# Crack Retroactivity: Procedural Issues


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**Introduction**

This document collects circuit case law addressing procedural issues that have arisen in the context of motions for sentence reductions under 18 U.S.C. § 3582(c)(2). That statute provides as follows:

> The court may not modify a term of imprisonment once it has been imposed except that . . . 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.

The statute references "the factors set forth in section 3553(a)," which are the same factors courts consider when initially imposing a sentence, as the Supreme Court discussed in *Booker v. United States* and subsequent cases.

The policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) provides as follows:

> (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) Limitation.--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 for Substantial Assistance.--If the 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 pursuant to a government motion to reflect the defendant’s substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may 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, 715, and 750 (parts A and C only).

Below are procedural questions that may arise in the course of adjudicating a motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) and the retroactive crack amendment. Following the questions are cases that address the issue, including a parenthetical where additional information, such as a quotation of the pertinent language from the case, may be helpful. The document does not attempt to collect *all* cases addressing these issues; rather, it focuses on circuit precedent with binding force where available and generally includes only one authority from a given circuit even if the same court has addressed a particular issue more than once. Where relevant, the document also cites the guidelines and the Federal Rules of Criminal Procedure.

**Does *Booker* apply to a § 3582(c)(2) resentencing?**

**No.**

*Dillon v. United States*, 560 U.S. __, 130 S. Ct. 2683, 2692 (2010) ("Given the limited scope and purpose of § 3582(c)(2), we conclude that proceedings under that section do not implicate the interests identified in *Booker*.").

**Are circuit courts of appeals without jurisdiction to consider allegations that a § 3582(c)(2) proceeding was procedurally or substantively unreasonable within the meaning of *Booker* and its progeny?**

**Possibly.**

In *United States v. Bowers*, 615 F.3d 715 (6th Cir. 2010), the Sixth Circuit held that it had no jurisdiction to consider a defendant's allegations that a district court's decision to deny his § 3582(c) motion for reduction of sentence was unreasonable in light of *United States v. Booker*, 543 U.S. 220 (2005) and *Gall v. United States*, 552 U.S. 38 (2007). The panel held that "a defendant's allegation of *Booker* unreasonableness in a § 3582(c)(2) proceeding does not state a cognizable 'violation of law' that § 3742(a)(1) would authorize us to address on appeal." *Id.* at 727.

Although no other court has addressed this question, appellate courts nationwide routinely review denials of § 3582(c)(2) motions–albeit without questioning or analyzing their jurisdiction to do so. *See Bowers*, 615 F.3d at 720-21 (citing out-of-circuit cases holding that §

3582(c)(2) determinations are appealable (1) under 28 U.S.C. § 1291, (2) under 18 U.S.C. § 3742, or (3) without specifying a statutory jurisdictional basis).

**Is a § 3582(c)(2) proceeding a full resentencing?**

**No.**

USSG §1B1.10(3) ("[P]roceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.").

*Dillon v. United States*, 560 U.S. __, 130 S. Ct. 2683, 2691 (2010) ("Section 3582(c)(2)'s text, together with its narrow scope, shows that Congress intended to authorize only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding.").

**Do the lower mandatory minimums contained in the Fair Sentencing Act of 2010 apply to defendants whose offense conduct occurred before its enactment but whose sentences are imposed after its enactment?**

**Maybe.**

On April 17, 2012, the Supreme Court will hear arguments in two cases that have been consolidated to present this issue, *Dorsey v. United States*, 11-5683, and *Hill v. United States*, 11-5721. Currently there is a circuit split on the issue.

Circuits holding that the lower mandatory minimums do **not** apply:

*United States v. Tickles*, 661 F.3d 212 (5th Cir. 2011), *petitions for cert. filed*, (U.S. Dec. 15, 2011) (No. 11-8023), (U.S. Dec. 17, 2011) (No. 11-8268).
*United States v. Fisher*, 646 F.3d 429 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 762 (2011).
*United States v. Sidney*, 648 F.3d 904 (8th Cir. 2011), *petition for cert. filed*, (U.S. Dec. 28, 2011) (No. 11-8134).

Circuits holding that they do apply:

*United States v. Douglas*, 644 F.3d 39 (1st Cir. 2011).
*United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011).
*United States v. Rojas*, 645 F.3d 1234 (11th Cir. 2011) (vacated, rehearing en banc pending).

**Can a district court grant safety-valve relief when reducing a defendant's sentence pursuant to § 3582(c)?**

**No.**

*United States v. Jackson*, 613 F.3d 1305, 1308 (11th Cir. 2010) ("[T]he safety-valve is inapplicable to sentence-modification proceedings."), *cert. denied*, 131 S. Ct. 1677 (2011).

**Does a defendant have the right to a hearing on a motion for sentence modification pursuant to § 3582(c)(2)?**

**Possibly, if sentence based on contestable factual propositions that affect the sentence.**

*United States v. Neal*, 611 F.3d 399, 401-02 (7th Cir. 2010) (although "[r]eliance on the prior resolution of factual disputes means that the court usually need not hold evidentiary hearings before acting on motions under § 3582(c)(2)," if judge wishes to rely on contestable post-sentence facts to deny § 3582(c)(2) motion, defendant "is entitled to an opportunity to contest propositions that affect how long he must spend in prison").

**No.**

*United States v. Styer*, 573 F.3d 151, 153-54 (3d Cir. 2009).

*United States v. Brown*, 556 F.3d 1108, 1113 (11th Cir. 2009).

*United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000).

*United States v. Edwards*, 156 F.3d 182, *3 (5th Cir. 1998) (unpublished).

**No, but if the court does not hold a hearing, it must provide enough explanation of its reasoning to allow for meaningful appellate review.**

*United States v. Burrell*, 622 F.3d 961, 966 (8th Cir. 2010) ("On remand, the district court need not conduct a resentencing hearing or consider additional briefing from the parties[,] engage in formulaic recitations of the relevant factors or provide lengthy reasoning for their decisions on § 3582(c)(2) motions. All that is required is enough explanation of the court's reasoning to allow for meaningful appellate review." (internal citations omitted)).

**Must the court order a new presentence report on a § 3582(c)(2) motion?**

**No.**

*United States v. Grafton*, 321 F. App'x 899, 901 (11th Cir. 2009) ("Because Grafton did not have an absolute right to a hearing before the district court decided his § 3582(c)(2) motion and there was no factual dispute in the pleadings before the court, we conclude that the district court did not abuse its discretion or violate Grafton's right to procedural due process by denying the motion without a hearing or the benefit of a new PSI").

**No, but if the court orders one, the defendant must be given the opportunity to respond to it.**

*United States v. Jules*, 595 F.3d 1239, 1245 (11th Cir. 2010) ("The fairness and due process principles embodied in the Federal Rules of Criminal Procedure, the Sentencing Guidelines' policy statements, and the reasoning of our sister courts compel us to hold that each party must be given notice of and an opportunity to contest new information relied on by the district court in a § 3582(c)(2) proceeding.")

*United States v. Neal*, 611 F.3d 399, 402 (7th Cir. 2010) (if judge wishes to rely on contestable post-sentence facts to deny § 3582(c)(2) motion, defendant "is entitled to an opportunity to contest propositions that affect how long he must spend in prison").

*United States v. Foster*, 575 F.3d 861, 864 (8th Cir. 2009) (holding that district court abused its discretion in relying on a modified presentence report that, due to procedural error, the defendant never received).

*United States v. Mueller*, 168 F.3d 186, 189 (5th Cir. 1999) ("The district court certainly has the discretion to consider a PSR addendum in resolving a § 3582(c)(2) motion if it determines that such an addendum would be helpful. However, a defendant must have notice of the contents of the addendum and notice that the court is considering it such that he will have the opportunity to respond to or contest it.").

**Does a defendant have the right to be present at a § 3582(c)(2) hearing?**

**No.**

Fed. R. Crim. P. 43(b)(4) ("A defendant need not be present [when] [t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).")

*United States v. Styer*, 573 F.3d 151, 154 (3d Cir. 2009).

*United States v. Webb*, 565 F.3d 789, 795 (11th Cir. 2009).

*United States v. Young*, 555 F.3d 611, 615 (7th Cir. 2009).

**Does a defendant have a right to counsel for purposes of filing a motion under § 3582(c)(2)?**

**No.**

*United States v. Brown*, 565 F.3d 1093, 1094 (9th Cir. 2009).

*United States v. Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009).

*United States v. Woodson*, 280 F.App'x 568, 569 (8th Cir. 2008) (per curiam) (unpublished) (holding that the district court "properly denied [defendant's] motion for appointment of counsel").

*United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (holding that due process did not require court to appoint counsel or hold a hearing to resolve § 3582(c)(2) motion).

*United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (holding that CJA did not require appointment of counsel on § 3582(c)(2) motion).

*United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999) ("The judge can appoint counsel for a movant, but need not do so.").

*United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (holding that § 3006A(c) did not entitle a defendant to appointed counsel for purposes of filing a § 3582(c)(2) motion).

**Possibly.**

*United States v. Robinson*, 542 F.3d 1045, 1052 (5th Cir. 2008) (declining to decide whether defendant has a right to counsel, but exercising discretion to appoint counsel for purposes of arguing appeal).

**Under what circumstances could a court go below the amended guideline range?**

**Where a substantial assistance-related downward departure was given at the original sentence:**

**Yes.**

USSG §1B1.10(b)(2)(B) ("If the 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 pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.").

*United States v. Vautier*, 144 F.3d 756, 761 (11th Cir. 1998) ("[A] district court, ruling on a defendant's § 3582(c)(2) motion, has the discretion to decide whether to re-apply a downward departure for substantial assistance when considering what sentence the court would have imposed under the amended guideline.").

*United States v. Wyatt*, 115 F.3d 606, 610 (8th Cir. 1997) ("The district court retains unfettered discretion to consider anew whether a departure from the new sentencing range is now warranted

in light of the defendant's prior substantial assistance."), *superseded on other grounds as recognized by United States v. Chaney*, 581 F.3d 1123 (9th Cir. 2009).

**Where a downward variance was given at the original sentence:**

**No.**

USSG §1B1.10(b)(2)(A) ("Limitation.-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.")

*United States v. Brown*, 556 F.3d 1108 (11th Cir. 2009).

**Where a downward departure was not given at the original sentence:**

**No.**

USSG §1B1.10(b)(2)(A) ("Limitation.-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.").

*Dillon v. United States*, 560 U.S. __, 130 S. Ct. 2683, 2691-92 (2010) ("Only if the sentencing court originally imposed a term of imprisonment below the Guidelines range does §1B1.10 authorize a court proceeding under § 3582(c)(2) to impose a term 'comparably' below the amended range." (quoting the former §1B1.10(b)(2)(B)).

**Does § 3582(c)(2) authorize a court to reduce a term of imprisonment imposed on a supervised release violation?**

**No.**

USSG §1B1.10, comment. (n.5(A)) ("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.") (former USSG §1B1.10, comment. (n.4(A))).

*United States v. Morales*, 590 F.3d 1049, 1052 (9th Cir.), *cert. denied*, 131 S. Ct. 207 (2010).

*United States v. Fontenot*, 583 F.3d 743, 744-45 (10th Cir. 2009).

*United States v. Forman*, 553 F.3d 585, 589 (7th Cir. 2009) (per curiam).

**May a court reduce a term of supervised release based on the new amendment?**

**Yes, but only pursuant to 18 U.S.C. § 3583(e)(1).**

USSG §1B1.10, comment (n.5(B)) ("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).").

18 U.S.C. § 3583(e)(1), (2) (A court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if [the court] is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice" and may "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release.").

*United States v. Johnson*, 529 U.S. 53, 60 (2000) (stating that under § 3583(e), "[t]he trial court, as it sees fit, may modify an individual's conditions of supervised release.").

**If a court wishes to modify terms of supervision at the same time it modifies the sentence pursuant to § 3582(c)(2), is a hearing required?**

**Possibly, subject to two exceptions.**

Fed. R. Cr. P. 32.1(c)(1) ("Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.").

Fed. R. Cr. P. 32.1(c)(2) (a hearing is not required where (1) defendant waives the hearing, (2) relief is favorable to the person and does not extend term of supervision and (3) the government has notice and does not object).

*United States v. Fernandez*, 379 F.3d 270, 277 n.8 (5th Cir. 2005) (stating that transfer of supervision does not require a hearing).

*United States v. Padilla*, 415 F.3d 211 (1st Cir. 2005) (recognizing general hearing requirement and its two exceptions).

**If a crack offender was sentenced as a career offender pursuant to §4B1.1, may a court reduce the sentence as a result of Amendment 706?**

**Only in limited circumstances.**

The reduction in the applicable offense level for crack offenses does not alter their status under the career offender provision as controlled substance offenses, nor does it impact the statutory maximum penalty to which the defendant was subject. Because the court, in sentencing under §4B1.1, does not take into account the offense level applicable to the offense of conviction, Amendment 706 does not impact the defendant's sentence and therefore § 3582(c)(2) is not applicable. This analysis would not apply, however, where the defendant would have been sentenced under §4B1.1 but was actually sentenced under §2D1.1 because that offense level was higher than the offense level from §4B1.1. *See* §4B1.1(b).

**No, because Amendment 706 did not lower defendant's guideline range.**

*United States v. Berry*, 618 F.3d 13, 15 (D.C. Cir. 2010) ("Accordingly, crack-cocaine offenders sentenced to a term of imprisonment within a career-offender range cannot rely on Amendment 706 to obtain a sentence reduction under § 3582(c)(2)."), *cert. denied*, ___ S. Ct. ___, 2012 WL 359579 (U.S. Mar. 5, 2012) (No. 11-8617).

*United States v. Washington*, 618 F.3d 869, 873 (8th Cir. 2010) ("[T]he district court correctly determined that [defendant sentenced under career offender guideline] is ineligible for a sentence reduction pursuant to Amendment 706 [because] . . . Amendment 706 did not have the effect of lowering Washington's Guidelines range.").

*United States v. Anderson*, 591 F.3d 789, 791 (5th Cir. 2009).

*United States v. Wesson*, 583 F.3d 728, 731-32 (9th Cir. 2009).

*United States v. Perdue*, 572 F.3d 288, 292-93 (6th Cir. 2009).

*United States v. Mateo*, 560 F.3d 152, 156 (3d Cir. 2009).

*United States v. Forman*, 553 F.3d 585, 589-90 (7th Cir. 2009).

*United States v. Caraballo*, 552 F.3d 6, 11 (1st Cir. 2008).

*United States v. Sharkey*, 543 F.3d 1236, 1239 (10th Cir. 2008).

*United States v. Moore*, 541 F.3d 1323, 1330 (11th Cir. 2008).

**Yes, if court departed from career offender downward to §2D1.1 range.**

*United States v. Munn*, 595 F.3d 183, 192 (4th Cir. 2010) (career offender designation in crack cocaine case does not bar §3582(c)(2) reduction where court granted §4A1.3 reduction for overstatement of criminal history and imposed a sentence equivalent to the §2D1.1 guideline range).

*United States v. Flemming*, 617 F.3d 252, 272 (3d Cir. 2010) ("We conclude that, under a pre-2003 edition of the Sentencing Guidelines, a career offender who is granted a §4A1.3 downward departure to the Crack Cocaine Guidelines range is eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).").

*United States v. Cardosa*, 606 F.3d 16, 21 (1st Cir. 2010) ("[W]e conclude that where the defendant's existing sentence was ultimately determined by the old crack cocaine guidelines rather than by the career offender guideline, resentencing is within the discretion of the district court.").

*United States v. McGee*, 553 F.3d 225, 228-29 (2d Cir. 2009) (exception to the general rule where defendant would have been a career offender but district court departed downward pursuant to §4A1.3 to defendant's §2D1.1 guideline range; in this case, defendant's sentence was "based on" a range lowered by Amendment 706 and he was eligible for relief under § 3582(c)(2)).

*But see United States v. Tolliver*, 570 F.3d 1062, 1066 (8th Cir. 2009) (holding defendant ineligible where given sentence that was a departure from career offender guidelines range and recognizing conflict with Second Circuit's decision in *McGee*, noted above).

**Does § 3582(c)(2) permit a reduction in sentence if the defendant's sentence was dictated by a statutory mandatory minimum?**

**No.**

*United States v. McPherson*, 629 F.3d 609, 611 (6th Cir. 2011) (holding defendant ineligible for sentence reduction under § 3582(c)(2) because "sentence was not based on a guidelines range that was subsequently reduced. . . . [but rather] was based on the 240-month minimum sentence mandated by statute").

*United States v. Coleman*, 314 F.App'x 201, 204-05 (11th Cir. 2008) (affirming denial of reduction where guideline range was lower than mandatory minimum, citing §5G1.1(b)).

*United States v. Luckey*, 290 F.App'x 933, 934 (7th Cir. 2008) (affirming denial of relief where defendant was sentenced to mandatory minimum).

*United States v. Jones*, 523 F.3d 881, 882 (8th Cir. 2008) (affirming district court's denial of reduction in sentence where defendant's "final originally calculated guidelines range was the statutorily required minimum sentence" pursuant to §5G1.1(b), holding that the "district court properly concluded that [the] guidelines range was unaffected by" Amendment 706).

**Does § 3582(c)(2) authorize a court to reduce a term of imprisonment where the defendant received a sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(e)?**

**No.**

*United States v. Jackson*, 577 F.3d 1032, 1036 (9th Cir. 2009) (affirming district court's order concluding that it did not have jurisdiction to reduce the defendant's sentence because it was based on a mandatory minimum, citing §5G1.1(b), and that the use of 18 U.S.C. § 3553(e) authority for a downward departure did not alter this analysis).

*United States v. Hood*, 556 F.3d 226, 228 (4th Cir. 2009) (affirming district court's order concluding that it did not have jurisdiction to reduce the defendants' sentences because the sentences were based on a statutory mandatory minimum, not the drug guideline).

*United States v. Williams*, 549 F.3d 1337, 1340-41 (11th Cir. 2008) (affirming denial of sentence reduction where defendant was subject to statutory mandatory minimum for repeat felony drug offenders).

*United States v. Johnson*, 517 F.3d 1020 (8th Cir. 2008) (affirming the defendant's 126-month sentence for possession with intent to distribute 50 grams or more of cocaine base and for possession of a firearm in furtherance of a drug trafficking crime, which reflected a reduction below the mandatory minimum of 180 months in response to the government's § 3553(e) motion; rejecting defendant's argument that he was entitled to resentencing on the basis of Amendment 706, holding that the defendant would not be entitled to relief: "Since the district court used the 120 month mandatory minimum as its point of departure, resentencing is not warranted.")

**Is relief pursuant to § 3582(c)(2) available where, under the revised guidelines, there would be no reduction in the defendant's base offense level?**

**No.**

*United States v. Leniear*, 574 F.3d 668, 673 (9th Cir. 2009) (affirming denial of relief where offense level for only one count of conviction would be reduced by Amendment 706, and ultimate guideline range was unaffected).

*United States v. Williams*, 551 F.3d 182, 186 (2d Cir. 2009) (affirming denial of relief where defendant's sentence was dictated by statutory mandatory minimum higher than guideline range otherwise applicable under §2D1.1)

*United States v. Poole*, 550 F.3d 676, 679 (7th Cir. 2008) (affirming denial of relief where defendant's sentence was dictated by statutory mandatory minimum higher than guideline range otherwise applicable under §2D1.1).

*United States v. James*, 548 F.3d 983, 986 (11th Cir. 2008) (affirming denial of sentence reduction where defendant was sentenced prior to increase in offense level at top of drug table, and therefore defendant's offense level would actually be higher than the offense level at his original sentencing).

*United States v. Thomas*, 545 F.3d 1300, 1302 (11th Cir. 2008) (affirming denial of sentence reduction where defendant was sentenced as an armed career criminal pursuant to §4B1.4).

*United States v. Herrera*, 291 F.App'x 886, 891 (10th Cir. 2008) (affirming denial of relief where defendant's applicable guideline range would not change because his offense involved more than 4.5 kilograms of crack).

*United States v. Wanton*, 525 F.3d 621, 622 (8th Cir. 2008) (summarily affirming district court's denial of reduction in sentence where defendant's sentence was based on a quantity of crack cocaine greater than 4.5 kilograms, citing §1B1.10 in holding that, under these circumstances "[the] guideline range would not be lowered, and [the] original sentence is unaffected by the amendments.").

*United States v. Fernandez*, 269 F.App'x 192, 193 (3d Cir. 2008) (affirming district court's conclusion that the defendant was not eligible for relief under the amended guideline because it would not lower the defendant's guideline range, stating that the defendant's "sentence was not based on the crack cocaine involved in the conspiracy but rather the heroin.").

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

**Yes, under some circumstances.**

On June 23, 2011 the Supreme Court decided *Freeman v. United States*, 131 S. Ct. 2685 (2011). A 5-4 majority of the Supreme Court held that the defendant, William Freeman, was eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2) after pleading guilty to drug and firearm charges under a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement ("Type C agreement"). The five justices who form the majority are split, however, on the reasons the defendant is so eligible.

A plurality of the court concluded that Freeman is eligible for a sentence reduction as a result of a retroactively-applicable guideline amendment because the district judge, in accepting the Type C agreement, had an "independent obligation to exercise its discretion" in imposing the sentence, and part of that exercise was consideration of the guidelines, including the crack cocaine guideline that was subsequently amended and given retroactive effect. As a result, the sentence was "based on" that guideline, and 18 U.S.C. § 3582(c)(2) permits the sentence to be reduced. Justice Sotomayor concurred in the judgment, but did so after finding that the Type C agreement in this particular case "expressly use[d] a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment," and that because it did, the sentence was "based on" the crack cocaine guideline.

Because Justice Sotomayor's concurrence represents a narrower ground for the Supreme Court's decision than the plurality opinion, lower courts have applied the rule articulated by Justice Sotomayor. Below are some examples.

*United States v. Rivera-Martinez*, 665 F.3d 344 (1st Cir. 2011) (finding that, where the court could not identify an agreed-upon guideline calculation within the four corners of the plea agreement itself, the defendant was not eligible for a sentence reduction under Justice Sotomayor's rule).

*United States v. Smith*, 658 F.3d 608 (6th Cir. 2011) (finding that a plea agreement to a term of imprisonment slightly above the bottom of a guideline range that was agreed upon by the parties and reflected in a worksheet attached to the plea agreement did permit a sentence reduction under Justice Sotomayor's rule, even if the district court before accepting the plea agreement calculated the guideline range differently)

*United States v. Brown*, 653 F.3d 337 (4th Cir. 2011) (finding that a plea agreement that "simply states that 'the appropriate sentence in this case is incarceration for not less than 180 months and not more than 240 months'" did not permit a sentence reduction under Justice Sotomayor's rule), *cert. denied*, 132 S. Ct. 1003 (2012).

**May a court of appeals review a district court's ruling on a defendant's motion for relief under § 3582(c)(2) if the defendant waived his rights to appeal as part of a plea agreement?**

No, if the appeal waiver is found to include appeals of motions under § 3582(c)(2). If the defendant explicitly and effectively waived his right to file a § 3582(c)(2) motion, the district court has no jurisdiction to act on that motion.

*United States v. Monroe*, 580 F.3d 552, 556-59 (7th Cir. 2009) (finding that, in light of particular language used in the plea agreement and at the plea colloquy, the defendant had not unambiguously waived his right to seek a sentence reduction under 18 U.S.C. § 3582(c)(2), but concluding that the defendant was not eligible for such a reduction because he was sentenced pursuant to a statutory mandatory minimum).

*United States v. Chavez-Salais*, 337 F.3d 1170, 1173 (10th Cir. 2003) ("In this case, however, the plea agreement did not explicitly state that Defendant was waiving his right to bring a later motion to modify his sentence under 18 U.S.C. § 3582(c)(2). Had the agreement contained such language, or language suggesting that Defendant waived the right 'to attack collaterally or otherwise attempt to modify or change his sentence,' we would likely find that Defendant had waived his right to bring the instant motion. The agreement contained no such language, however, and we do not believe that motions under 18 U.S.C. § 3582(c)(2) are clearly understood to fall within a prohibition on 'any collateral attack.' Defendant's motion under § 3582(c)(2) does not so much challenge the original sentence as it seeks a modification of that sentence based upon an amendment to the Guidelines. Thus, we find that the language of the plea agreement itself does not clearly reach Defendant's instant motion under 18 U.S.C. § 3582(c)(2).")

*United States v. Contreras*, 215 F.3d 1334, *1 (9th Cir. 2000) (unpublished) (dismissing appeal of denial of a § 3582(c)(2) motion for lack of jurisdiction on grounds that defendant waived right to appeal "any sentence imposed by the Court and the manner in which the sentence is determined so long as the court determines that the total offense level is 31 or below.")

**May a court grant a § 3582(c)(2) motion based on the new crack amendments prior to March 3, 2008, the effective date of the amendment to §1B1.10?**

**No.**

*United States v. Tensley*, 270 F. App'x 758 (11th Cir. 2008) (per curiam) (affirming district court's denial of defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) on grounds that it was filed before the amendment became retroactively applicable).

*United States v. Wise*, 515 F.3d 207, 221 n. 11 (3d Cir. 2008) ("Some may argue that, because the Guidelines are no longer mandatory, defendants need not wait to apply for relief under § 3582(c)(2). That fundamentally misunderstands the limits of *Booker*.").

**Can a defendant get a sentence reduction pursuant to a retroactive amendment to the guidelines by filing a petition for habeas relief under 28 U.S.C. § 2255?**

**No.**

The proper vehicle for seeking a sentence reduction pursuant to an amendment to the guidelines given retroactive application by the Commission is a motion to reduce sentence pursuant to 18 U.S.C. § 3582. *See United States v. Carter*, 500 F.3d 486, 490 (6th Cir. 2007) (holding that "[w]hen a § 3582 motion requests the type of relief that § 3582 provides for - that is, when the motion argues that sentencing guidelines have been modified to change the applicable guidelines used in the defendant's sentencing - then the motion is rightly construed as a motion to amend sentencing pursuant to § 3582" and "when a motion titled as a § 3582 motion otherwise attacks the petitioner's underlying conviction or sentence, that is an attack on the merits of the case

and should be construed as a § 2255 motion"); *United States v. Rios-Paz*, 808 F. Supp. 206 (E.D. N.Y. 1992) (holding relief sought in form of reduction of sentence by reason of subsequent amendment of sentencing guidelines was beyond the scope of a motion for reduction under the habeas statutes because a sentencing court must consider the guidelines in effect at the sentencing date); *United States v. Snow*, 2008 WL 239517 (W.D. Pa. Jan. 29, 2008) (finding that waiver of right to file § 2255 motion would not result in a miscarriage of justice because § 3582(c)(2) "will provide the Court with an avenue for addressing [the retroactivity] issue once the issue is ripe").

Courts have held it is not proper for a court to treat a motion to reduce sentence as a petition for habeas relief. *See Simon v. United States*, 359 F.3d 139 (2d Cir. 2004) (holding that the district court erred in converting motion pursuant to 18 U.S.C. § 3582(c) into petition for writ of habeas corpus). *See also Castro v. United States*, 540 U.S. 375 (2003) (holding that a district court was required to notify defendant prior to recharacterizing motion as motion to vacate, and to provide defendant with certain warnings and an opportunity to withdraw). These decisions are based, in part, upon the limitations for filing a petition under section 2255 established by the Antiterrorism and Effective Death Penalty Act (AEDPA). Pursuant to AEDPA, a petition for habeas relief must be filed within one year of certain specified events. *See* 28 U.S.C. § 2255. Moreover, AEDPA barred the filing of a second or subsequent petition except under specified circumstances. *See* 28 U.S.C. §§ 2244, 2255.

A petition for relief under section 2255 is proper only when it alleges that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." *See* 28 U.S.C. § 2255(a). *See also Hill v. United States*, 368 U.S. 424, 428 (1962) (discussing types of errors cognizable under a writ of habeas corpus: error that is "jurisdictional" or "constitutional," or that is a "fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure," or presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent").

The Supreme Court has held that post-sentencing changes in policy do not support a collateral attack on the original sentence under section 2255. See *United States v. Addonizio*, 442 U.S. 178 (1979) (holding that actions taken by Parole Commission subsequent to sentencing do not retroactively affect the validity of the final judgment, nor do they provide a basis for collaterally attacking the sentence). Other courts have held that changes in the guidelines after the defendant's sentencing did not provide grounds for post-conviction relief under section 2255. *See, e.g.*, *Burke v. United States*, 152 F.3d 1329 (11th Cir. 1998) (holding that defendant's claim that enhancement of his sentence was contrary to a subsequently enacted clarifying amendment to the guidelines was not cognizable on a motion for postconviction relief). Moreover, erroneous application of the guidelines at sentencing do not provide grounds for relief under section 2255. *See Kirkeby v. United States*, 940 F. Supp. 241 (D. N.D. 1996) (holding that, absent a complete miscarriage of justice, claims involving a sentencing court's failure to properly apply the Sentencing Guidelines will not be considered on a § 2255 motion where the defendant failed to

raise them on direct appeal). *See also United States v. Faubion*, 19 F.3d 226, 232-33 (5th Cir. 1994) (holding that an erroneous upward departure under sentencing guidelines was not a "miscarriage of justice"); *Knight v. United States*, 37 F.3d 769, 773 (1st Cir. 1994) (holding that a misapplication of the sentencing guidelines does not amount to a "complete miscarriage of justice"); *United States v. Schlesinger*, 49 F.3d 483, 484-86 (9th Cir. 1994) (acknowledging that nonconstitutional sentencing errors may not be reviewed under § 2255 with possible exception for errors not discoverable at time of appeal); *Scott v. United States*, 997 F.2d 340, 341-42 (7th Cir. 1993) (holding that an erroneous criminal history score under sentencing guidelines was not subject to collateral attack); *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992) (holding that an error in technical application of sentencing guidelines was not subject to collateral attack).

**Can a defendant who is dissatisfied with the disposition of a properly filed motion for reduction in sentence under § 3582(c) file a successive motion for relief under § 3582(c)?**

**No.**

*United States v. Redd*, 630 F.3d 649, 651 (7th Cir. 2011) (defendant dissatisfied with disposition of first motion under § 3582(c) for reduction in sentence and who failed to appeal or file for reconsideration "could not use a new § 3582(c)(2) motion to obtain a fresh decision—or to take what amounts to a belated appeal of the original decision").

*United States v. Goodwyn*, 596 F.3d 233, 236 (4th Cir.) ("When the Sentencing Commission reduces the Guidelines range applicable to a prisoner's sentence, the prisoner has an opportunity pursuant to § 3582(c)(2) to persuade the district court to modify his sentence. If the result does not satisfy him, he may timely appeal it. But he may not, almost eight months later, ask the district court to reconsider its decision."), *cert. denied*, 130 S. Ct. 3530 (2010).