligibility requirements for a reduction in his sentence. *See* § 3582(c)(2) (allowing resentencing for defendants who were originally "sentenced . . . based on a sentencing range that has subsequently been lowered by the Sentencing Commission"). Application of Amendment 706 would not lower [the defendant's] applicable guideline range.

United State v. Thomas, 524 F.3d 889, 890 (8th Cir. 2008) (per curiam).

This result is also consistent with the Sentencing Commission's revised policy statement, a consistency mandated by statute. *See* 18 U.S.C. § 3582(c)(2) (allowing a sentence reduction "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission"). The Commission's policy statement

provides, in § 1B1.10(a)(2)(B), that a sentence reduction "is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if . . . an amendment . . . does not have the effect of lowering the defendant's applicable guideline range." Accordingly, as explained above, because the defendant's applicable *guideline range* was not lowered by Amendment 706, a sentence reduction to account for that Amendment would be inconsistent with the policy statement and hence inconsistent with the statute.

The Application Notes to the revised policy statement further confirm this reading of the statute and policy statement. In Application Note 1(A), the Sentencing Commission explained that a sentence reduction is not authorized when "an amendment . . . is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment)." Here, while the Amendment is applicable to the defendant because it reduces his base offense level, it does not have the effect of lowering his "applicable guideline range because of the operation of another guideline," *i.e.*, the career offender guideline. § 1B1.10, Application Note 1(A). Accordingly, as explained by the Sentencing Commission, a sentence reduction in this context "is not consistent with [the] policy statement and therefore is not authorized under 18 U.S.C. § 3582(c) . . . ." § 1B1.10(a)(2)(B). *See also Moore*, 2008 WL 4093400, *4 (describing policy statement and Application Note 1(A)).

The two appellate courts that have addressed the career offender scenario in published opinions both reached the same conclusion. *See, e.g.*, *Moore*, 2008 WL 4093400, *3-4; *Thomas*, 524 F.3d 889; *United States v. Tingle*, 524 F.3d 839 (8th Cir. 2008) (per curiam).[5] *See also United States v. Liddell*, __ F.3d __, 2008 WL 4149750, *3 n.3 (7th Cir. Sept. 10, 2008) (stating in dicta that a defendant who was sentenced under the career offender guidelines could not benefit from the recent amendments to the crack guidelines).

In sum, because Amendment 706 did not reduce the guideline range applicable to the defendant, he is not entitled a reduction under § 3582(c)(2) based on that Amendment.

---

[5] Although only the Eighth and Eleventh Circuits have expressly addressed this issue in published opinions, three other circuits have issued unpublished orders reaching the same conclusion. *See, e.g.*, *United States v. Johnson*, 2008 WL 4189662 (5th Cir. Sept. 11, 2008) (per curiam) (not precedential); *United States v. Thompson*, 2008 WL 3974337 (3rd Cir. Aug. 28, 2008) (per curiam) (not precedential; summary affirmance because "this appeal presents no substantial question"); *United States v. Gray*, 271 Fed. Appx. 304, 306 fn.* (4th Cir. 2008) (per curiam) (not precedential); *United States v. Bronson*, 267 Fed. Appx. 272, 274-75 (4th Cir. 2008) (per curiam) (not precedential).

2. That the district court granted a departure from the career offender range at the time of the original sentencing does not make the defendant eligible for a sentence reduction under the new crack guidelines.

Despite this straightforward application of the statute and policy statement, the defendant contends that he is entitled to a reduction under the new crack guidelines because, at the original sentencing, the district court granted him a downward departure under U.S.S.G. § 4A1.3, after finding that the career offender designation overstated the seriousness of his criminal history. According to the defendant, he is entitled to a reduction because the court's departure authority was exercised to sentence him at the level that would have applied in the absence of the career offender designation, *i.e.*, the level mandated by the drug quantity guidelines.

The defendant's argument is based primarily on three district court cases from other districts around the country: *United States v. Poindexter*, 550 F. Supp.2d 578 (E.D. Pa. 2008); *United States v. Nigatu*, 2008 WL 926561 (D. Minn. Apr. 7, 2008); and *United States v. Cornish*, 2008 U.S. Dist. LEXIS 50577 (D. N.J. June 25, 2008). These cases hold that when a district court departs downward from the career offender guideline to the guideline dictated by drug quantity, the defendant is entitled to a sentence reduction under 18 U.S.C. § 3582(c)(2). *See Poindexter*, 550 F. Supp.2d at 581-82; *Nigatu*, 2008 WL 926561, *1-2; *Cornish*, 2008 U.S. Dist. LEXIS 50577, *6-7. *See also Moore*, 2008 WL 4093400, *5 (stating in dicta that a

reduction would be authorized when a district court granted a downward departure under § 4A1.3 from the career offender guidelines to the drug quantity guideline); *United States v. Collier*, 2008 WL 4204976, *3 (E.D. Mo. Sept. 5, 2008) (granting reduction to defendant who was career offender but who received a lower sentence that court concluded was "based on" the drug quantity guideline); *United States v. Ragland*, ___ F. Supp.2d ___, 2008 WL 2938662, *1 (D.D.C. July 31, 2008) (approving reduction based on prior departure from career offender guideline to crack guideline, but noting that government did not oppose departure to this extent); *United States v. Clark*, 2008 WL 2705215, *1 (W.D. Pa. July 7, 2008) (approving reduction based on prior departure from career offender guideline to crack guideline; noting that government had agreed to the reduction); *but see United States v. Menafee*, 2008 WL 3285254 (D. Conn. Aug. 7, 2008) (denying departure even though career offender was given a downward departure to the crack guidelines at time of sentencing).

The defendant's reliance on these cases is misplaced for two reasons. First, these cases are not controlling on this Court. Second, and more importantly, these cases are not persuasive because the reductions they approve are inconsistent with the Sentencing Commission's policy statement. *See* 18 U.S.C. § 3582(c)(2) (authorizing a sentence reduction based on an amendment to the sentencing guidelines when such a reduction "is consistent with applicable policy statements issued by the Sentencing Commission"). In a nutshell, the policy statement authorizes sentence reductions only when a defendant's

pre-departure guidelines range has been reduced by a subsequent amendment. By contrast, the defendant's cases authorize reductions based on a conclusion that a defendant's *post*-departure guidelines range has been reduced. Critically, *none* of the cases relied on by the defendant acknowledge this inconsistency, much less attempt to address it.

Section 1B1.10(a)(2)(B) provides that a sentence reduction "is not consistent with this policy statement . . . if [a retroactive amendment] does not have the effect of lowering the defendant's *applicable guideline range*." (emphasis added). The defendant's argument rests on the premise that the phrase "applicable guideline range" in this section refers to a *post*-departure guideline range. Thus, under the defendant's theory, his guidelines range was lowered because his post-§ 4A1.3 departure range (*i.e.*, his crack guidelines range) was lowered by Amendment 706.

A careful reading of the complete policy statement, however, demonstrates that the defendant's reading is wrong. The phrase "applicable guideline range" in § 1B1.10(a)(2)(B) refers to the defendant's *pre*-departure guidelines range.

To read the language as defendant's theory suggests would render large parts of § 1B1.10(b)(2) meaningless. Section § 1B1.10(b)(2)(A) sets forth a basic limitation on sentence reductions under § 3582(c)(2), providing that in general, a court cannot sentence a defendant "to a term that is less than the minimum of the amended guideline

range." This general rule is subject to an exception, however, as set forth in § 1B1.10(b)(2)(B):

> If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range . . . may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

In context, the language in this exception referring to the "guideline range applicable to the defendant at the time of sentencing" must refer to the *pre*-departure guideline range. If this language referred to the *post*-departure guideline range, then this exception would only apply in a limited set of cases, namely, those cases where a district court had imposed a non-guidelines sentence under *Booker* and § 3553(a). (For defendants sentenced before *Booker*, there was no legally authorized way for a district court to sentence a defendant below a *post*-departure guideline range, and hence this exception – authorizing a reduction "comparably less than the amended guideline range" would have no effect.) And yet it is clear from the structure of § 1B1.10(b)(2)(B) that it contemplates application in many "non-*Booker*" cases, *i.e.*, where a district court has imposed a sentence below the applicable

guideline range by some method other than a *Booker* non-guidelines sentence. That other method is a departure.

This reading of § 1B1.10(b)(2)(B) is confirmed by the Sentencing Commission's commentary. Application Note 3 describes the application of § 1B1.10(b)(2)(B) and provides an example that confirms that the "applicable guideline range" is the *pre*-departure guideline range:

> If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended

> guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In other words, the Sentencing Commission understood that some defendants were sentenced based on departures from the "applicable guideline range" and provided explicit guidance to district courts on how to apply the sentence reduction in those cases. This express guidance, however, makes clear that departures from the applicable guideline range are not relevant until it has been determined that a defendant is eligible for a reduction – an eligibility that is only triggered by an amendment that lowers the defendant's pre-departure, applicable guideline range.

Here, although the defendant's *post*-departure guideline range was lowered by Amendment 706, that is irrelevant under the policy statement. The relevant inquiry is whether the defendant's pre-departure guideline range was lowered, and here, there is no dispute that it was not. Because Amendment 706 did not lower the defendant's applicable guideline range, he is ineligible for a sentence reduction under § 3582(c)(2).

II. There is no basis for remanding this case to the district court for resentencing in light of *Gall*, *Kimbrough* and *Regalado*.

The defendant asks this Court to remand to the district court to allow the district court to reconsider his sentence in light of *Kimbrough*, *Gall*, and *Regalado*. This argument, presented for the first time on appeal, is misplaced in this appeal from the denial of a motion under § 3582(c)(2), and is effectively foreclosed by this Court's decision in *United States v. Ogman*, 535 F.3d 108 (2d Cir. 2008) (per curiam).

A. Standard of review

When a defendant raises an argument for the first time on appeal, this Court can reverse only if there is (1) an error (2) that is plain (3) which affected the substantial rights of the defendant (4) and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See* Fed. R. Crim. P. 52(b); *United States v. Johnson*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732-36 (1993); *United States v. Carter*, 489 F.3d 528, 537 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1066 (2008).

Error is "[d]eviation from a legal rule" that has not been waived. *Olano*, 507 U.S. at 732-33. That error must be "'clear' or, equivalently, obvious . . . under current law." *Id.* at 734 (internal citations omitted). An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court,

except "in the rare case" where it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted). The error must have affected substantial rights, that is, "must have been prejudicial . . . having affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. When those three conditions are met, an appellate court may exercise its discretion to correct the error "but only if the error seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Johnson*, 520 U.S. at 467 (internal quotation marks and citations omitted).

B. Discussion

1. Section 3582 proceedings are not for relitigating issues that should have been raised in sentencing.

The defendant's argument that he is entitled to resentencing in light of *Gall*, *Kimbrough*, and *Regalado*, reflects a misunderstanding about the appropriate scope of proceedings under § 3582(c)(2), which permits sentencing courts to reduce a sentence only when "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." In its recently revised policy statements, the Sentencing Commission made clear that proceedings under § 1B1.10 and § 3582(c)(2) "do not constitute a full resentencing of the defendant." § 1B1.10(a)(3). Furthermore, in subsection (b)(1) the

policy statement explicitly directs that "[i]n determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court . . . shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected."

The limitation imposed by the Sentencing Commission must be respected. *See United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) (holding that sentencing adjustments under § 3582(c)(2) "[do] not constitute a de novo resentencing"); *United States v. Smartt*, 129 F.3d 539 (10th Cir. 1997) (declining to consider collateral attack to sentence as part of motion under § 3582(c)(2)); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) ("A § 3582(c)(2) motion is not a second opportunity to present mitigating factors to the sentencing judge, nor is it a challenge to the appropriateness of the original sentence."); *United States v. Smith*, 2008 WL 2600789 (E.D. Wis. June 26, 2008) (motion based on crack amendment does not permit reconsideration of other sentencing determinations).[6]

Plainly, the provision for reduction of sentence stated in § 3582(c)(2) and implemented in § 1B1.10 is narrow, given the essential jurisprudential interest in finality in

---

[6] *See also United States v. Williams*, 2008 WL 3861175, *2 (10th Cir. Aug. 15, 2008) (unpublished) (cannot collaterally challenge sentencing calculation through 3582(c)(2) motion).

criminal litigation. *See Teague v. Lane*, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect."). A federal criminal sentence is generally final following a direct appeal, and modification is permitted by law only in very circumscribed situations. Section 3582(c)(2) allows modification based on a guideline amendment deemed retroactively applicable by the Sentencing Commission; Federal Rule of Criminal Procedure 35 allows a revision based on specified clerical and technical errors, or pursuant to a government motion; and 28 U.S.C. § 2255 permits resentencing to correct errors of constitutional magnitude or those amounting to a miscarriage of justice.

Thus, the power afforded in § 3582(c)(2) is limited, and that limit should be honored. *See Braxton v. United States*, 500 U.S. 344, 348 (1991) ("In addition to the *duty* to review and revise the Guidelines, Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). This power has been implemented in USSG § 1B1.10, which sets forth the amendments that justify sentence reduction.") (emphasis in original). The Third Circuit explained:

> It is, thus, clear that only the retroactive amendment is to be considered at a resentencing under § 3582 and the applicability of that retroactive amendment must be determined in light of the circumstances existent at the time sentence was originally imposed. In other words, the

> retroactive amendment merely replaces the provision it amended and, thereafter, the Guidelines in effect at the time of the original sentence are applied.

United States v. McBride, 283 F.3d 612, 615 (3rd Cir. 2002). *McBride* rejected an effort to invoke the new constitutional rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (that any fact which increases a statutory maximum sentence must be proven to a jury beyond a reasonable doubt), through the filing of a § 3582(c)(2) motion, given that *Apprendi* did not represent an action of the Sentencing Commission lowering a guideline range. *McBride* held that, consistent with the limited relief afforded by § 3582(c)(2) and § 1B1.10, the district court could impose a sentence within a reduced guideline range regardless of whether that sentence violated *Apprendi*. *McBride*, 283 F.3d at 615-16.

Other courts have acted consistently in rejecting any claims made under § 3582(c)(2) other than those seeking application of a retroactive guideline amendment. *See, e.g.*, *United States v. Jordan*, 162 F.3d 1 (1st Cir. 1998) (when reducing a sentence based on a retroactive amendment, the court does not have authority to grant a departure on any other ground, including the provision in § 5K2.0 for departures in extraordinary cases); *Cortorreal*, 486 F.3d at 744 (§ 3582(c)(2) motion may not be employed to present claim under *Booker*); *United States v. Carter*, 500 F.3d 486, 490-91 (6th Cir. 2007) (same; explaining that a § 3582(c)(2) motion may only be presented based on a guideline amendment of the

Sentencing Commission, as the basis of the motion is distinct from other claims that might affect the sentence, which must be presented, if at all, under § 2255); *United States v. Smith*, 241 F.3d 546, 548 (7th Cir. 2001) (§ 3582(c)(2) motion may not be employed to present claim under *Apprendi*); *United States v. Lloyd*, 398 F.3d 978, 979-80 (7th Cir. 2005) (claims that district judge miscalculated the defendant's relevant conduct, and that the CCE statute was improperly applied, were cognizable only under § 2255, and the § 3582(c)(2) motion was therefore properly dismissed); *United States v. Price*, 438 F.3d 1005, 1007 (10th Cir. 2006) (§ 3582(c)(2) motion may not be employed to present claim under *Booker*); *Bravo*, 203 F.3d at 782 (11th Cir. 2000) (district court correctly denied Eighth Amendment claim; "Section 3582(c), under which this sentencing hearing was held, does not grant to the court jurisdiction to consider extraneous resentencing issues such as this one. Bravo must instead bring such a collateral attack on his sentence under 28 U.S.C. § 2255."); *Moreno*, 421 F.3d at 1220 (Section 3582(c)(2) motion may not be employed to present claim under *Booker*).

Accordingly, because the defendant may not raise a collateral attack on his sentence in the course of a proceeding under § 3582(c)(2), there was no error – plain or otherwise – in the district court's failure to reconsider his sentence in light of *Regalado*.

2. Since the defendant was sentenced under the career offender guideline, there is no reason to remand the matter pursuant to *Regalado*.

Even if the defendant could raise his argument for resentencing under *Kimbrough* and *Regalado* in a § 3582(c)(2) proceeding, there is no basis for a remand here because it is undisputed that the defendant was a career offender as defined in U.S.S.G. § 4B1.1 and that he was sentenced under that provision – not pursuant to the crack cocaine guidelines.

In *Regalado*, this Court remanded a case for resentencing to allow the district court to determine whether it would have imposed a non-guidelines sentence knowing that it had discretion under *Kimbrough* to deviate from the crack guidelines to serve the objectives of sentencing under 18 U.S.C. § 3553(a).

Unlike the defendant in *Regalado*, however, the defendant's initial guideline sentencing range was not driven by the quantity of controlled substances involved in his case. Rather, the defendant's applicable guideline range of 151-188 months was determined solely by his undisputed status as a career offender, as his offense of conviction was a controlled substance offense, and he had the requisite two prior convictions. His initial sentencing guidelines offense level of 32 was based solely on the authorized statutory maximum of twenty years' imprisonment for the offense of conviction. Accordingly, the defendant's total offense level was 29, after a three-level departure for acceptance of responsibility. That level,

combined with a criminal history category of VI, resulted in a guideline range of 151-188 months. Notwithstanding this range, the district court imposed a sentence of 115 months of imprisonment, after departing downward under § 4A1.3.

As this Court made clear in *Regalado*, a remand was appropriate in that case only because of the "unusual circumstance[]" that this Court had previously "tended to discourage district courts from deviating from the crack cocaine Guidelines." *Regalado*, 518 F.3d at 148, 147 (citing this Court's pre-*Kimbrough*/*Gall* decision in *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006)). The Court decided that a remand was appropriate in light of *Kimbrough* because there was an "unacceptable likelihood of error" given that the district court would have been, "quite understandably, unaware of (or at least insecure as to) its discretion to consider that the 100-to-1 ratio might result in a sentence greater than necessary." *Id.* at 148.

In *Ogman*, this Court declined to remand the matter for resentencing in the situation presented here, finding that *Regalado*

> does not counsel in favor of, much less require, a remand in this case. Unlike in *Regalado*, where we remanded to allow the district court to determine "whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the [crack] Guidelines to serve [the objectives of sentencing under 18 U.S.C. § 3553(a)]," the Guidelines range applied to Ogman's case was not

> the result of the 100-to-1 powder to crack ratio, but rather resulted from his undisputed status as a *career offender* under U.S.S.G. § 4B1.1(a), coupled with the *statutory* maximum term of life imprisonment for his cocaine-base offense, 21 U.S.C. § 841(b)(1)(A)(iii). *See* U.S.S.G. § 4B1.1(b)(A).

535 F.3d at 111 (citation omitted).

Here, just as in *Ogman*, the defendant was sentenced under the career offender guidelines, and, accordingly there is no basis for a remand under *Regalado*. At a minimum, it was certainly not *plain* error for the district court to fail to reconsider the crack/powder disparity when it ruled on the defendant's § 3582(c)(2) motion.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: September 24, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY

Michael J. Gustafson
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,267 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 3582(c)(2)

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or 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 that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

U.S.S.G. §1B1.10. REDUCTION IN TERM OF IMPRISONMENT AS A RESULT OF AMENDED GUIDELINE RANGE (POLICY STATEMENT)

(a) *Authority.*–

(1) *In General.*–In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the

defendant's term of imprisonment shall be consistent with this policy statement.

(2) *Exclusions.*–A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if–

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) *Limitation.*–Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) *Determination of Reduction in Term of Imprisonment.*–

(1) *In General.*–In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the

time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) *Limitations and Prohibition on Extent of Reduction.*–

(A) *In General.*–Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) *Exception.*–If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543

U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) *Prohibition.*–In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) *Covered Amendments.*–Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

Commentary

Application Notes:

1. *Application of Subsection (a).*–

(A) *Eligibility.*–Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of

lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) *Factors for Consideration.*–

(i) *In General.*–Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) *Public Safety Consideration.*–The court 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 in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) *Post-Sentencing Conduct.*–The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I)

whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. *Application of Subsection (b)(1).*–In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. *Application of Subsection (b)(2).*–Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, 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 determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection

(b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. *Supervised Release.*–

(A) *Exclusion Relating to Revocation.*–Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) *Modification Relating to Early Termination.*–If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction 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). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under

the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n 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 or 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 that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and

the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts

should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

* So in original. Probably should be "to fall above the amended guidelines".