

No. 09-6338

**In The
Supreme Court of the United States**

PERCY DILLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit**

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

- I. Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.
- II. Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (J.A. 47-55), is reported at 572 F.3d 146.

**STATEMENT OF JURISDICTION**

The United States Court of Appeals for the Third Circuit entered its judgment on June 10, 2009. The petition for a writ of certiorari was filed on September 1, 2009, and granted on December 7, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

**CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED**

The Questions Presented implicate the Sixth Amendment to the United States Constitution, which provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . .”

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a), 3582, other pertinent sections of the United States Code, including 18 U.S.C. § 3742 and 28 U.S.C. § 994, and of the United States Sentencing Guidelines, USSG § 1B1.10, are included as a Statutory Addendum to this brief.



STATEMENT OF THE CASE

1. At age twenty-three, Percy Dillon was convicted at trial of conspiracy to distribute and possess with the intent to distribute in excess of 500 grams of powder cocaine and in excess of fifty grams of crack cocaine; possession with intent to distribute in excess of 500 grams of powder cocaine; and use of a firearm during and in relation to a drug trafficking crime.¹ (J.A. 15, 49; Docket Entry 19.) The jury verdict authorized a maximum sentence of 195 months (sixteen years, three months).²

¹ See Comprehensive Drug Abuse Prevention and Control Act §§ 401(a)(1), 406 and 902(c)(1), 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 924(c)(1) (1988).

² Under the Guidelines in effect at the time of sentencing, the maximum sentence authorized by the jury verdict was 135 months for the drug offenses, plus a mandatory consecutive sentence of sixty months for the firearms offense. The jury verdict established that Mr. Dillon was accountable for an amount of powder cocaine in excess of 500 grams, and an amount of crack cocaine in excess of fifty grams. The Guidelines require that each drug be converted to its marijuana equivalency to create a total combined offense level. USSG § 2D1.1, comment (n.10). Using 501 grams of powder cocaine and fifty-one grams of crack cocaine, for ease of calculation, these equal 100.2 kilograms of marijuana, and 1020 kilograms of marijuana respectively, for a combined total of 1,120.2 kilograms of marijuana, *id.*, and an offense level of thirty-two. USSG § 2D1.1(a)(3). After applying the two-level reduction for Acceptance of Responsibility under USSG § 3E1.1, Mr. Dillon's final offense level would have been thirty. At Criminal History Category II, the Category used by the District Court, Mr. Dillon's Guidelines range would have been 108 to 135 months imprisonment. Given the mandatory minimum ten-year sentence under 21 U.S.C. § 841(b)(1)(A)(iii),

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At sentencing, the district court applied the then-mandatory United States Sentencing Guidelines (“Guidelines”) and made factual findings about matters not presented to or proved beyond a reasonable doubt to the jury. Specifically, the district court found Mr. Dillon was responsible for 1.5 kilograms of crack cocaine and 1.6 kilograms of powder cocaine, which set the base offense level under USSG § 2D1.1 at thirty-eight. (Docket Entry 53 pp. 4, 10.) The court further found that he recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer under USSG § 3C1.2. (Docket Entry 53 pp. 6-7.) That finding increased Mr. Dillon’s offense level by two levels, to forty. The court then reduced the offense level by two levels, under USSG § 3E1.1, after finding that Mr. Dillon clearly demonstrated acceptance of responsibility. (J.A. 10; Docket Entry 56.) The court also concluded that Mr. Dillon fell within Criminal History Category II based on two prior misdemeanor convictions for marijuana possession and resisting arrest. (J.A. 74-75, PSR ¶¶44-47.) Based on the district court’s findings, and Mr. Dillon’s criminal history, the mandatory Guidelines range was

Mr. Dillon’s actual Guidelines range would have been 120 to 135 months imprisonment, to be followed by the additional mandatory minimum sixty months for the firearms offense under § 924(c) and USSG § 2K2.4(a).

322 to 387 months.³ The district court sentenced Mr. Dillon to the low end of that range, 322 months (twenty-six years, ten months). (J.A. 21, 49.)

When sentencing Mr. Dillon, the judge explained that he was constrained by the Guidelines to impose what he considered to be an unreasonably severe sentence: “The crimes you were convicted of are very serious crimes; however, I personally don’t believe that you should be serving 322 months. But I feel I am bound by those Guidelines” (J.A. 12-13, 49-50.) The court reiterated its dissatisfaction with the Guidelines before imposing sentence, telling Mr. Dillon, “I don’t say to you that these penalties are fair. I don’t think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime.”⁴ (J.A. 13, 50.) The

³ This Guidelines range includes the mandatory consecutive sixty-month sentence for the firearms offense. *See* 18 U.S.C. § 924(c)(1); USSG § 2K2.4(a) (1993). (J.A. 49.)

⁴ On the face of the judgment, the district court memorialized its view that the Guidelines were too harsh: “While the Court considers the defendant’s offenses serious, it also believes that the guidelines range is unfair to the defendant. The Court, however, is bound by the guidelines range.” (J.A. 22, 50.)

In public comments made shortly after the sentencing, the district court judge who sentenced Mr. Dillon explained that he believed a five-year sentence would have been sufficient: “[W]hatever good prison might have done for Dillon – who . . . came from a good family – could be accomplished in five years.” (J.A. 62; Docket Entry 193, Exhibit D-1.) Two years later, at a status conference held on a remand, the court again expressed its view that the sentences imposed on Dillon and his co-defendant were unreasonably long: “It disturbed me greatly

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court expressed “hope that while [Mr. Dillon is] in prison, which will be a very long, considerable period of time, that you will take some time to consider the direction that your life will take when you return to society. I don’t know if there is any way, but I would hope that if you have friends and family in your community at home, you will convey to them the seriousness of the penalties for dealing in drugs. It is only through people like you, if you spread the word that other young men of your age will hesitate to get involved in it.” (J.A. 13.)

2. While incarcerated, Percy Dillon did what the district court judge asked and more. He matured into a leader and worked to educate himself and others. (See, e.g., Appendix filed November 25, 2008 in the Court of Appeals for the Third Circuit, *United States v. Percy Dillon*, No. 08-3397 (“App.”) at 101-08, 148-50, 150a-b, 151-52, 154-56, 156a, 159, 163.) “Eager [] to help other young men in the community understand his perils and hopefully reach some before they [too fell] victim” (App. 152a-b, 156), Mr. Dillon has been “relentless” in his efforts to “encourag[e] and motivat[e] the generation that [succeeds] him.” (App. 151.) He has reached out to juvenile offenders at Pike County Juvenile Detention Center, in Mississippi, encouraging them with literature to take a path away from crime. (App. 156.)

when I sentenced these two. There’s no doubt about their guilt . . . but the length of the sentences disturbed me greatly. I had to follow the law . . .” (Docket Entry 97, pp. 16-17, 18.)

Mr. Dillon also has worked tirelessly with the Executive Director of Hunters Point Family, a nationally recognized youth development agency that serves high-risk youth and families in San Francisco's Bayview Hunters Point – the community in which Mr. Dillon grew up. Working with the University of California at Berkeley and San Francisco State, Mr. Dillon helped establish an African-American studies program at Hunters Point Family to “educate [local] youth about their rich heritage and uplift them.” (App. 148.) “The program has been very successful and continues today as part of [the] Young Men's Leadership Institute.” (App. 148-49.)

And, in conjunction with the University of California at Berkeley, Mr. Dillon helped create an African-American Studies program for inmates at the United States Penitentiary at Atwater. (App. 150a-b, 151-52.) Berkeley's Prison Outreach Coordinator credits Mr. Dillon for the success of the program: “without his insight and advice, our project would not have succeeded and grown the way it has.” (App. 150a-b.)

Not only has Mr. Dillon striven to enrich the lives of at-risk youth and fellow inmates, he has taken advantage of opportunities to further his own education. After obtaining his GED in prison, he pursued vocational training through a nationally accredited distance education program. *See* <http://www.ashworthcollege.edu>. Focusing on skills that will help him upon release from prison, Mr. Dillon graduated in 2004 from the Professional Career Development

Institute, completing its Professional Property Management Program. (App. 134-36, 138, 139-47.) Mr. Dillon's efforts have paid off, as he has job prospects awaiting him should he be released from prison. (App. 161, 152b.)

Throughout his more than fifteen years of incarceration, Mr. Dillon has enjoyed strong family support, which will ease his transition into the community upon release and help ensure successful reentry. (Docket Entry 56, Exhibits; App. 153-54, 156a, 161-63.) *See generally* Damian Martinez, *Family Connections and Prisoner Reentry* (April 2009).⁵

3. After Mr. Dillon had served twelve years of his nearly twenty-seven year sentence, this Court decided *United States v. Booker*, 543 U.S. 220 (2005), holding that the mandatory Guidelines violated the Sixth Amendment, and rendering the Guidelines advisory.

Booker had plain implications for defendants in crack cocaine cases. Relying on the United States Sentencing Commission's ("Commission") Reports to Congress in 1995, 1997, 2001, 2002 and 2007, which found that the 100:1 powder to crack cocaine ratio resulted in sentences that were greater than necessary to satisfy sentencing purposes and created unwarranted disparity, many of those defendants urged courts to reject the Guidelines' adoption of the

⁵ Available at <http://ccj.asu.edu/downloads/paper-martinez>.

ratio and to impose a sentence below the advisory Guidelines range.⁶ See, e.g., *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006); *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), both abrogated by *Kimbrough v. United States*, 552 U.S. 85 (2007). As summarized in the Commission’s May 2007 Report, the quantity-based penalties for crack cocaine “overstate the relative harmfulness of crack cocaine compared to powder cocaine,” “sweep too broadly and apply most often to lower level offenders,” “overstate the seriousness of most crack offenses and fail to provide adequate proportionality,” and their “severity . . . mostly impacts minorities.”⁷

4. On May 1, 2007, seeking to “somewhat alleviate” the “urgent and compelling . . . problems associated with the 100-to-1 drug quantity ratio,” the

⁶ Even before *Booker*, many defendants, including Mr. Dillon, challenged the ratio under the Equal Protection Clause, the Due Process Clause and the Eighth Amendment. (*United States v. Dillon*, Joint Brief of Appellants filed in the Court of Appeals for the Third Circuit, Nos. 93-3615, 93-3619, available at 1994 WL 16176787; see Docket No. 53 (district court overruling equal protection objection and not reaching due process challenge)). These arguments were unsuccessful. See, e.g., *United States v. Frazier*, 981 F.2d 92 (3d Cir. 1992) (rejecting equal protection and Eighth Amendment challenges to crack to powder cocaine ratio); *United States v. Byse*, 28 F.3d 1165 (11th Cir. 1994) (rejecting equal protection and due process challenges to crack ratio; listing other circuits to have rejected equal protection arguments).

⁷ U.S. Sentencing Commission Report to Congress: *Cocaine and Federal Sentencing Policy* 8 (2007) (“2007 Report”).

Commission submitted to Congress an amendment to reduce base offense levels for most crack cocaine offenses by two levels. See 72 Fed. Reg. 28,558, 28,572-573 (May 21, 2007); 2007 Report at 9. The amendment was “only . . . a partial remedy” and “neither a permanent nor complete solution,” but corrected for “the manner in which [the Commission] constructed . . . the Drug Quantity Table in USSG § 2D1.1,” which “contribute[d] to the problems” by setting base offense levels two levels above the statutory mandatory minimum penalties. 2007 Report at 9-10. The amendment became effective, prospectively, November 1, 2007.⁸

Before the Commission reached a decision whether to make the amendments to the crack cocaine Guidelines retroactive, this Court decided *Kimbrough*, upholding the district court’s decision, pursuant to the advisory Guidelines regime established in *Booker*, to impose a sentence based on a 20:1 ratio rather than the 100:1 ratio reflected in the pre-amendment Guidelines. In doing so, this Court

⁸ USSG, App. C, Amend. 706 (Nov. 1, 2007). Amendment 706 was further amended by Amendment 711, which also became effective November 1, 2007. Amendments 706 and 711 were made retroactive effective March 3, 2008. USSG, App. C, Amend. 713 (Mar. 3, 2008). These amendments were further amended by Amendment 715, which became effective May 1, 2008, and was made retroactive by Amendment 716 on the same date. Amendments 711 and 715 made adjustments in the method for converting crack cocaine to an equivalent quantity of marijuana in cases involving more than one drug.

rejected the government's argument that the Anti-Drug Abuse Act of 1986 required the drug Guidelines to be calibrated to the quantity-based mandatory minimum penalties, *Kimbrough*, 552 U.S. at 102-05, and confirmed that district courts may vary from Guidelines ranges based on policy considerations, including disagreements with the Guidelines. *Id.* at 101-02; see also *Rita v. United States*, 551 U.S. 338, 351 (2007) (holding that district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). The Court concluded that the district court did not abuse its discretion in finding that the crack Guidelines yielded a sentence greater than necessary to achieve § 3553(a)'s purposes in an ordinary case, like Mr. Kimbrough's. *Kimbrough*, 552 U.S. at 110.

This Court reached that conclusion after reviewing evidence, set forth in several of the Commission's reports to Congress, showing that the Guidelines based on the 100:1 powder to crack ratio in the Anti-Drug Abuse Act of 1986 were disproportionately severe for the seriousness of the offense in most cases and resulted in unwarranted disparity and disrespect for law. *Id.* at 94-100. Regarding the amendments reducing Guidelines ranges by two levels that had taken effect November 1, 2007, the Court observed that the amended ranges were still keyed to the mandatory minimums, still yielded sentences between two and five times longer than offenses involving equal amounts of powder, and were only a partial remedy. *Id.* at 100 & nn.10-11.

The day after *Kimbrough* was decided, the Commission voted to make the amendments to the crack cocaine Guidelines retroactive, and also to amend USSG § 1B1.10, p.s., in what would become Amendment 712.⁹

5. Section 1B1.10 addresses motions under 18 U.S.C. § 3582(c)(2). Section 3582(c)(2), which was enacted as part of the original Sentencing Reform Act (“SRA”), authorizes the district court to reduce a term of imprisonment “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),” and directs the court, in deciding whether and by how much to reduce the term of imprisonment, to “consider[] the factors set forth in section 3553(a) to the extent that they are applicable” and to be “consistent with applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(2).

Prior to Amendment 712, USSG § 1B1.10 addressed the court’s authority to entertain a motion under 18 U.S.C. § 3582(c)(2) by stating that a reduction in the term of imprisonment was “authorized” only if the applicable Guidelines range “has subsequently been lowered” by an amendment “listed in subsection (c).” *See* USSG § 1B1.10(a), p.s. (2007); *see*

⁹ 73 Fed. Reg. 217 (Jan. 2, 2008); USSG, App. C, Amend. 712 (Mar. 3, 2008).

also id., comment. (n.1) (“Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.”). The prior version addressed the resentencing decision by stating:

In determining whether and to what extent a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

See USSG § 1B1.10(b), p.s. (2007); *see also id.*, comment. (n.3) (Except that “in no case shall the term of imprisonment be reduced below time served . . . the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.”).

Amendment 712 changed USSG § 1B1.10 in several significant ways, some of which are relevant here. As an initial matter, USSG § 1B1.10, now speaks in mandatory terms, stating that “any such reduction *shall* be consistent with this policy statement,” USSG § 1B1.10(a)(1), p.s. (2008) (emphasis supplied), and refers to “18 U.S.C. § 3582(c)(2) and this policy statement” as equivalent authority, *id.*, USSG § 1B1.10(a)(3), (b)(1), (b)(2)(A), p.s. Section

1B1.10 also asserts that the amended Guidelines range is binding, instructing that “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.” See USSG § 1B1.10(b)(2)(A), p.s. (2008) (emphasis added). It also explicitly forbids courts from giving full effect to consideration of the factors set forth in § 3553(a), including post-sentence conduct, where those factors warrant a sentence below the minimum of the amended Guidelines range. See *id.*, comment. (n.1(B)).¹⁰

6. After the Commission promulgated the crack amendment, but before it voted to make the amendment retroactive, Mr. Dillon filed a *pro se* motion for a reduction in his term of imprisonment under § 3582(c)(2). (Docket Entry 206.) He sought a two-level reduction based on Amendment 706 and argued that his sentence should be further reduced under *Booker* and 18 U.S.C. § 3553(a). (Docket Entries 206, 208, 209.) Had Mr. Dillon’s sentence been based on the one-to-one ratio between crack and

¹⁰ The amended background commentary states that the new USSG § 1B1.10 seeks to provide “guidance and limitations,” USSG § 1B1.10, comment. (backg’d), p.s. (2008), where the former policy statement sought only to provide “guidance[.]” USSG § 1B1.10, comment. (backg’d), p.s. (2007). One pertinent limitation appears in subsection (a)(3), which announces that “proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.” USSG § 1B1.10(a)(3), p.s.

powder cocaine, as he requested at his original sentencing, (Docket Entry 52 pp. 5-6, 14, Docket Entry 53 p. 10; *see* J.A. 8-9), the Guidelines range would have been 147 to 168 months.¹¹ Because he faced statutory mandatory minimum sentences under §§ 841(a)(1) and 924(c)(1), he would have been sentenced to 180 months.

Mr. Dillon also asked the court to revisit his criminal history category or depart under USSG § 4A1.3. (Docket Entry 206.) The district court held the motion in abeyance pending a decision by the Commission on retroactivity. (Docket Entry 206, Order entered December 7, 2007.) On January 7, 2008, Mr. Dillon filed a *pro se* letter request to amend his motion, relying on *Kimbrough* as further support for a sentence below the amended Guidelines range. (J.A. 30-31.)

After the decision to make the crack amendment retroactive became effective, the district court decided

¹¹ Treating crack cocaine as powder results in a total combined drug quantity of 3.1 kilograms cocaine. Under the Drug Quantity Table set forth in USSG § 2D1.1, between 2 kilograms and 3.5 kilograms of cocaine results in an offense level of twenty-eight. After reducing the Offense Level by two for Acceptance of Responsibility, USSG § 3E1.1, and increasing it by two for his judge-found reckless endangerment during flight, USSG § 3C1.1, Mr. Dillon's final offense level would be twenty-eight. At Criminal History Category II, Mr. Dillon's Guidelines range for the drug counts would be 87 to 108 months, and 147 to 168 months after factoring in the consecutive sixty months for the gun count.

that Mr. Dillon was eligible for a reduction in his term of imprisonment. In resentencing him, the court recalculated his Guidelines range as instructed by the newly revised USSG § 1B1.10(b)(1), p.s. (2008). (J.A. 32.) Using its 1993 fact findings regarding drug quantity, the court found that the new base offense level under USSG § 2D1.1 was thirty-six. (J.A. 34-36.) Again using its prior fact findings regarding reckless endangerment during flight, two levels were added under USSG § 3C1.2, and two were subtracted for acceptance of responsibility under USSG § 3E1.1. The amended Guidelines range, based on Mr. Dillon's criminal history score and including the mandatory consecutive sixty-month sentence for the firearms conviction, was 270-322 months. (J.A. 35-36.) Notwithstanding its statements at the original sentencing that a much shorter sentence was sufficient, and the substantial additional mitigating evidence of Mr. Dillon's post-sentencing conduct, the district court declared itself bound by USSG § 1B1.10, and sentenced Mr. Dillon to 270 months imprisonment (twenty-two years, six months). (J.A. 37-41.) The court stated that "it would be patently inconsistent" with the policy statement "to impose a term of imprisonment lower than the bottom of the amended Guideline range." (J.A. 39-40.) The court observed: "Indeed, the amendments to Section 1B1.10 appear to have been enacted specifically to prevent the application of *Booker* to Section 3582(c)(2) proceedings." (J.A. 40.)

The district court also refused to revisit Mr. Dillon's criminal history category, finding that "neither Section 1B1.10 nor Section 3582(c)(2) permit this Court to re-examine any of the prior convictions which formed the basis of the Court's original guideline determinations." (J.A. 41-42.)

7. Mr. Dillon appealed the district court's failure to reduce his term of imprisonment below the amended Guidelines range and also challenged the sentence imposed as unlawful because it was based on an incorrect calculation of his criminal history score. (Brief for Appellant filed November 25, 2008 in the Court of Appeals for the Third Circuit, *United States v. Percy Dillon*, No. 08-3397.) The Third Circuit affirmed. It acknowledged that "[i]f *Booker* did apply in proceedings pursuant to § 3582, Dillon would likely be an ideal candidate for a non-Guidelines sentence," (J.A. 49), but found that the district court "correctly concluded that it lacked the authority to further reduce the Appellant[s] sentence [] . . . [b]ecause USSG § 1B1.10 is binding on the District Court pursuant to 3582(c)[.]" (J.A. 54 (quoting *United States v. Doe*, 564 F.3d 305, 312-14 (3d Cir. 2009)).) The court also rejected Mr. Dillon's argument that the district court committed procedural error by failing to correctly calculate his criminal history score, finding that "the District Court had no authority to reconsider its prior criminal history determination." (J.A. 54-55.)

In the Third Circuit’s view, *Booker*’s constitutional holding did not apply to § 3582(c)(2) proceedings because “[n]owhere in *Booker* did the Supreme Court mention § 3582(c)(2),” and “§ 3582(c)(2) proceedings may only reduce a defendant’s sentence and not increase it.” (J.A. 52 (quoting *United States v. Doe*, 564 F.3d 305, 312-14 (3d Cir. 2009) (internal citations and quotation marks omitted).) In addition, the Third Circuit concluded *Booker*’s remedial holding was likewise inapplicable because *Booker* applies only to “full sentencing hearings . . . but not to sentence modification proceedings under § 3582(c)(2).” (J.A. 52-53.) The Third Circuit noted this Court’s statement in *Booker* that “[w]ith these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the [SRA] satisfies the Court’s constitutional requirements,” suggesting that § 3582(c)(2) must therefore have survived constitutional scrutiny. (J.A. 53.) This Court granted *certiorari*. (J.A. 56.)



SUMMARY OF ARGUMENT

In resentencing Mr. Dillon under 18 U.S.C. § 3582(c)(2), the district court felt constrained to impose a sentence within the amended Guidelines range and believed it could not revisit any of its prior Guidelines decisions. Such constraint is neither required nor permitted. After *United States v. Booker*, 543 U.S. 220 (2005), district courts cannot be forced

to adhere to an unconstitutional and unjust Guidelines range when imposing a new sentence under § 3582(c)(2). A Sentencing Commission policy statement, revised in response to *Booker*, attempts to do exactly that. Following that policy statement, USSG § 1B1.10, the district court adopted an amended Guidelines range that incorporated the Sixth Amendment error dating from the mandatory-Guidelines era, and failed to correct the an erroneous criminal history calculation that increased Mr. Dillon's original sentence separate and apart from the Sixth Amendment error. This result cannot be sustained under *Booker's* Sixth Amendment analysis, its remedial opinion, or the law of the case doctrine.

This is so even though the sentence at issue here was imposed at a Section 3582 resentencing. There is no practical or functional difference between a resentencing pursuant to § 3582(c)(2) and any other resentencing. The principles that apply at other resentencings must apply equally to Section 3582 resentencings. No matter the context, once a court reopens a sentence and imposes a new one, that sentence must comport with existing law.

Any sentence, including a new sentence imposed under § 3582(c)(2), violates the Sixth Amendment if it exceeds the maximum allowed under the facts found by the jury or admitted by the defendant. If a district court binds itself to a previous unconstitutional Guidelines range as a baseline for a new sentence, as USSG § 1B1.10 purports to require, it reoffends the Sixth Amendment. It is immaterial that the new

sentence reduces an offender's original term of imprisonment, when the new sentence is only a reduction compared to the term the defendant originally received. It still exceeds the maximum punishment allowed based solely on facts found by the jury or admitted by the defendant by more than six years. For this reason, *Booker's* Sixth Amendment holding requires that Mr. Dillon's sentence be vacated and the case be remanded for imposition of a constitutional sentence.

Booker's remedial opinion requires that district courts treat the Guidelines sentencing ranges, and Guidelines policy statements, as advisory. There is no basis to exempt USSG § 1B1.10 or the amended Guidelines range from the now-controlling statutory rule that the Guidelines cannot bind a sentencing court's discretion or otherwise limit its ability to comply with the statutory directive set forth in 18 U.S.C. § 3553(a): to consider the factors set forth therein and to impose a sentence sufficient, but not greater than necessary, to accomplish the goals of sentencing. Section 3582(c)(2), which incorporates this governing principle, is consistent with *Booker's* interpretation of the Sentencing Reform Act and must be applied consistently with that law.

The district court was required to correctly calculate the Guidelines range before imposing sentence. And, post-*Booker*, the court of appeals was required to review the new sentence for procedural reasonableness, which requires reversal and remand where procedural error, including an incorrect calculation of

the criminal history score, is established. Because the court of appeals agreed that the district court lacked the authority to reconsider its prior Guidelines decisions, it allowed the criminal-history error to stand. The district court had the authority, however, to correct the error under the law-of-the-case doctrine, which permits courts to reopen previously adjudicated questions if a prior decision was clearly erroneous and would work a manifest injustice if not corrected. The criminal-history error here meets that standard.

Because the district court was required, when resentencing Mr. Dillon, to impose a sentence that conformed to the Constitution and the Sentencing Reform Act, and that was based on a correct determination of the Guidelines sentencing range, Mr. Dillon's sentence must be vacated.



ARGUMENT**I. BOOKER'S CONSTITUTIONAL AND REMEDIAL HOLDINGS APPLY WHEN A DISTRICT COURT IMPOSES A NEW SENTENCE UNDER SECTION 3582(c).**

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory Federal Sentencing Guidelines system violated the Sixth Amendment because it required courts to sentence defendants above the maximum authorized by the jury verdict or facts admitted by the defendant. 543 U.S. at 226-27. To remedy this constitutional infirmity, the Court excised 18 U.S.C. § 3553(b)(1) – the provision which directed courts to treat the Guidelines as mandatory. *Id.* at 258-59. For all future cases, the Court ruled, the Guidelines must be treated as advisory. *Id.* at 245. These holdings apply when a district court imposes a new sentence under § 3582.

A. Booker Applies to All Resentencings Where a New Sentence is Imposed in Accordance with 18 U.S.C. § 3553(a).

After *Booker* excised § 3553(b)(1), all federal sentencing under § 3553 (“Imposition of Sentence”) is governed by § 3553(a)’s “overarching provision instructing judges to ‘impose a sentence sufficient, but not greater than necessary,’ to accomplish the goals of sentencing[.]” *Kimbrough*, 552 U.S. at 101. It is this statutory provision, not the mandatory Guidelines,

which ultimately governs the sentencing court's decision.

Nevertheless, the Commission's amended policy statement respecting § 3582 resentencings provides that "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." USSG § 1B1.10(b)(2)(A), p.s. (2008) (emphasis added). Although the policy statement mirrors § 3553(b)(1)'s now excised command to "impose a sentence of the kind, and within the [Guidelines] range[.]" the Commission defends it, notwithstanding *Booker*, on the ground that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." USSG § 1B1.10(a)(3), p.s. (2008). This suggestion that Section 3582 resentencings are different from other ones rests on a "false . . . dichotomy." *United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007).

Even if a Section 3582(c)(2) resentencing is limited in certain respects, as many resentencings are, courts imposing a new sentence under § 3582(c)(2) must follow the same procedures under § 3553, and consider the same factors under § 3553(a), as courts imposing any other kind of new sentence. In a § 3582 resentencing, just as in any other resentencing in which a defendant's original offense level has been shown to be erroneous, the district court recalculates a new Guidelines range. In a Section 3582 resentencing, just as in any other resentencing proceeding,

the court must consider the factors set forth in 18 U.S.C. § 3553(a). § 3582(c)(2). In a Section 3582 proceeding, just as in any other resentencing proceeding, the court imposes a new sentence, based on the Guidelines and the other § 3553(a) factors, in place of the old one. And a sentence imposed pursuant to § 3582(c)(2), like a sentence imposed under § 3553(a), is reviewable under 18 U.S.C. § 3742. *See* 18 U.S.C. § 3742(a).

There is, therefore, no practical or functional difference between a Section 3582 proceeding and any other resentencing where a district court reopens a previous judgment to alter the Guidelines calculation. *See United States v. Byfield*, 391 F.3d 277, 280 (D.C. Cir. 2004) (finding “no material distinction, for these purposes, between initial sentencings and § 3582(c)(2) revisions” in response to government’s suggestion that USSG § 6A1.3 may not apply in § 3582(c)(2) proceedings). Though courts conducting a Section 3582 resentencing are not permitted to revisit all prior Guidelines application decisions, the same is true in all other cases where findings of fact or conclusions of law that were not disturbed on appeal become the law of the case. *See United States v. Thomas*, 572 F.3d 945, 948-50 (D.C. Cir. 2009) (invoking law-of-the-case doctrine to foreclose challenge to determination in original sentencing that was not disturbed on appeal); *United States v. Carr*, 557 F.3d 93, 102 (2d Cir. 2009) (same).

Booker applies to all resentencings conducted in accordance with § 3553(a). For example, the courts

of appeals have consistently applied *Booker* at resentencings where the defendant was originally sentenced before *Booker* and his sentence was vacated for reasons unrelated to that decision. *See, e.g., Cirilo-Munoz v. United States*, 404 F.3d 527, 533 n.7 (1st Cir. 2005) (noting agreement among several circuits “that the advisory guidelines regime is to be used after *Booker*, even when remands for resentencing were not caused by a *Booker* error”); *United States v. Stewart*, 420 F.3d 1007, 1021-22 (9th Cir. 2005); *United States v. Kimbrew*, 406 F.3d 1149, 1154 (9th Cir. 2005); *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 359 n.14 (5th Cir. 2005); *United States v. Doe*, 398 F.3d 1254, 1261 n.9 (10th Cir. 2005); *United States v. Gleich*, 397 F.3d 608, 615 (8th Cir. 2005); *see also United States v. Verporter*, 196 F. App’x 839, 841, 2006 WL 2641809, at *1 (11th Cir. 2006) (holding that *Booker* applies in resentencing following limited habeas relief); *United States v. Hernandez*, 450 F.Supp.2d 950, 982 (N.D. Iowa 2006) (same); *Ferrara v. United States*, 384 F.Supp.2d 384, 435 (D. Mass. 2005) (same).

Booker’s application in this case becomes especially clear when § 3582(c)(2) is compared with 18 U.S.C. § 3742, which governs remands for resentencing. Like § 3742, which directs courts on remand to “resentence a defendant in accordance with § 3553,” Section 3582(c)(2) requires the court to “consider the factors set forth in section 3553(a).” *Compare* 18 U.S.C. § 3742(g) *with* § 3582(c)(2). In particular, both provisions expressly require courts to

consider *all* of the Section 3553(a) factors and impose a sentence that serves section 3353(a)'s "overarching statutory directive." *Kimbrough*, 552 U.S. at 101. Furthermore, section 3582(b), the statutory provision that provides several instances in which otherwise final sentences may be modified or corrected, likewise puts resentencings under § 3582(c) and those following reversal under § 3742 on an equal footing. *See* 18 U.S.C. § 3582(b) (1)-(3). Insofar as the discretionary aspects of resentencings under § 3582(c) and § 3742 are the same, there is no principled reason to apply *Booker* at one and not the other.

Reduced to its essence, the Commission's (and Third Circuit's) position amounts to nothing more than labeling. This Court's Sixth Amendment jurisprudence teaches that when the right to a jury trial is at issue, however, "label[s]" do not control; realities do. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 494 (2000). "The dispositive question" in this area of law "is one not of form, but of effect." *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi*, 530 U.S. at 494); *id.* at 610 (Scalia, J. concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."). Because the substantive operation and effect of a Section 3582 resentencing is in all relevant respects the same as any

other resentencing, *Booker* must apply in Section 3582(c)(2) proceedings as it does in any other sentencing or resentencing proceeding.

Some courts have justified the decision not to apply *Booker* in Section 3582(c) proceedings by suggesting that doing so would give defendants who were initially sentenced before *Booker*, but obtain a resentencing after *Booker* for reasons having nothing to do with that decision, a windfall. *See, e.g., United States v. Cunningham*, 554 F.3d 703, 708-09 (7th Cir. 2009) (“It would be unfair to allow a full *Booker* resentencing to only a subset of defendants whose sentences were lowered by a retroactive amendment.”); *United States v. Dunphy*, 551 F.3d 247, 255 & n.6 (4th Cir. 2009). But a defendant’s right to be sentenced under *Booker* simply reflects the reality that when a federal court enters a new judgment, that judgment must avoid violating current law. *See Hughey v. United States*, 495 U.S. 411, 413 n.1, 110 (1990) (agreeing with the lower court’s implicit conclusion that the law in effect at the time of sentencing controls), *superseded by statute on other grounds as noted in United States v. Arnold*, 947 F.2d 1236, 1237 (5th Cir. 1991)). As the Fourth Circuit has explained:

It could certainly be said that Butler was fortunate that the district court twice sentenced him incorrectly, thus continuing his case long enough for *Booker* to be decided before his latest sentence was imposed. But, it is not unusual for temporal happenstance

to control whether a criminal defendant receives the benefit of a Supreme Court decision. And Butler is no less “deserving” of benefiting from *Booker* than are any of the other defendants who happened to have been sentenced after *Booker* was decided. The fact is that when Butler was sentenced, *Booker* had already been decided, and that is all that matters.

United States v. Butler, 139 F. App’x 510, 512, 2005 WL 1655028, at *2 (4th Cir. 2005) (*per curiam*). That is all that matters here as well. When the district court decided to resentence Mr. Dillon, *Booker* was the controlling law. The court was required to conduct a resentencing that was in all relevant respects identical to any other resentencing.

Indeed, the only way a Section 3582 proceeding currently differs from any other resentencing proceeding in the post-*Booker* era is that USSG § 1B1.10 purports to forbid a court in a Section 3582 proceeding from imposing a sentence that is lower than the minimum of the applicable Guidelines range, and from considering the factors set forth in § 3553(a) to the full extent that they are applicable in light of the circumstances. USSG § 1B1.10(b)(2)(A) & comment. (n.1(B)), p.s. (2008). Policy statements cannot make a Guidelines range binding on the district courts or compel a violation of the Sixth Amendment. Accordingly, *Booker* requires that those portions of USSG § 1B1.10 that purport to make the amended Guidelines range mandatory be viewed as

advisory, and that district courts have discretion to determine the appropriate sentence after considering the amended Guidelines range, the other factors set forth in § 3553(a), and any applicable policy statements, just as they would at any other sentencing or resentencing.

B. *Booker's* Constitutional Holding Extends to a Resentencing Conducted Under 18 U.S.C. § 3582(c).

The Third Circuit did not dispute that the sentence imposed at Mr. Dillon's resentencing is six years longer than the maximum authorized by the jury's verdict. Nor did it dispute that the district court treated the Guidelines as binding. Yet the court held that Mr. Dillon's new sentence does not violate *Booker's* constitutional holding because "*Booker* applies to full sentencing hearings – whether in an initial sentencing or in a resentencing where the original sentence has been vacated for error," but not to resentencings under § 3582(c).¹² (J.A. 52-53.) This holding misses the point: any sentence, including a

¹² The court based its holding on the fact that both of the statutory provisions severed in *Booker* apply only in "full resentencings." (J.A. 52-53.) Because § 3553(b)(1) made the Guidelines mandatory for full sentencings and § 3742(e) directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines, the Third Circuit reasoned, *Booker* must apply only to initial sentencings, appeals therefrom, and resentencings following a reversal where the original sentence is vacated for error. *Id.*

new sentence imposed under § 3582(c)(2), violates the Sixth Amendment if it exceeds the maximum allowed under the facts found by the jury or admitted by the defendant.

The Third Circuit's assertion that *Booker* does not apply at a resentencing under § 3582(c)(2), because the court "may only reduce a defendant's sentence and not increase it[.]" (J.A. 52), misapprehends a defendant's rights under the Sixth Amendment. Although a new sentence imposed under § 3582 reduces an offender's term of imprisonment *compared to the term he originally received*, the new sentence cannot survive Sixth Amendment scrutiny where, as here, the district court treated the Guidelines as binding at the original sentencing and imposed a new sentence that is still longer than would otherwise be allowed based solely on facts found by the jury or admitted by the defendant. When a court binds itself to "a defendant's previous, unconstitutional sentence as a baseline for a new sentence," it reoffends the Sixth Amendment. *See Lafayette*, 585 F.3d at 438 (recognizing that "if *Hicks* is correct, it is because a section 3582(c)(2) sentence reduction requires a new Guidelines calculation, and it is that calculation . . . that raises a *Booker* problem").¹³ That is precisely what occurred here.

¹³ To the extent that the district court's decision to carry forward the unconstitutional elements of Mr. Dillon's prior sentence can be read to rely upon the law-of-the-case doctrine, the intervening decision in *Booker* would render that reliance

(Continued on following page)

Building on the basic tenets of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803), this Court has emphasized that Congress may not confer jurisdiction on a federal court and then direct (or authorize the Commission to direct) that “it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them.” *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J. dissenting), *cited with approval in United States v. Sioux Nation*, 448 U.S. 371, 392 (1980). “[W]henver the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it.” *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting); *see also Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987) (Congress may not pass a law and “then avoid judicial review of a broad category of constitutional challenges by individuals injured by the law.” Courts “must apply all applicable laws in rendering their decisions.”). That is exactly what the Third Circuit’s decision condones. Once a federal court’s Article III jurisdiction has been called

inappropriate. The law-of-the-case doctrine contains an exception for intervening changes in law. *See, e.g., Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008); *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000); *Hull v. Freeman*, 991 F.2d 86, 90 (3d Cir. 1993); *United States v. Monsisvais*, 946 F.2d 114, 117 (10th Cir. 1991); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1441 (11th Cir. 1984).

into play, it cannot be limited in this manner without raising profound Article III and separation-of-powers concerns.

When a district court determines that a defendant is eligible for reduction in his term of imprisonment under § 3582(c)(2), any new sentence must be imposed in a manner consistent with the Constitution. By treating the amended Guidelines range as mandatory, the district court imposed a new sentence which violated the Constitution.¹⁴ The constitutional violation can only be remedied if this Court vacates Mr. Dillon’s sentence and remands for the district court to impose a sentence in accordance with *Booker*.

C. *Booker*’s Remedial Holding Extends to a Resentencing Conducted Under 18 U.S.C. § 3582(c).

The *Booker* Court found that the only “appropriate cure” for the Sixth Amendment problem with the mandatory Guidelines system “was to sever and excise the provision of the statute that rendered

¹⁴ By construing USSG § 1B1.10(b)(2)(A) & comment. (n.1(B)) as advisory – that is, as recommending, but not requiring, that district courts impose a new sentence no lower than the minimum of amended Guidelines range when imposing a new sentence under Section 3582 – the Court can avoid the constitutional question. *See, e.g., Northwest Austin Mun. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508, 2513 (2009) (constitutional avoidance canon).

the Guidelines mandatory, 18 U.S.C. § 3553(b)(1),” *Kimbrough*, 552 U.S. at 100-101, along with 18 U.S.C. § 3742(e), “which depends on the guidelines mandatory nature.” *Booker*, 543 U.S. at 245. Under the advisory Guidelines system, “judges [are] no longer . . . tied to the sentencing range indicated in the Guidelines, but they [are] obliged to ‘take account of’ that range along with the other sentencing goals Congress enumerated in the SRA at 18 U.S.C. § 3553(a).” *Cunningham v. California*, 549 U.S. 270, 286-87 (2007). The Court has affirmed this revision of the SRA more than once, rejecting the argument that some guidelines remain mandatory, while the rest are advisory. *Kimbrough*, 552 U.S. at 91 (“the cocaine Guidelines, like all other Guidelines, are advisory only”); *Spears v. United States*, 129 S.Ct. 840, 842 (2009) (*per curiam*) (quoting *Kimbrough*).¹⁵ Like “all other Guidelines,” *Kimbrough*, 552 U.S. at 91, USSG § 1B1.10 must be treated as advisory under *Booker* too.

By purporting to bind courts to the Guidelines sentencing range during resentencings under § 3582(c)(2), USSG § 1B1.10 attempts to resurrect the

¹⁵ In *Vazquez v. United States*, No. 09-5370, the Solicitor General recently conceded that the Career Offender Guidelines are advisory, as well. See *Vazquez v. United States*, ___ S. Ct. ___, 2010 WL 154871 (Jan. 19, 2010) (granting certiorari, vacating judgment, and remanding, noting Solicitor General’s agreement with petitioner that district courts may conclude in sentencing particular defendants that the career offender guideline yields a sentence greater than necessary).

mandatory Guidelines system *Booker* invalidated. In *Booker*, however, the Court made clear that a “mandatory system was no longer an open choice.” *Booker*, 543 U.S. at 263. The Court expressly rejected the government’s proposal to make the Guidelines advisory in some cases and binding in others. *Booker*, 543 U.S. at 265-67. “Section 1B1.10 cannot restrict a resentencing court’s discretion to sentence outside of the amended guidelines range because it is, like all other guidelines, advisory under *United States v. Booker*.” *United States v. Harris*, 556 F.3d 887, 889 (8th Cir. 2009) (Bye, J., concurring in the judgment) (citing *Hicks*, 472 F.3d at 1172-73).

Nevertheless, the Third Circuit found that USSG § 1B1.10 could require the district court to impose a sentence within the amended Guidelines range, because *Booker*’s remedial holding did not mention § 3582(c)(2). According to the court, “[n]othing in *Booker* purports to obviate the congressional directive in § 3582(c)(2) that a sentence reduction pursuant to that section be consistent with Sentencing Commission policy statements.” (J.A. 53.) That § 3582(c)(2) is not expressly addressed in *Booker* is not surprising, as it was not at issue.¹⁶ Determining whether

¹⁶ “Federal courts sit ‘solely to decide on the rights of individuals,’” *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803)), and therefore must “refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of [their] judicial function, when the question is raised by a party whose interests entitle him to raise

(Continued on following page)

§ 3582(c)(2) could survive constitutional scrutiny was not necessary to the Court's decision in *Booker* and, consequently, no meaning can be ascribed to its absence from the Court's opinion.¹⁷

Even if § 3582(c)(2) had been at issue in *Booker*, this Court would not have had to sever any of it. Section 3582(c), on its face, does not compel a

it.” *Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464, 471 (1982) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)).

¹⁷ Courts have recognized that other statutory provisions not specifically mentioned or excised in *Booker*, but which render the Guidelines mandatory or “which depend [] upon the guidelines’ mandatory nature,” cannot stand side-by-side with *Booker*. See, e.g., *United States v. Allen*, 450 F.3d 565, 570 n.5 (4th Cir. 2006) (stating that notwithstanding mandatory language, and *Booker*’s focus on 18 U.S.C. § 3553(a), not subsection (e), this Court, post-*Booker*, has recognized that a court under § 3553(e) may give full consideration to the § 3553(a) factors and is not bound by the guidelines in imposing a sentence below the mandatory minimum); *United States v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005) (*Booker* rationale requires us to consider subsection 3553(b)(2) to be excised); *United States v. Bolanos*, 409 F.3d 1045, 1047 (8th Cir. 2005) (if safety valve provision of 18 U.S.C. § 3553(f) applied, defendant would be sentenced under the Guidelines as qualified by *Booker*); *United States v. Yazzie*, 407 F.3d 1139, 1145 (10th Cir. 2005) (applying *Booker*’s reasoning to excise § 3553(b)(2)); *States v. Sharpley*, 399 F.3d 123, 127 n.3 (2d Cir. 2005) (concluding *Booker*’s failure to excise 18 U.S.C. § 3553(b)(2) from the SRA “was simply an oversight”); *United States v. Duran*, 383 F.Supp.2d 1345, 1349 (D. Utah 2005) (Cassell, J.) (finding “unpersuasive” the argument that “the Guidelines nonetheless remain mandatory when the court proceeds under the safety valve”; the “pursuant to” language does not transform advisory guidelines into mandatory guidelines).

constitutional violation.¹⁸ It does so only when combined with a mandatory reading of USSG § 1B1.10's post-*Booker* directive to treat the Guidelines range as binding. It is USSG § 1B1.10 – and not § 3582 – that renders the Guidelines mandatory and seeks to override this Court's interpretation of the SRA. Section 1B1.10 expressly limits consideration of the factors in § 3553(a) to a determination of where – within the recalculated

¹⁸ Once the Commission exercises its power under 28 U.S.C. § 994(o) to amend a Guideline, and its power under 28 U.S.C. § 994(u) to make the amendment retroactive, § 3582(c)(2) commits the decision whether to grant a reduction and impose a new sentence to the sound discretion of the district court. By directing the court to act “consistent with applicable policy statements issued by the Sentencing Commission,” § 3582(c)(2) does not impose a mandatory limit on a judge's discretion to reduce a defendant's term of imprisonment.

Section 994(a)(2)(C) directs the Commission to issue general policy statements regarding the appropriate use of 13 sentencing-related provisions, including § 3582(c). 28 U.S.C. § 994(a)(2)(C). None of the policy statements promulgated with respect to the provisions enumerated in § 994(a)(2)(c), except USSG § 1B1.10, as revised post-*Booker*, purports to independently bind the court to a Guidelines range (or a particular sentence) where the related statutory provision does not. *See* USSG §§ 1B1.13, p.s., 5B1.3(c)-(e), p.s., 5D1.2(b), p.s., 5D1.3(c)-(e), p.s., 6B1.1, p.s., 6B1.2, p.s., 6B1.3, p.s., 6B1.4, p.s. In any event, this Court's post-*Booker* decisions establish that the mandate in USSG § 1B1.10 that courts impose within-Guideline sentences cannot properly be treated as binding. *See Rita v. United States*, 551 U.S. 338, 351 (2007) (authorizing variances where Guidelines policy statements do not treat offender characteristics in the proper way); *Gall v. United States*, 552 U.S. 38 (2007) (same).

Guidelines range – to set the sentence a defendant, thereby preventing the district court from fashioning a sentence that complies with its statutory directive to “impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing.” *Kimbrough*, 552 U.S. at 101.

Section 1B1.10 cannot be interpreted to limit the sentencing court’s authority to comply with § 3553(a). As this Court has made clear, directions in the Guidelines are invalid if inconsistent with federal statutory law. *Stinson v. United States*, 508 U.S. 36, 38 (1993) (Guidelines commentary is authoritative unless it violates the Constitution or a federal statute). When interpreted as a mandatory limit on a district court’s discretion to impose a sentence under the SRA, USSG § 1B1.10 is not consistent with federal statutory law, as it conflicts with *Booker’s* constitutionally required interpretation of the SRA. Where the policy statement and the statute (as interpreted and modified by *Booker*) conflict, the policy statement must give way. *Hicks*, 472 F.3d at 1173; *see also Stinson*, 508 U.S. at 38 (explaining that the Guidelines commentary “is authoritative unless it violates the Constitution or a federal statute”); *Neal v. United States*, 516 U.S. 284, 293 (1996) (noting that the Commission does not have authority to give a statute pertaining to criminal penalties a different interpretation than given it by this Court).

A ruling that *Booker’s* remedial holding extends to a Section 3582 resentencing – and renders USSG § 1B1.10 advisory – would be consistent with the

post-*Booker* amendment to Federal Rule of Criminal Procedure 35(b), which conformed Rule 35(b)(1) to this Court's decision in *Booker*. Before the amendment, a district court could not reduce a defendant's sentence unless "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Fed. R. Crim. P. 35(b)(1)(B) (2006). The rule now reads: "Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person." Fed. R. Crim. P. 35(b)(1) (2007).

Subsection (b)(1)(B) was deleted "because it treat[ed] the guidelines as mandatory." Fed. R. Crim. P. 35 advisory committee's note (2007). The committee that reviewed Rule 35 concluded that "strong arguments existed for amending" Rule 35 because the requirement that any reduction in sentence be in accordance with the Guidelines "assume[s] that the sentencing guidelines are mandatory – a principle rejected by the Supreme Court in *Booker*." Minutes of the Advisory Committee on Federal Rules of Criminal Procedure, April 4-5, 2005.¹⁹

The Commission requested that the Committee "preserve [] the existing rule's explicit reference to the Sentencing Guidelines and questioned whether the *Booker* remedial opinion applied to post-sentencing

¹⁹ The minutes are available at <http://www.uscourts.gov/rules/Minutes/CR04-2005-min.pdf>.

proceedings.” Minutes of the Advisory Committee on Federal Rules of Criminal Procedure, April 3-4, 2006.²⁰ The Rules Advisory Committee was not persuaded. Although the Commission was unsuccessful in convincing the Rules Advisory Committee that *Booker*’s remedial holding did not apply in Rule 35(b) resentencings, it amended USSG § 1B1.10, in the district court’s words, “specifically to prevent the application of *Booker* to Section 3582(c)(2) proceedings” and to “make it clear that *Booker* variances are not consistent with the Sentencing Commission policy statements.” (J.A. 40, 41.) The Court should reject any effort to limit *Booker*’s application in cases sentenced under the Guidelines and confirm that *Booker*’s remedial holding applies to all sentences imposed under the SRA, including those imposed pursuant to § 3582(c).

²⁰ The minutes are available at <http://www.uscourts.gov/rules/Minutes/CR04-2006-min.pdf>. Notably, the Department of Justice offered no comment to the Committee’s proposal to amend Rule 35(b) to conform with *Booker*. Indeed, after extensive notice and comment procedures, the Commission voiced the only opposition to the Committee’s proposal. See generally Criminal Rules Committee Chart, available at <http://www.uscourts.gov/rules/CR%20Rules%202005.htm>.

II. THE DISTRICT COURT HAD AUTHORITY TO CALCULATE CORRECTLY THE AMENDED GUIDELINES RANGE AT MR. DILLON'S SECTION 3582(c) RESENTENCING.

The district court originally sentenced Mr. Dillon based on a clearly erroneous criminal history category that resulted in an incorrect Guidelines range and a sentence two years longer than it should have been. At the Section 3582(c)(2) resentencing, the district court concluded it could not address its prior determination and, consequently, left the error uncorrected. The court was wrong: precedent and statute make clear that all sentencing proceedings, including resentencings, must begin with the correctly calculated Guidelines range. The district court therefore had both the duty and the authority to correct the error. Its failure to do so requires that Mr. Dillon's sentence be vacated. Regardless of this Court's ruling on the first Question Presented, therefore, this case should be remanded for a resentencing with instructions that the district court begin with a correct Guidelines range calculation.

A. The Sentence Imposed By the District Court Was Based on an Incorrect Guidelines Calculation.

The criminal history calculation improperly included a one-point assessment for a misdemeanor resisting arrest conviction for which Mr. Dillon received a suspended probationary sentence. The error changed Mr. Dillon's Criminal History Category from Category I to Category II, and increased the amended Guidelines range (and consequently his sentence) by nearly two years.

According to the Presentence Report, Mr. Dillon pled guilty in 1990 to misdemeanor resisting arrest, and a California court imposed a suspended sentence of two years probation, with credit for two days time served. (J.A. 74 at ¶47.) The presentence report also indicates that Mr. Dillon "was placed in a 6-month diversion program[, which h]e successfully completed . . . on December 20, 1990." (J.A. 27, 75 at ¶47.) Relying on the Report, the district court found Mr. Dillon's prior California misdemeanor resisting arrest conviction counted toward his criminal history score. Based on that finding, the court assigned the conviction one criminal history point under USSG § 4A1.1(c) and USSG § 4A1.2(c)(1). (J.A. 74 at ¶47.)

This calculation was erroneous: because the only term of imprisonment imposed was two days and the probationary portion of Mr. Dillon's sentence was suspended, the prior conviction could not be counted for purposes of calculating his criminal history score.

Under USSG § 4A1.2(c)(1), sentences for listed misdemeanors, including resisting arrest, are counted only if “(A) the sentence was a *term of probation of at least one year or a term of imprisonment of at least thirty days.*” USSG § 4A1.2(c)(1)(A) (emphasis added). The term of imprisonment here was two days’ time served, fewer than 30 days, so Mr. Dillon’s misdemeanor resisting arrest conviction could only count toward his criminal history score if the sentence included a term of probation of at least one year that was *actually* imposed and not suspended. *United States v. Mejia*, 559 F.3d 1113, 1116 (9th Cir. 2009) (holding “[j]ust as ‘a term of imprisonment’ means ‘a term of actual confinement’ . . . , a term of probation means a term of *actual* probation[,]” and finding plain error where court assigned one criminal history point for a California misdemeanor resisting arrest conviction when the sentence imposed was a suspended sentence of two years probation) (emphasis added). Because the court suspended Mr. Dillon’s two-year sentence of probation, the sentence is not counted under U.S.S.G. § 4A1.2(c)(1)(A). In assessing the one criminal history point for the resisting arrest conviction, however, the district court never addressed whether and how the imposition of the *suspended* sentence affected the calculation of criminal history score in this case.

Nine years after the sentence was imposed, Mr. Dillon obtained an order from a California state court allowing him to withdraw his guilty plea to resisting arrest, dismissing the accusatory pleading, and

releasing him “from all penalties and disabilities resulting from the conviction pursuant to Penal Code Section 1203.4.” (J.A. 28.) Mr. Dillon then filed a *pro se* motion asking the district court to correct his criminal history score and to resentence him. (Docket Entries 141, 145.) The district court denied his request, concluding that “the setting aside of a conviction under California Penal Code Section 1203.4 has no effect on the calculation of his sentence. . . . [and USSG § 4A1.2, comment. (n.10)] mandate[s] that convictions set aside under state law be counted in computing criminal history.” (J.A. 28.)

Even if the district court were correct that convictions set aside under the California statute are counted under USSG § 4A1.2’s commentary, a point that Mr. Dillon does not concede, its analysis of Mr. Dillon’s *pro se* arguments again failed to appreciate the overriding significance of the suspended nature of the sentence. A sentence for resisting arrest – whether or not it was imposed on a conviction that is later set aside or vacated – does not count under USSG § 4A1.2(c)(1) unless it is an actual (not suspended) term of probation of at least one year.

The district court erred at Mr. Dillon’s original sentencing, in its 1999 order, and again at the Section 3582(c) resentencing when it determined the Guidelines range based on an incorrectly calculated

criminal history category. Finding it was not permitted under USSG § 1B1.10 or § 3582(c) to revisit the criminal history issue at resentencing, the district court adopted its prior error. As a result of the error, the court added one criminal history point to Mr. Dillon's criminal history score. Together with the one point properly assessed for a 1989 misdemeanor marijuana possession conviction, the erroneously assessed point increased Mr. Dillon's Criminal History Category from I to II. Using this erroneous criminal history category, the court determined the amended Guidelines range to be 270 to 322 months. The 270-month sentence imposed is nearly two years longer than a sentence at the bottom end of the correctly calculated range (248 to 295 months).

B. The District Court Had the Duty to Correctly Calculate the Amended Guidelines Range.

As this Court repeatedly has explained, “a district court should begin all sentencing proceedings by correctly calculating the Guidelines range.” *Gall v. United States*, 552 U.S. 38, 49-50 (2007) (citing *Rita*, 551 U.S. at 351); see also *Booker*, 543 U.S. at 261-62. The failure to correctly calculate the Guidelines range constitutes reversible error. *Gall*, 552 U.S. at 49-50. The duty to correctly calculate the Guidelines range applies with equal force at a Section 3582(c) resentencing. *United States v. Hall*, 582 F.3d 816, 818-19 (7th Cir. 2009) (remanding to district court to correctly calculate offense level in

Section 3582(c)(2) proceeding where there was ambiguity about the drug quantity established by defendant's guilty plea admissions); *United States v. Jennings*, 2009 WL 2917709, at *2 (11th Cir. 2009) (unpublished) (finding district court committed procedural error at § 3582(c) resentencing by incorrectly calculating the Guidelines range and failing to consider § 3553(a) factors but declining to remand because error benefited defendant).

Section 3742, which provides that a defendant may appeal “an otherwise final sentence if the sentence was imposed as a result of an incorrect application of the sentencing guidelines,” 18 U.S.C. § 3742(a)(2), is one source of this duty. Where, as here, the sentence was imposed as a result of an incorrect application of the Guidelines, Section 3742(f) requires reversal. 18 U.S.C. § 3742(f)(1) (“If the court of appeals determines that – (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate. . . .”).

The court's duty to correctly calculate the Guidelines range also flows from the appellate standard of review for sentences. On review, a sentence imposed under § 3582(c), like all others, is reviewed for reasonableness. *United States v. Lafayette*, 585 F.3d 435, 439 (D.C. Cir. 2009) (reasonableness review applies to sentences imposed under § 3582(c)(2); *United States v. Styer*, 573 F.3d 151 (3d Cir. 2009) (reviewing

§ 3582(c)(2) sentence for reasonableness). *But see United States v. Evans*, 587 F.3d 667 (5th Cir. 2009) (reasonableness standard does not apply to review of Section 3582(c)(2) sentence). When reviewing a sentence for reasonableness, of course, appellate courts “must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range.”²¹ *Gall*, 552 U.S. at 49-50. If procedural error is found, reversal and remand are required. *Id.*

Because Mr. Dillon’s new sentence is reviewed for reasonableness and because procedural correctness is a necessary part of such review, it was error to leave the Guidelines error uncorrected.

²¹ This is true whether the sentence was imposed at an initial sentencing, resentencing on remand, or following a revocation of supervised release. *See, e.g., United States v. Bungar*, 478 F.3d 540, 542 (3d Cir. 2007) (“The dust has settled, post-*Booker*, and it is now well understood that an appellate court reviews a sentence for reasonableness. . . . We see no reason why that [reasonableness] standard should not also apply to a sentence imposed upon a revocation of supervised release, and we so hold.”), *joining United States v. Sweeting*, 437 F.3d 1105, 1106-07 (11th Cir. 2006); *United States v. Tyson*, 413 F.3d 824, 825 (8th Cir. 2005); *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005).

C. The District Court Had the Authority to Correctly Calculate the Amended Guidelines Range.

It is undisputed that the Commission's decision to make the amendment to the crack cocaine Guidelines retroactive triggered the court's authority to resentence in Mr. Dillon's case. Even the Commission acknowledges that this required the court to recalculate his Guidelines range. USSG § 1B1.10(b)(1) & comment. (n.2). And, it should be beyond dispute that every sentencing that requires a calculation of the Guidelines should begin with correct calculation. *See Gall*, 552 U.S. at 49-50 (citing *Rita*, 551 U.S. at 351).

Once the court's authority to resentence is triggered, the new sentence under § 3582(c)(2), like any other sentence, must be imposed in accordance with factors set forth in § 3553(a). 18 U.S.C. § 3582(c)(2) ("the court may reduce the term of imprisonment after considering the factors set forth in § 3553(a)"). Nevertheless, when calculating the amended Guidelines range at Mr. Dillon's Section 3582(c) resentencing, the district court relied on USSG § 1B1.10's instruction to "substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and [] *leave all other guideline application decisions unaffected*," USSG § 1B1.10(b)(1) (emphasis added), and concluded it lacked the authority to consider whether its original

calculation of Mr. Dillon's criminal history category was correct. (J.A. 41-42.)

The above-quoted language from USSG § 1B1.10 does not "prohibit" the district court from reconsidering prior decisions. *See United States v. Adams*, 104 F.3d 1028, 1030 (11th Cir. 1997).²² To the extent the district court was bound by its previous decisions, *see id.*, it was bound only by jurisprudential principles embodied in the law-of-the-case doctrine, which typically prohibits a court from reopening an issue decided in an earlier stage of the same litigation. *Agostini v. Felton*, 521 U.S. 203, 236 (1997); *Christianson v. Colt Industries Operating Corp.*, 486

²² The Eleventh Circuit interpreted the instruction in USSG § 1B1.10 that "all other guideline application decisions remain unaffected" to mean that "all other applicable guidelines remain unaffected by the amendments." The court stated: "the reference is to decisions with respect to what other guidelines are applicable and to their meaning, not to prior factual findings." *United States v. Adams*, 104 F.3d 1028, 1030 (11th Cir. 1997).

The court's interpretation is supported by the history of USSG § 1B1.10. When USSG § 1B1.10 was amended in 1994 to include the above language, the reason for the amendment was "to substantially simplify its operation" and ensure that the amended Guidelines range was determined "using only those amendments expressly designated as retroactive." 59 Fed. Reg. 23,608, 23,609 (May 5, 1994). Prior to 1994, the amended Guidelines range was "determined by applying all amendments to the Guidelines (i.e., as if the defendant was being sentenced under the Guidelines currently in effect)," USSG § 1B1.10, p.s. (1989), which had the effect of making all Guidelines amendments retroactive for defendants resentenced under § 3582(c).

U.S. 800, 817 (1988) (citation omitted) (“law-of-the-case doctrine ‘merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power.’”). A court may, however, revisit an issue when it is “convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.” *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983). See *Dobbs v. Zant*, 506 U.S. 357, 358-59 (1993) (*per curiam*) (summarily reversing denial of habeas corpus relief where lower court erroneously failed to apply manifest injustice exception to “law of the case” doctrine).

At Mr. Dillon’s original sentencing and at his Section 3582(c) resentencing, the district court selected a sentence at the bottom of the Guidelines range. Had the court corrected the error and, as before, sentenced Mr. Dillon to the low end of the Guidelines range, it would have further reduced Mr. Dillon’s sentence by nearly two years. The failure to correct the error constitutes a manifest injustice, especially when considered in light of the fact that Mr. Dillon’s sentence already exceeds by more than six years the maximum sentence authorized by the jury’s verdict. See *United States v. Glover*, 531 U.S. 198, 203 (2001) (“our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance”).

Because the district court based its amended Guidelines range calculation, in part, on a clearly erroneous prior decision, and because the error, left uncorrected, works a manifest injustice, the district

court had the duty and authority to correct the error as an exception to the law-of-the-case doctrine. Nothing contained in USSG § 1B1.10 is to the contrary.

◆

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Third Circuit, vacate the sentence, and remand to the district court for resentencing.

Respectfully submitted,

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STATUTORY ADDENDUM

18 U.S.C. § 3553(a), provides in part:

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 –

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(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, . . .

(5) any pertinent policy statement – (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, . . .

(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.

18 U.S.C. § 3582, provides in part:

(b) **Effect of finality of judgment.** – Notwithstanding the fact that a sentence to imprisonment can subsequently be –

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

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

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

18 U.S.C. 3742(g) provides:

(g) Sentencing upon remand. – A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that –

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date

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of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

28 U.S.C. § 994(a) provides in part:

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System – . . .

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of – . . .

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(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18. . . .

28 U.S.C. § 994(o) provides in part:

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.

28 U.S.C. § 994(u) provides in part:

(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.

USSG § 1B1.10. REDUCTION IN TERM OF IMPRISONMENT AS A RESULT OF AMENDED GUIDELINE RANGE (POLICY STATEMENT) (2008) (after Amendment 712)

(a) *Authority.* –

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

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

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

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

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

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

(1) *In General.* – In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

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

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

(B) *Exception.* – If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection

may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

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

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

Commentary

Application Notes:

1. Application of Subsection (a). –

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

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

(B) Factors for Consideration. –

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

(ii) Public Safety Consideration. – The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct. – The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

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

3. Application of Subsection (b)(2). – *Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.*

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the

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

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

4. Supervised Release. –

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

(B) Modification Relating to Early Termination. – *If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).*

Background: *Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section*

3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”

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

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

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

of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

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(a) Where 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

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listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) 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, and 702.

Commentary

Application Notes:

1. *Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.*

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

3. *Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.*

4. *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.*

5. *If the limitation in subsection (b) 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, 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 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.

Background: *Section 3582(c)(2) of Title 18, United States Code, provides: “[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”*

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

the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b).

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

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

instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases.” S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

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