08-3826-cr

To Be Argued By:
MICHAEL E. RUNOWICZ

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-3826-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MARVIN SMITH,
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

MICHAEL E. RUNOWICZ
Assistant United States Attorney
SANDRA S. GLOVER
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 (Alan H. Nevas, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. §§ 3231 and 3582(c)(2). The district court granted in part and denied in part the defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) in an order entered July 28, 2008. A-11, A-152.[1] The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on August 1, 2008. A-11, A-153.

This Court has jurisdiction over an appeal of a final order denying a § 3582(c)(2) motion under 28 U.S.C. § 1291. *United States v. McGee*, 553 F.3d 225, 227 (2d Cir. 2009).

---

[1] The defendant filed an appendix with his brief. Each page has been numbered "A-#" and record citations herein will be to that page numbering.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Title 18, U.S.C. § 3582(c)(2) authorizes a district court to reduce a defendant's sentence if the Sentencing Commission reduces a Sentencing Guideline applicable to the defendant *and* if the reduction is consistent with the Commission's policy statements. The Commission reduced the Guideline for crack cocaine offenses and authorized the retroactive application of the new Guideline, but limited the reduction to two offense levels. Did the district court abuse its discretion when it declined to reduce the defendant's sentence beyond the two levels authorized by the Commission?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-3826-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MARVIN SMITH,
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 arises out of a request filed by the defendant, Marvin Smith, to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2) based on the amendments to the Sentencing Guidelines reducing the applicable base offense levels for cocaine base ("crack") offenses. The district court granted the defendant's motion in part and reduced his sentence of imprisonment from 120 months to 99 months. The reduction represented a change from the

middle of the Guideline range that applied at the time of sentencing to the middle of the amended Guideline range.

In addition to the two-level reduction in the Guideline offense level contemplated by Amendments 706 and 713 to the Sentencing Guidelines, the defendant also sought a further reduction of his sentencing relying on *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). The district court, however, declined to reduce the defendant's sentence below 99 months. The district court held that "[t]o the extent that § 3582 or any other authority permits the court to reduce the defendant's sentence more than the two levels contemplated by Amendments 706 and 713, the court, after considering all relevant factors, declines to do so." A-152.

The defendant contends here that the district court abused its discretion in denying him a reduction of his sentence beyond that provided for by the amended Sentencing Guidelines for cocaine base offenses.[2] This Court should reject the defendant's arguments and affirm the district court. Nothing in the Supreme Court's holdings in *United States v. Booker*, 543 U.S. 220 (2005) or its progeny, including *Kimbrough*, changes the statutory directive in § 3582(c)(2) limiting the extent to which a sentencing court may reduce an otherwise final sentence.

---

[2] This issue is currently before the Court in two other cases: *United States v. Lopez*, No. 08-2572-cr, and *United States v. Savoy*, 08-4900-cr.

The Sixth Amendment rationale underlying *Booker* – which reflected the unconstitutionality of exposing a defendant to an *increased* maximum sentence based on judicial fact finding – does not apply to a § 3582(c)(2) motion, as the latter authorizes only a sentence *reduction*. Moreover, even if the law allowed a greater sentencing reduction, the district court here exercised its discretion to deny a reduction beyond that authorized by the Sentencing Commission. That decision was not an abuse of discretion.

Statement of the Case

On September 16, 2003, a federal grand jury sitting in New Haven, Connecticut, returned an indictment charging the defendant with two counts of possessing cocaine base with the intent to distribute and distribution of cocaine base. A-3, A-12. The case was assigned to the Honorable Dominic J. Squatrito, United States District Judge for the U.S. District Court, District of Connecticut. On November 25, 2003, the case was reassigned to the Honorable Alan H. Nevas, Senior United States District Judge for the District of Connecticut. A-4.

On November 5, 2004, the defendant pled guilty to one count of possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1). A-7. On April 5, 2005, the defendant was sentenced principally to 120 months' incarceration. A-9, A-101. The defendant thereafter filed a notice of appeal from this sentence, and this Court eventually summarily affirmed the conviction. A-10.

On May 16, 2008, the district court issued an Order to Show Cause to the government to show why the defendant was not entitled to a sentence reduction pursuant to amendments to the Sentencing Guidelines. A-10, A-109. After the government filed its response to this order, A-10, A-110, agreeing that the defendant was eligible for such a reduction, A-110, A-114, the defendant filed a reply to that response seeking a reduction greater than what was authorized by the amended Guideline range. A-10, A-122. The district court issued an order on July 25, 2008, reducing the defendant's sentence from 120 months to 99 months. A-11, A-152. The order entered on the docket on July 28, 2008, and the defendant filed a notice of appeal on August 1, 2008. A-11, A-153.

The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

On September 23, 2003, the defendant was arrested after having been charged by indictment with two counts of possession with the intent to distribute and distribution of cocaine base. A-3, A-12. The charges were based on two separate sales of cocaine base by the defendant to a cooperating individual working under the direction of agents from the Federal Bureau of Investigation. One sale was for 3.5 grams of cocaine base, and the other was for 53.4 grams of the same drug. A-110.

On November 5, 2004, the defendant pled guilty to one count of possession with intent to distribute and

distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1). A-7. Since prior to the entry of the plea, the government had filed an information asserting that the defendant had previously been convicted of a felony drug offense, the defendant faced a maximum term of imprisonment of 30 years. A-14.

At sentencing, although the presentence report had concluded that the defendant was a career offender, a finding which was disputed by the defendant, the court determined that two felony convictions then in question were related offenses and accordingly concluded that the defendant was not a career offender. A-81. The district court determined that the amount of cocaine base involved in this case was 56 grams, A-87, and further found that the defendant's offense level after a reduction for acceptance of responsibility was 29 which when coupled with a Criminal History Category of III resulted in a Guideline range of 108 to 135 months. A-96-97. The court imposed a sentence of 120 months. A-101. This sentence was subsequently affirmed by this Court on direct appeal. A-10.

On May 16, 2008, the district court issued an Order to Show Cause directing the government to show cause "why MARVIN SMITH is not entitled to a reduction in his sentence pursuant to Amendment 706 to U.S.S.G. § 2D1.1 and 18 U.S.C. § 3582(c) . . . ." A-109.

The government responded to this order on June 5, 2008, and asserted that the defendant appeared to be eligible for the retroactive application of amendments to

the Guidelines and that pursuant to 18 U.S.C. § 3582(c) the district court could exercise its discretion and reduce its previously imposed sentence of 120 months to 99 months. A-114, A-119. After the government had filed this response, the defendant, on June 27, 2008, filed a reply asking the district court not only to reduce his sentence as permitted by the amendments to the Guidelines, but also to reduce his sentence even further based on his post-conviction conduct and consideration of the sentencing disparity between powder cocaine offenses and crack cocaine offenses. A-124-25.

In an order issued July 25, 2008, the district court granted the defendant a sentencing reduction to 99 months, a sentence that was within the amended Guideline range. A-152. In reaching this decision, the district court stated

> The defendant also asks the court to "impose a sentence that is less than provided for by the 2-level Guideline reduction contemplated by Amendments 706 and 713." To the extent that § 3582 or any other authority permits the court to reduce the defendant's sentence more than the two levels contemplated by Amendments 706 and 713, the court, after considering all relevant factors, declines to do so.

Id.

Summary of Argument

I. The district court properly declined to reduce the defendant's sentence below the amended Guideline range. Courts lack authority to modify an otherwise final sentence absent specific authorization. Congress authorized a narrow exception to this finality rule in 18 U.S.C. § 3582(c)(2), permitting a sentence reduction where the term of imprisonment was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The statute is clear, though, that any such reduction in sentence must be consistent with the policy statements issued by the Sentencing Commission. The Sentencing Commission, in turn, adopted a policy statement implementing this authority and providing that, with one exception not applicable here, the extent of any sentence reduction is limited and shall not be "less than the minimum of the amended guideline range" as determined by the district court. U.S.S.G. § 1B1.10(b)(2)(A).

The Sixth Amendment (and recent Supreme Court cases such as *Booker* and *Kimbrough* interpreting the Sixth Amendment in the context of sentencing) do not render advisory this Congressional mandate that courts must follow the Guidelines in the context of a § 3582(c)(2) motion. The holding in *Booker* was based on the conclusion that a Sixth Amendment violation occurs where a district court finds facts that *increase* a defendant's statutory maximum sentence. That rationale does not apply to a § 3582(c)(2) motion because a district court may only *reduce* a defendant's sentence in that

circumstance. Furthermore, this Court's prior decisions dealing with sentence reductions in the context of 18 U.S.C. § 3553(f) confirm this conclusion. This Court has held, post-*Booker*, that Congress may constitutionally require courts to apply the Guidelines in determining whether a defendant may be eligible for safety valve relief from a mandatory minimum sentence under 18 U.S.C. § 3553(f). *See United States v. Holguin*, 436 F.3d 111, 115-17 (2d Cir. 2006). This holding is equally applicable here.

II. In the alternative, even if the law permitted the district court to reduce the defendant's sentence below the amended Guidelines range (and it does not), the district court did not abuse its discretion in declining to do so. Although the defendant claims that the court's refusal to reduce his sentence below 99 months was "unreasonable," his claim is based solely on his dissatisfaction with the amount of his sentence reduction. He makes no showing that the district court abused its discretion in reducing his sentence by almost two years (twenty-one months), but merely restates the arguments that he presented to the district court. Furthermore, a 99-month sentence for this defendant with many felony drug convictions to his credit was not an abuse of discretion.

Argument

I. The district court properly declined to reduce the defendant's sentence below the amended Guidelines range.

The defendant's central contention on appeal is that the district court erred by refusing to reduce his sentence to a period of incarceration that was less than that provided by the amended Guideline range. This argument is meritless and should be rejected. The amendments to the Sentencing Guidelines which lowered the offense levels for cocaine base offenses authorized the district court to reduce the defendant's previously imposed sentence of 120 months to a point within a lower Guideline range, and precluded a reduction beyond that range.

A. Governing law and standard of review

1. Section 3582(c)(2) and the amended 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). Indeed, this Court has noted that "Congress has imposed stringent limitations on the authority of courts to modify sentences, and courts must abide by those strict confines." *United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998). One limited exception to the rule prohibiting district courts from modifying a final sentence is in 18 U.S.C. § 3582(c)(2), which 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.

In § 1B1.10 of the Guidelines, the Sentencing Commission has identified the amendments which may be applied retroactively pursuant to this authority, and articulated the proper procedure for implementing the amendment in a concluded case.

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."

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). *See* U.S.S.G. App. C, Amend. 712.

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

> (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.

U.S.S.G. § 1B1.10(a).

Section 1B1.10(b) sets forth procedures for deciding whether a sentence reduction is appropriate and limits the extent of any departure based on a Guideline amendment that applies retroactively. Section 1B1.10(b)(2), for instance, provides that, with one exception not applicable here, "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)." U.S.S.G. § 1B1.10(b)(2)(A) (emphasis added).

The amendment in question in this matter is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.[3] In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine 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

---

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

quantity of less than 250 milligrams. That offense level now applies to a quantity of less than 500 milligrams.

On December 11, 2007, the Commission added Amendment 706 to the list of amendments in § 1B1.10(c) which may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713. *Id.* Congress has delegated to the Sentencing Commission the sole authority to permit the retroactive application of a Guideline reduction, and no court may alter an otherwise final sentence on the basis of such a retroactive guideline unless the Sentencing Commission expressly permits it. *See, e.g.*, *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997).

2. Standard of review

This Court reviews a district court's decision on a motion for relief under 18 U.S.C. § 3582(c)(2) for abuse of discretion. *United States v. Borden*, 2009 WL 1066910, *3 (2d Cir. Apr. 17, 2009). Where, as here, the district court's decision rests on an interpretation of a statute and the Guidelines, this Court reviews the question *de novo*. *McGee*, 553 F.3d at 226; *see also Borden*, 2009 WL 1066910 at *3 (a district court abuses its discretion if it bases its decision on "an erroneous view of the law") (quoting *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008)).

B. Discussion

Booker and its progeny do not render advisory the statutory requirement in § 3582(c)(2) that a district court

must limit the extent of any sentence reduction to that which is consistent with the Guidelines.

1. Section 3582(c)(2) limits sentencing reductions based on retroactive Guidelines to those authorized by the Sentencing Commission.

In 18 U.S.C. § 3582(c)(2), Congress created a "narrow exception to the rule that final judgments are not to be modified." *United States v. Armstrong*, 347 F.3d 905, 909 (11th Cir. 2003) (quotation omitted). Section 3582(c)(2) permits a sentencing reduction based on a retroactive guideline only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." In the Sentencing Reform Act, Congress specifically delegated to the Sentencing Commission the authority to determine when, and to what extent, a sentencing reduction is allowed. Under 28 U.S.C. § 994(u), when the Commission amends the Guidelines, the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

As the Supreme Court has explained, under this provision, "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." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (citing § 994(u); emphasis omitted). Thus, under the express statutory language of § 3582(c)(2) and § 994(u), the Commission's policy statements that

implement the statute's authorization of retroactive sentence reductions are binding, just as the statutory restrictions on reductions below a mandatory minimum are binding. *See United States v. Walsh*, 26 F.3d 75, 77 (8th Cir. 1994) ("Congress has made the policy statements set forth in § 1B1.10 the applicable law for determining whether a district court has the authority to reduce a sentence in this situation.").

2. The statute and policy statements prohibit a reduction below the floor set by the Sentencing Commission.

Section 3582(c)(2) does not provide for full resentencing of defendants. The Sentencing Commission made this clear in its recent revision to the policy statement governing sentencing reductions under § 3582(c)(2), specifically noting that proceedings under the statute "do not constitute a full resentencing of the defendant." U.S.S.G.§ 1B1.10(a)(3); *see United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) (Section 3582(c)(2) "does not constitute a de novo resentencing") (citing *United States v. Cothran*, 106 F.3d 1560, 1562 (11th Cir. 1997)); *see also United States v. McBride*, 283 F.3d 612, 615 (3d Cir. 2002); *United States v. Jordan*, 162 F.3d 1, 4 (1st Cir. 1998); *United States v. Torres*, 99 F.3d 360, 361 (10th Cir. 1996).

Rather than authorizing a full reexamination of a defendant's sentence, the Sentencing Commission has placed explicit limits on the extent of a sentencing reduction permissible under § 3582(c)(2). Section

1B1.10(b)(1) 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." U.S.S.G. § 1B1.10(b)(1). As noted above, § 1B1.10(b)(2) sets out specific limits on the extent of sentencing reductions, providing that, with one exception not applicable here, "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)." U.S.S.G. § 1B1.10(b)(2)(A).[4]

---

[4] The sole exception is set forth in § 1B1.10(b)(2)(B), which provides that if the defendant's "original term of imprisonment was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) may be appropriate." U.S.S.G. § 1B1.10(b)(2)(B); *see id*., app. note 3 (if defendant's original sentence was a downward departure of 20% below guideline range, reduction to a term that is 20% below amended guideline range would be a "comparable reduction"). Section 1B1.10(b)(2)(B) further provides that if the defendant's original sentence "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."

Thus, the Commission, consistent with the authorization provided by Congress, has set a floor below which a reduced sentence may not fall. In short, 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10 are narrow provisions which permit a limited reduction of sentence, while prohibiting a complete reevaluation of the sentence. *See, e.g.*, *United States v. Hasan*, 245 F.3d 682, 685-86 (8th Cir. 2001) (en banc) (reduction below the amended guideline range is not permitted); *Bravo*, 203 F.3d at 781 (court was not permitted to "depart downward . . . to an extent greater than that authorized under Section 3582(c) based on the amended guideline provision").

Accordingly, the governing statute, in providing that sentencing reductions must be "consistent with applicable policy statements issued by the Sentencing Commission," precludes a sentence reduction which exceeds the scope of the reductions authorized by the Commission.

3. *Booker* did not affect the limits on sentencing reductions under section 3582(c)(2).

Booker and its progeny do not render advisory the statutory requirement in § 3582(c)(2) that a district court must limit the extent of any sentence reduction to that which is consistent with the Guidelines. In *Booker*, the Supreme Court held that the Sixth Amendment, as construed by the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), applied to the federal Sentencing Guidelines, under which the sentencing court rather than the jury

found facts that established the mandatory Guidelines range. *Booker*, 543 U.S. at 230-45. The Court remedied that constitutional defect by severing the statutory provisions that made the Guidelines range mandatory, resulting in a regime in which the Guidelines are advisory, and courts are to consider the Guidelines and the other factors in 18 U.S.C. § 3553(a) in selecting an appropriate sentence. *Id*. at 245-68; *see Gall*, 128 S. Ct. at 594.

Booker had no direct effect on § 3582(c)(2). *Booker*'s constitutional holding applied the now-familiar rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Booker*, 543 U.S. at 231 (quoting *Apprendi*, 530 U.S. at 490). That rule has no application to proceedings under § 3582(c)(2), which can only decrease – not increase – the defendant's sentence.

The remedial holding in *Booker* is likewise inapplicable. *Booker* applies to full sentencing hearings – whether in an initial sentencing or in a resentencing where the original sentence is vacated for error. The Court excised and severed the provision that made the Guidelines mandatory in those sentencings, 18 U.S.C. § 3553(b). It also excised the related provision on appellate review, 18 U.S.C. § 3742(e). "With these two sections excised (and statutory cross-references to the two sections consequently invalidated)," the Court held, "the remainder of the Act satisfies the Court's constitutional requirements." 543 U.S. at 259. Section 3582(c)(2) contains no cross-reference to § 3553(b) and therefore was

not excised by *Booker*. Nor is there anything else in *Booker* that directly addresses § 3582 proceedings.

The *Booker* Court applied its advisory Guidelines remedy to cases in which no Sixth Amendment violation existed, concluding that Congress would not have wanted the Guidelines to be mandatory in some contexts and advisory in others. 543 U.S. at 266. The Court rested its conclusion on two observations, neither of which is applicable to reduction proceedings under § 3582(c)(2). The first was that Congress would not have wanted to "impose mandatory . . . . limits upon a judge's ability to *reduce* sentences," but not to "impose those limits upon a judge's ability to *increase* sentences." *Id*. (emphasis in original); *see id*. (Congress would not have wanted such "one-way lever[s]"). But Congress clearly intended § 3582(c)(2) to be a "one-way lever" – it gives the court the option to leave a defendant's sentence alone or to reduce it, but does not permit the court to increase the sentence. Second, the Court observed that rendering the Guidelines partially advisory and partially mandatory in federal sentencings would engender significant "administrative complexities." *Id*. Given the limited scope of a proceeding under § 3582(c)(2), none of the significant "administrative complexities" is present that led the Supreme Court to require all Guideline provisions to be advisory at full sentencing proceedings. *Booker*, 543 U.S. at 266. To the contrary, holding that *Booker* requires full resentencings whenever a Guideline is made retroactive – in many cases years after the original sentencing – would create major administrative complexities and would vastly

expand the intended scope of a sentencing reduction under § 3582(c)(2).

Section 3582(c)(2)'s direction that the court shall "conside[r] the factors set forth in section 3553(a) to the extent that they are applicable" also does not aid the defendant. Although one of the factors in § 3553(a) is the Guidelines range, and *Booker* made that range advisory, the still-valid statutory language in § 3582(c)(2) requires courts to consider the § 3553(a) factors (including the Guidelines) when determining whether and by how much to reduce the sentence, "consistent with applicable policy statements issued by the Sentencing Commission." The Commission has made clear that courts are to consider the § 3553(a) factors in determining whether a reduction is warranted and "the extent of such reduction, but only *within the limits*" of § 1B1.10. U.S.S.G. § 1B1.10, app. note 1(B)(i) (emphasis added).

Nothing in the Supreme Court's recent decisions in *Gall* or *Kimbrough* affects this analysis. Both decisions reaffirmed *Booker*'s remedial holding that the Guidelines are advisory and that sentences are subject to appellate review for reasonableness, and both decisions proceeded to apply that remedial holding to the questions before them. *Kimbrough*, 128 S. Ct. at 564; *Gall*, 128 S. Ct. at 594-602. Because, as explained above, *Booker* does not apply to § 3582(c) proceedings, the applications of *Booker*'s remedial opinion in *Gall* and *Kimbrough* do not apply in such proceedings either.

This conclusion – that *Booker* does not render advisory the Sentencing Commission's limitations on sentence reductions under § 3582(c)(2) – is further buttressed by this Court's decisions recognizing that the Sixth Amendment permits Congress to incorporate Guidelines concepts by reference into statutes that authorize sentencing reductions.

In *United States v. Barrero*, 425 F.3d 154 (2d Cir. 2005), this Court rejected a defendant's argument that, in determining his eligibility for safety valve relief from an otherwise mandatory minimum sentence under 18 U.S.C. § 3553(f), the district court "should have considered the Guidelines advisory for purposes of calculating his criminal history points," and that "section 3553(f)(1) itself, by virtue of its reference to and incorporation of a Guidelines term (the defendant's 'criminal history points'), should be considered advisory post-*Booker*." *Id*. at 155. The Court disagreed with this assessment, noting first that "it conflicts with the plain terms of the statute." *Id.* at 157. According to the Court, the only basis for disregarding the mandate of § 3553(f)(1) would have been to avoid a Sixth Amendment violation, but the Court found no constitutional infirmity in that provision. As the Supreme Court had long held, a defendant has no Sixth Amendment right to jury factfinding regarding his prior convictions. *Id.* at 157-58. Accordingly, Congress could permissibly condition safety valve eligibility on a judicial determination that, as measured by the Guidelines, the defendant had no more than one criminal history point. *Id.*

The Court expanded upon *Barrero*'s holding in *United States v. Holguin*, 436 F.3d 111 (2d Cir. 2006), finding no Sixth Amendment violation when a district court makes factual findings under other Guidelines provisions – such as role in the offense – that disqualify the defendant for safety valve relief. *Id*. at 115-17. In *Holguin*, the defendant had been sentenced to the mandatory minimum 60 months in prison for possession with intent to distribute 500 grams or more of cocaine. *Id*. at 113. Like Barrero, Holguin claimed that § 3553(f)'s mandate – that courts make certain Guidelines determinations as a prerequisite to safety valve eligibility – should be deemed advisory in the wake of *Booker*. *Id*. at 113-14. This Court quickly dispatched this argument:

> As to Holguin's argument concerning . . . § 3553(f)(1), we reiterate our holding in *United States v. Barrero*, 425 F.3d 154 (2d Cir. 2005), that Holguin's argument "conflicts with the plain terms of the statute" and cannot find support in the holding of *Booker*.

Id. at 116.

The *Holguin* Court then addressed a question that had been reserved in *Barrero* – namely, whether the Sixth Amendment permitted § 3553(f) to direct judicial factfinding on safety-valve eligibility criteria unrelated to the prior-conviction exception. The Court held that such factfinding was constitutional because it "does not permit a higher maximum to be imposed; the only effect of the judicial fact-finding is either to *reduce* a defendant's

sentencing range or to leave the sentencing range alone, not to *increase* it." *Id.* at 117. Quoting the Government's brief with approval, the Court observed that Holguin's argument turned § 3553(f) on its head by "'converting the eligibility criteria for a sentence *reduction* into elements of the offense which *increase* his maximum sentence.'" *Id.* Moreover, the Court agreed that this result was consistent with the Supreme Court's holding in *Harris v. United States*, 536 U.S. 545 (2002), that judicial factfinding is constitutional when used to set a minimum (rather than a maximum) sentence. *Holguin*, 436 F.3d at 118. "As the government argues, '[i]f judges may make findings that establish a sentencing floor, then *a fortiori* they may make findings that drop a defendant's sentence below that floor as with the safety valve.'" *Id.*; *see also United States v. Jiminez*, 451 F.3d 97, 103-04 (2d Cir. 2006) (per curiam) (upholding mandatory application of § 3553(f)(5), which requires defendant to provide truthful information to government to be eligible for safety valve).

The upshot of *Holguin* and *Barrero* is that Congress may require by statute that judges apply Guidelines concepts in a mandatory fashion, if they are used to determine whether a sentence reduction is appropriate. Section 3582(c)(2), like § 3553(f), offers the prospect of reducing a defendant's sentence rather than increasing the maximum sentence to which he is exposed. Accordingly, *Booker* does not undermine Congress's decision to incorporate Guidelines calculations as a mandatory matter into the eligibility calculus for § 3582(c)(2).

The conclusion that *Booker* does not apply in proceedings under § 3582(c)(2) is also consistent with the holding of this Court (and other courts) that defendants whose convictions are final have no right to resentencing under *Booker* on collateral review under 28 U.S.C. § 2255. *See Guzman v. United States*, 404 F.3d 139, 141-44 (2d Cir. 2005). *See also In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007); *United States v. Gentry*, 432 F.3d 600 (5th Cir. 2005); *United States v. Morris*, 429 F.3d 65, 69-72 (4th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005) (per curiam); *Never Misses A Shot v. United States*, 413 F.3d 781, 783-84 (8th Cir. 2005); *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 613-16 (3rd Cir. 2005); *Cirilo-Muñoz v. United States*, 404 F.3d 527, 532-33 (1st Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860-63 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005). It would be incongruous if courts interpreted the congressional scheme in § 3582(c)(2), which provides for much more limited relief than § 2255, concerns only sentence reductions, and raises no Sixth Amendment concerns, as triggering a full *Booker* resentencing.

Indeed, given that *Booker* does not apply to the many defendants whose sentences were final when *Booker* was decided, it would be unfair to apply *Booker* to that subset of those defendants whose sentences are being lowered under Amendment 706. Section 3582(c)(2) was designed only to permit courts to reduce defendants' sentences to account for a retroactive Guideline amendment. To grant

these defendants a further reduction that is not afforded to all other similarly situated defendants would produce the unwarranted sentencing disparities Congress sought to eliminate in the Sentencing Reform Act. It would also entail enormous additional cost and effort in resentencing tens of thousands of inmates, even though § 3582(c)(2) by its terms does not authorize a full resentencing.

Moreover, if the Court were to hold that *Booker* applies in these circumstances, then the rule that courts lack jurisdiction to modify a final sentence would effectively be swallowed by what was intended to be the narrow exception in § 3582(c)(2). There is simply no question that the Sentencing Commission has the sole authority, pursuant to sections 994 and 3582(c), to declare an amendment retroactive. *See Cortorreal*, 486 F.3d at 744; *Perez*, 129 F.3d at 259. But if § 1B1.10 is advisory, then so is the Sentencing Commission's decision to include an amendment in the list in that section of retroactive provisions. If that were the case, then each district court would be left to decide for itself whether to apply any, all, or none of the amendments in the Guidelines retroactively. This would result in § 3582(c)(2)'s limited authority to modify a final sentence being invoked – or not – in an utterly haphazard fashion with few, if any, real limits. Surely this was not Congress's intent, nor is it by any means a logical outgrowth of the Supreme Court's holding in *Booker*.

There is nothing about the binding nature of the Commission's authority to determine when sentences may be *reduced* or to what extent they may be *reduced* that

violates the Sixth Amendment concerns behind the *Booker* decision. Thus, because the grant of authority to the Commission is constitutional, the Commission's clear limitation must be enforced. *See Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (Congress may constitutionally delegate its authority to the Sentencing Commission to establish guidelines for sentencing); *Barrero*, 425 F.3d at 158 ("Because 18 U.S.C. § 3553(f)(1) is constitutional, we may not ignore its dictates, as the defendant urges us to do.").

For these and other reasons, the overwhelming majority of courts to have considered the issue – including six appellate courts – have held that *Booker* and its progeny do not authorize a sentence reduction beyond that authorized by the Sentencing Commission. *See United States v. Fanfan*, 558 F.3d 105, 108-11 (1st Cir. 2009); *United States v. Dunphy*, 551 F.3d 247, 252-55 (4th Cir. 2009), *pet'n for cert. filed*, No. 08-1185 (Mar. 20, 2009); *United States v. Cunningham*, 554 F.3d 703, 705-708 (7th Cir. 2009), *pet'n for cert. filed*, No. 08-1149 (Mar. 16, 2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir. 2009), *pet'n for cert. filed*, No. 08-9839 (Apr. 13, 2009); *United States v. Rhodes*, 549 F.3d 833, 839-41 (10th Cir. 2008), *cert. denied*, 2009 WL 178619 (Apr. 27, 2009); *United States v. Melvin*, 556 F.3d 1190 (11th Cir. 2009) (per curiam), *pet'n for cert. filed*, No. 08-8664 (Feb. 10, 2009); *but see United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007) (holding that limiting the extent of a sentence reduction under § 3582(c)(2) to that prescribed by Sentencing Commission amounted to mandatory application of Guidelines in violation of *Booker*). *See also*

Cortorreal, 486 F.3d at 743 (*Booker* does not provide independent basis for sentence reduction under § 3582(c)(2)); *United States v. Sharkey*, 543 F.3d 1236, 1239 (10th Cir. 2008) (same); *United States v. Jones*, 548 F.3d 1366, 1368-69 (11th Cir. 2008) (per curiam) (same), *cert. denied*, 2009 WL 469071 (Mar. 23, 2009); *United States v. Mateo*, 560 F.3d 152, 155-56 (3rd Cir. 2009) (same, and without discussion rejecting argument that adhering to policy statements violates *Booker* and contravenes advisory nature of Guidelines).

4. Full resentencing hearings are not authorized in proceedings under § 3582(c).

To the extent that the defendant argues that he is entitled to resentencing under *Gall*, *Kimbrough*, and *Regalado* separate and apart from a sentence reduction under § 3582(c)(2), this argument 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 Bravo*, 203 F.3d at 781 (holding that sentencing adjustments under § 3582(c)(2) "[do] not constitute a de novo resentencing"); *United States v. Smartt*, 129 F.3d 539, 541-43 (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.").

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 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*, 500 U.S. at 348 ("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.

McBride, 283 F.3d at 615.

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.*, *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. Price*, 438 F.3d 1005, 1007 (10th Cir. 2006) (§ 3582(c)(2) motion may not be employed to present claim under *Booker*); *United States v. Moreno*, 421 F.3d 1217, 1220 (11th Cir. 2005) (same); *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. Smith*, 241 F.3d 546, 548 (7th Cir. 2001) (§ 3582(c)(2) motion may not be employed to present claim under *Apprendi*); *Bravo*, 203 F.3d at 782 (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."); *Jordan*, 162 F.3d at 2-6 (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).

Accordingly, because a defendant may neither raise a collateral attack on his sentence in the course of a proceeding under § 3582(c)(2) nor raise claims under *Booker* and its progeny, there was no error in the district court's decision to not reduce the defendant's sentence below the amended Guideline range. Here, following the provisions of § 3582(c)(2), the district court correctly

reduced the offense level by two levels to level 27 and determined the amended Guideline range to be 87 to 108 months, a finding that the defendant does not challenge on appeal. The district court properly selected a point within that range (99 months). Nothing more could be done and there was no error committed by the district court.

II. Alternatively, the district court did not abuse its discretion by declining to reduce the defendant's sentence below the amended Guidelines range.

Even if the law permitted the district court to reduce the defendant's sentence below the two levels authorized by Amendments 706 and 713 (and, as described above, it does not), the court exercised its discretion and declined to do so. That decision, on the facts of this case, was not an abuse of discretion.

A. Governing law and standard of review

Although a defendant may qualify for a sentence reduction under § 3582(c)(2) and the applicable policy statements of the Commission, a sentence reduction is not automatic. The court's discretion is set forth in § 3582(c)(2) itself, which provides: "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." (emphasis added). Thus, as this Court recently explained, "[b]ecause the statute states that a district court *may* reduce the term of imprisonment, it clearly allows for a

district court to exercise its discretion when considering a motion to reduce a sentence brought pursuant to § 3582(c)(2)." *Borden*, 2009 WL 1066910, *3. *See also United States v. Vautier*, 144 F.3d 756, 760 (11th Cir. 1998) (holding that "[t]he grant of authority to the district court to reduce a term of imprisonment is unambiguously discretionary," even when the Guideline range is actually reduced). A district court has "substantial discretion" in deciding whether to reduce a sentence; even "[a]n agreement between the government and the defendant that a sentence reduction is appropriate does not bind the judge; nor is the judge's consideration of the question limited to the factors the parties regard as relevant." *United States v. Young*, 555 F.3d 611, 614 (7th Cir. 2009).

Subject to the limits set forth in § 1B1.10(b), as described above, the court may consider all pertinent information in applying the § 3553(a) factors and determining whether and by how much to reduce the defendant's sentence. In particular, the court must consider public safety considerations, and may consider information regarding the post-sentencing conduct or situation of the defendant, whether positive or negative. Revised application note 1(B)(ii) directs that "[t]he 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." Revised application note 1(B)(iii) further directs that "[t]he court may consider post-sentencing conduct of the defendant that occurred after the imposition of the original term of imprisonment." The application note explains that these factors are relevant in determining whether and by how

much to reduce a sentence, but only within the limits set forth in § 1B1.10(b).

In *Borden*, this Court held that a district court's denial of a motion for sentence reduction under § 3582(c)(2) is reviewed for abuse of discretion. 2009 WL 1066910, *3.

B. Discussion

The district court expressly stated that even if it were authorized to reduce the defendant's sentence more than the two levels authorized by the Sentencing Commission, it declined to do so "after considering all relevant factors." A-152. That decision was not an abuse of discretion.[5]

In reducing defendant's original sentence of 120 months to 99 months, the district court did not abuse its discretion. When imposing the original sentence, the district court noted that it had considered all of the § 3553(a) factors and carefully weighed, *inter alia*, the defendant's claims for mitigation, his personal history including the tragic death of his daughter, his criminal record, and the facts of the offense of conviction. A-99-

---

[5] The defendant invokes the "reasonableness" standard established in *Booker* to argue that his 99-month sentence is unreasonable. "Reasonableness" review, however, is equivalent to review for abuse of discretion. *See Gall*, 128 S. Ct. at 594. Accordingly, whether the issue is framed as whether a 99-month sentence is reasonable or whether the district court abused its discretion in reducing the defendant's sentence to 99 months, the analysis is the same.

104; A-106-107. Moreover, the district court considered the defendant's request for downward departure based on the 100:1 crack to cocaine powder ratio, and concluded that the 120-month sentence, a point in the middle of the then applicable Guideline range, was a fair one, A-101, A-107. This was a sentence the court had initially determined to be the most appropriate sentence whether or not the Sentencing Guidelines were even applicable. *See* A-105. So too, the district court again considered all these factors when deciding to reduce the previously imposed 120-month sentence to an even lower one of 99 months, which fell within the middle of the revised Guideline range. *See* A-152 (court considered all relevant factors); A-122 (defendant's argument for lower sentence relying on same factors presented at sentencing).

The government submits that a 99-month sentence was not unreasonable for a man who at time of sentencing was 51 years old with a long criminal history of at least seven prior felony drug convictions, many of which were not counted in his criminal history calculation due to the age of the convictions. A-42. The fact that some offenses were not counted because of their age demonstrates that the defendant has been a long-time distributor of controlled substances. The 99-month sentence was reasonable.

In response, the defendant claims, as he did below, that his 99-month sentence was too long because he was driven back to dealing drugs because of the violent death of his daughter and that had he been sentenced for powder cocaine and not cocaine base, his sentence would have been shorter.

These arguments, in effect, ask this Court to reconsider the questions presented to the district court both at the time of the original sentencing in this matter, April 5, 2005, A-98, and again in his reply motion of June 27, 2008. A-122. But as this Court has repeatedly emphasized, review for abuse of discretion or "reasonableness," does not "entail the substitution of [the appellate court's] judgment for that of the sentencing judge." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006). *See also United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (holding that this Court "cannot substitute [its] judgment for that of the District Court").

In sum, the district court's decision was proper. The court properly held that even if it were authorized to go below the two levels authorized by the Sentencing Commission, it declined to do so. That decision was not an abuse of discretion, and the defendant makes no serious argument to the contrary.

CONCLUSION

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

Dated: April 29, 2009

Respectfully submitted,

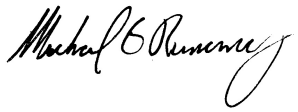
NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

MICHAEL E. RUNOWICZ
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
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 8,655 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



MICHAEL E. RUNOWICZ
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 3582. Imposition of a sentence of imprisonment

* * *

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

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(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.

28 U.S.C. § 994. Duties of the Commission

* * *

(u) 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.

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by

the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.