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

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I. COURTS MUST CONDUCT ALL SENTENCINGS IN ACCORDANCE WITH *BOOKER*'S CONSTITUTIONAL AND REMEDIAL HOLDINGS, AND MAY DO SO AND STILL RESPECT THE SENTENCING COMMISSION'S IMPORTANT FUNCTION.

The government's vision of a Section 3582(c) resentencing strikingly resembles the mandatory Guidelines system dismantled in *Booker*, which prevented courts from honoring the Sixth Amendment's jury trial guarantee and the directive in 18 U.S.C. §3553(a) to "impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing." 18 U.S.C. §§3553(a), (b)(1) (abrogated). It urges this Court to hold that the Guidelines still mandate courts resentencing under 18 U.S.C. §3582(c)(2) to impose a sentence within the Guidelines range – even if the sentence imposed exceeds the maximum penalty authorized under the Sixth Amendment and is longer than needed to serve the statutory goals of sentencing. The government claims its proposed rule can be reconciled with this Court's decision in *Booker*, arguing that resentencings under §3582(c)(2) do not constitute "*de novo* sentencing[s] under §3553(a)," (Br. 13) and are, therefore, uniquely subject to the Commission edicts and insulated from this Court's constitutional commands. Both statute and policy, according to the government, require this anomaly.

The government is wrong. Whether Section 3582(c)(2) proceedings are labeled "sentencings,"

"*de novo* sentencings" "resentencings" or "sentence reduction proceedings," (See, e.g., Br. 6, 10, 12-15, 23, 25-30, 35-38) the government fails to develop a meaningful Sixth Amendment distinction between a Section 3582(c)(2) resentencing and other resentencings – like those following limited remand – at which *Booker* applies.

The government's arguments ignore that the Guidelines, and the judgments of the Sentencing Commission that they embody, are now subordinate to §3353(a)'s "overarching statutory directive." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). Nothing in §3582 or elsewhere in the Sentencing Reform Act (SRA) alters this fact. And, even if there were a clear statutory requirement that district courts impose Guidelines sentences in Section 3582(c)(2) resentencings, it could not survive under the Sixth Amendment. *See Booker*, 543 U.S. 220, 259 (2005) (severing and excising §3553(b)(1), which expressly "requires sentencing courts to impose a sentence with the applicable Guidelines range (in the absence of circumstances that justify a departure)"). Nor can a Guidelines policy statement – even if given the legal force of a statute, as the government urges here – abrogate this Court's interpretation of what the Constitution requires. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

The government envisions a judicial proceeding at which the Guidelines still require the court to impose a sentence that exceeds the statutory maximum penalty allowed for the offense of conviction and is greater than necessary to satisfy the purposes of sentencing. This Court must reject the invitation to carve out a category of sentencing proceedings at which neither the Sixth Amendment nor ordinary jurisprudential principles apply.

A. For *Booker* Purposes, Section 3582(c)(2) Proceedings Function Just Like Any Other Sentencing, And The Government's Distinction Between Plenary And Other Resentencing Is Not Only Fictional, But Flawed.

This Court granted *certiorari* to decide "[w]hether 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?" *Dillon v. United States*, 130 S. Ct. 797 (2009). The government contends that the formulation of this question "misapprehends the nature of Section 3582(c) sentence-reduction proceedings" (Br. 13) because a district court does not impose "a 'new sentence' under 18 U.S.C. §3553(a), as it would at an initial or plenary resentencing." (Br. 26).

This Court's decision in *Booker*, finding the federal sentencing Guidelines unconstitutional and rendering them advisory, 543 U.S. at 259, did not limit

application of its holdings to a particular type of sentencing proceeding, and no such limitation flows from *Booker* or this Court's post-*Booker* jurisprudence. Despite the government's *labels*, Section 3582(c) resentencings *function*, in all ways relevant to the Sixth Amendment, like any other resentencing. Section 3582(c) proceedings invoke the power of an Article III judge, involve the application of the Section 3553(a) factors, and replace a previously-imposed sentence with a new one that results in a final appealable judgment. Like all sentencings, they must therefore comport with the Sixth Amendment.

1. The limits on courts imposing new sentences under Section 3582(c)(2) are analogous to those which apply following limited appellate remands, at which the government concedes *Booker* applies.

The government does not dispute that courts imposing reduced sentences under §3582(c)(2) must consider the Guidelines and the other factors set forth in §3553(a), just as courts at initial sentencings and resentencings following an unlimited remand must do. Nor does it dispute that a sentence imposed under §3582(c)(2), like any other sentence imposed under §3553(a), results in a new judgment that is reviewable under §3742. (Gov't C.A. Br. 2.) It also acknowledges that "[w]hen a court resentences a defendant because of an error in an earlier-imposed sentence, the court must impose a 'new sentence' to replace one

that has been vacated or set aside," (Br. 28 (quoting *United States v. Arrous*, 320 F.3d 355, 359 (2d Cir. 2003)) and that the new sentence must comport with current law (id. (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987))).

The government draws a distinction between so-called "plenary" sentencings or resentencings and Section 3582 proceedings on the fact that, at a Section 3582 resentencing, the court cannot *increase* a defendant's prior sentence based on the Section 3553(a) factors or modify other components of the sentence, such as the term of supervised release, fines, or restitution. (Br. 26.) But, this does not transform the Section 3582(c)(2) proceeding into something different than a resentencing, or the resulting sentence into anything other than a new sentence. To the contrary, as the government correctly acknowledged in *United States v. Cothran*, 106 F.3d 1560 (11th Cir. 1997), a Section 3582(c)(2) resentencing is analogous to a limited remand. *Id*. at 1562 (noting government's argument that a Section 3582(c) resentencing is "merely a form of limited remand").

At resentencing following a limited remand, a district court might also lack the authority to increase a defendant's sentence or to modify any aspect of the original sentence. *See, e.g.*, *United States v. Orlando*, 363 F.3d 596, 602 (6th Cir. 2004) (district court lacked the authority to review defendant's sentence *de novo* where remand was limited); *United States v. Kim*, 114 F.3d 1192 (7th Cir. 1997) (unpublished) (no increase in sentence or change in

restitution permitted). And, by definition, a limited remand does not authorize "plenary resentencing." (See, e.g., Br. 23, 26, 30.) However, as the government agrees, *Booker* would nevertheless apply. (Br. 28-29 (citing 18 U.S.C. §3742(g) and noting its requirement that courts resentencing following remand to "resentence in accordance with §3553 and with such instructions as may have been given by the court of appeals."))[1]

The government suggests that when a sentence is reopened for any reason other than a court finding of error, finality precludes application of current law unless that law is retroactively applicable. (Br. 23-24, 28.) Mr. Dillon agrees that "[o]nce a district court has pronounced sentence and the sentence becomes final, the court may not alter that sentence except as

[1] The government's only explanation for why Section 3582(c)(2)'s reference to §3553(a) does not carry the same significance as Section 3742(g)'s reference to §3553 is that "Section 3582(c)(2) does not direct the court to evaluate, as an original matter, whether the defendant's sentence of imprisonment comports with the 3553(a) factors." (Br. 29.) Section 3582, however, does not limit consideration of the §3553(a) factors to the determination where within the amended Guidelines range to sentence, as the government would have it. (Br. 28-29.) Instead, as discussed, see pp. 21-27, *infra*, the statutory command to courts to consider the Section 3553(a) factors "to the extent that they are applicable," is only properly interpreted as meaning to the extent they apply under the facts and circumstances of the particular case, as the government appears to acknowledge. (See Br. 34-35 (stating that if USSG §1B1.10 were not "binding," courts would consider "the Section 3553(a) factors" to the extent that they are applicable "from case to case."))

Congress allows." (Br. 18 (citations omitted).) Here, however, Congress provided for alteration through §3582(c)(2). *Booker*'s remedy applies at a Section 3582(c)(2) resentencing, not because such proceedings mandate application of "all subsequent legal developments" (Br. 38) but because the Sixth Amendment requires an advisory Guidelines system at all sentencings to ensure that judicial fact finding does not result in a sentence above that authorized by a guilty plea or jury verdict.

The government does not persuasively explain how it can meaningfully distinguish a sentence reopened under §3582(c) from other resentencings for purposes of determining whether the new sentence must comport with the Sixth Amendment and *Booker*'s remedial opinion. (Br. 28.) The distinction does not appear to rest on the concept of finality. Indeed, with its repeated characterizations of Mr. Dillon's sentence as "otherwise final" instead of final (Br. 14, 23, 28, 29 n.7) and its acknowledgement that §3582(c)(2) represents an "exception to the general rule of finality of criminal sentences" (Br. 17, 23) the government appears at times to concede that finality does not provide a legal basis for limiting application of *Booker*.

This concession is a necessary one. Any rule that forbids *Booker*'s application at Section 3582(c)(2) proceedings would strain the concept of finality and stretch non-retroactivity beyond its natural limits. The original sentence cannot, at the same time, be final, reopened, and replaced with a new sentence

and final appealable judgment. No formulation of the non-retroactivity doctrine requires courts to engage in time travel. *See United States v. Jones*, 606 F.Supp.2d 1293, 1284 (D. Colo. 2009) (noting that Tenth Circuit's ruling that *Booker* is inapplicable at Section 3582(c)(2) proceedings "force[s] courts to engage in the legal fiction of going back, in a post-*Booker* world, to a pre-*Booker* time to 'substitute' a new Guideline"). Where, as here, a new sentence is imposed, finality and retroactivity are not at issue.[2]

The government accuses Mr. Dillon of seeking to "convert Section 3582(c)(2) from a limited exception to the general rule of finality of criminal sentences into a broad vehicle for revisiting criminal sentences whenever the Commission elects to make a particular Guidelines amendment retroactively applicable" (Br. 17) and claims that "Congress did not empower the Commission to license courts to engage in wholesale, plenary resentencings" (Br. 23) or to "permit broadly reopening [] sentences." (Br. 36.) Setting aside *Booker* and the Sixth Amendment, this attempt to recast Section 3582(c)(2) proceedings does not accord

[2] The Commission mischaracterizes Mr. Dillon's argument that *Booker* applies at Section 3582(c)(2) resentencings as a challenge to his original sentence. (USSC Br. 19-20.) Mr. Dillon does not seek to rely on *Booker* to challenge his original sentence of 322 months' imprisonment – an attack that would require retroactive application of *Booker*. He argues that his new sentence of 270 months' imprisonment, imposed on June 11, 2008, after *Booker* was decided, is unconstitutional.

with the history of the statute or the Guidelines policy statement involved in this case.

In fact, the Guidelines in effect when the district court first sentenced Mr. Dillon in November 1993 expressly provided for *de novo* resentencings at Section 3582(c)(2) proceedings. *See* USSG §1B1.10 & comment. (n.1) (1993) ("the amended guideline range . . . is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect))." A Section 3582(c)(2) resentencing conducted pursuant to that version of USSG §1B1.10 constituted a complete "do-over of an original proceeding." (USSC Br. 20.) It defies understanding how the government and the Commission could now claim that "broadly reopening" sentences under §3582(c)(2) is not permissible.[3]

Mr. Dillon, however, has not argued that Section 3582(c)(2) proceedings constitute *de novo* resentencings; nor is he seeking to transform §3582(c) into a "mechanism for incorporating all subsequent legal developments into the sentence." (Br. 28.) He seeks only a ruling that would require courts resentencing under §3582(c) to comply with the Sixth Amendment and that would allow them to revisit prior decisions

[3] The prior version of USSG §1B1.10 is the best available evidence of the Commission's understanding of the congressionally permitted breadth of a Section 3582(c)(2) proceeding. The Court should reject its efforts to retreat from its previous understanding. (USSC Br. 18-21.)

when a defendant is able to meet the requirements of a well-recognized exception to the law-of-the-case doctrine. (See Pet. Br. 21-31; 46-49.)[4] Nothing in SRA demands a contrary decision.

2. Because a new sentence is being imposed, the same procedural protections should apply at a Section 3582(c)(2) sentencing as at any other sentencing.

As another basis for classifying §3582(c)(2) resentencings as unique proceedings, the government points to Federal Rule of Criminal Procedure 43. (Br. 25-27 (citing Fed. R. Crim. P. 43(b)(4).) It argues that, because the rule does not require a defendant to be present at Section 3582(c)(2) resentencings, the proceedings are not of the type at which *Booker* should apply. Rule 43, however, offers little support to the government's position. First, it is silent on the proposition for which it is cited – a defendant's *right* to be present at Section 3582(c)(2) proceedings. *See* Fed. R. Crim. P. 43(b)(4) (providing only that a defendant "need not be present"). Second, and more importantly, when Rule 43 was amended in 1998 to obviate the need for a defendant's presence, Section 3582(c)(2) proceedings were vastly different from the

[4] More fundamentally, the government's mischaracterization of Mr. Dillon's position as unduly broad ignores the sweeping implications of its own proposition that courts imposing sentence under §3582(c)(2) can ignore the Constitution.

proceedings contemplated under the current version of USSG §1B1.10.

Under the current version, district courts must consider new facts and arguments and make findings of fact. The Fifth Circuit has recognized the difference, in addressing whether defendants should be provided counsel at 3582 hearings. *United States v. Robinson*, 542 F.3d 1045 (5th Cir. 2008). As that court noted, "[t]he question [] of whether a §3582(c)(2) motion triggers either a statutory or constitutional right to an attorney – in either this court or the district court – is a different question now than it was before the amendments to USSG §1B1.10(b)." *Robinson*, 542 F.3d at 1052 (finding *United States v. Whitebird*, 55 F.3d 1007 (5th Cir. 1995), no longer controlling in light of substantial revisions to USSG §1B1.10). The court explained that "[w]hile previous courts had to determine what sentence they would have given the defendant in light of the facts as they existed at the time of the original sentencing, the new process requires district courts when answering this question to consider, in every case, 'the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment' and allows district courts to consider 'post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment.'" *Id*.

Neither Rule 43, nor the cases cited by the government, resolve the issue of whether, under the current version of USSG §1B1.10, a defendant has a

right to be present and/or a right to counsel at a Section 3582(c)(2) resentencing, as the government would have it.[5] Notably, however, the overwhelming majority of courts to confront resentencing under the current version of USSG §1B1.10 decided to appoint counsel in Section 3582(c)(2) proceedings. Indeed, in most every district, a standing order provided for

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[5] Under this new structure, a defendant must have the right to be present under the Sixth Amendment and the Due Process Clause, which guarantee the right to be present at all stages of the criminal process "where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *see Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934) (concerning defendant's due process right to be present). It seems equally apparent that "where substantial rights of a criminal accused may be affected," counsel is needed to "marshal[ ] the facts, introduce[e] evidence of mitigating circumstances and in general aid[ ] and assist[ ]the defendant to present his case as to sentence. . . ." *Mempha v. Rhay*, 398 U.S. 128, 257 (1967).

In Section 3582(c) proceedings, counsel is necessary to assist in calculating the revised guideline range, to marshal facts and evidence in mitigation of sentence, counter any evidence or argument that public safety or post-sentence conduct should result in a sentence higher than justified under §3553(a). Indeed, these factors were relied upon by the government to challenge, or by courts to deny, Section 3582(c)(2) reductions in numerous cases. *See* http://www.fd.org/odstb_dillon_orders.htm (collecting Section 3582(c)(2) cases involving additional fact finding). Even under the limited range of sentencing options envisioned under USSG §1B1.10, the decisions required by the district court, insofar as they affect the length of imprisonment, have Sixth Amendment significance. *See Glover v. United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of actual jail time has Sixth Amendment significance").

appointment of counsel at all Section 3582(c)(2) resentencings.[6]

B. In Imposing New Sentences Under Section 3582(c)(2), Courts Must Treat The Sentencing Guidelines As Advisory To Avoid Violating *Booker*'s Sixth Amendment And Remedial Holdings.

Under the advisory Guidelines system announced in *Booker*, "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 Government has offered no compelling reason why a single Guidelines policy statement could, in the wake of *Booker* and this Court's post-*Booker* jurisprudence, bind district courts and require them to impose a sentence within a mandatory Guidelines range irrespective of the Sixth Amendment and the statutory goals of sentencing set forth in §3553(a). As one court noted, "it would, to say no more, be ironic, if the relief available to a defendant who received a sentence that is now recognized to be unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guideline

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[6] Orders appointing counsel are collected and available at http://www.fd.org/odstb_Orders_Appointing_Counsel.htm.

under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline." *United States v. Polanco*, 2008 WL 14825 *3 (S.D.N.Y. Jan. 15, 2008).

1. Treating Section 1B1.10 as mandatory in Section 3582(c)(2) sentencings violates the Sixth Amendment because it requires calculation of a new Guidelines range based on judicially determined facts that increase the sentence above the statutory maximum.

The government attempts to escape the fact that the sentence imposed by the district court at Mr. Dillon's resentencing exceeds the sentence authorized by the jury's verdict by arguing that "[a]ny 'constitutional infirmities' that may inhere in the sentence are 'features of earlier sentencing decisions,'" and not of the district court's sentence under §3582(c)(2). (Br. 30 (quoting *United States v. Lafayette*, 585 F.3d 435, 438 (D.C. Cir. 2009).) The government's reliance on *Lafayette* is misplaced. In *Lafayette*, the district court denied the request for a sentence reduction, "so [the] sentence [was] not based on any new [Guidelines] calculation at all." *Lafayette*, 585 F.3d at 438-39. The court therefore found that the defendant was "seeking to challenge a Guidelines determination made years ago." *Id*. at 439. Whether the constitutional infirmities of the original sentence inure when a court denies a Section 3582(c)(2) motion – the issue before

the court in *Lafayette* – differs from the question presented here, where the court granted a reduction in Mr. Dillon's sentence. As the court in *Lafayette* recognized, reducing a sentence under §3582(c)(2) "requires a new Guidelines calculation, and it is that calculation, not the calculation at the original sentence, that raises a *Booker* problem." *Id*. at 438.

The law does not support the government's claim that USSG §1B1.10 "simply instructs district courts how to calculate the scope of the benefit a retroactive Guidelines amendment offers a particular defendant," and does not require calculation of a new, mandatory Guidelines range. (Br. 21); *see* USSG §1B1.10(b)(1) & comment. (n.2). Not only does the very case the government cites recognize that resentencing under §3582(c)(2) "requires a new Guidelines calculation," *Lafayette*, 585 F.3d at 438, but other courts to confront the issue directly have reached the same conclusion. *See, e.g.*, *United States v. Melvin*, 556 F.3d 1190, 1192 (11th Cir. 2009); *United States v. Dunphy*, 551 F.3d 247, 251 (4th Cir. 2009).

The Guidelines calculation method selected and outlined in USSG §1B1.10(b)(1) does not present the constitutional problem here. (Br. 31 (quoting §994(u).) The critical question under *Booker* and the Sixth Amendment is whether courts treat the Commission's requirement that courts sentence within the amended Guidelines range, *see* §1B1.10(b)(2)(A), as mandatory or as advisory. Where, as here, the court calculated a new Guidelines range that was based on judicially determined facts that increased Mr. Dillon's sentence

above the maximum sentence allowed under the jury's verdict, treating that range as mandatory violated the Sixth Amendment under *Booker*.

2. Section 3582(c)(2) is subject to *Booker*'s remedial opinion because it cannot function independently of the Guidelines and Section 3553(a).

That *Booker* did not excise or mention §3582(c)(2) cannot support the government's argument. As Mr. Dillon has argued, the statute was not before the Court in *Booker*. (Pet. Br. 31-38.) And, the Court's statement in *Booker* that "the remainder of the Act "functions independently," *Booker*, 543 U.S. at 259 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)), did not, as the government suggests (Br. 32) render all remaining provisions of the SRA constitutional. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991) (noting the hermeneutical risks inherent in textual silence because "of the dubious reliability of inferring specific intent from silence"). Indeed, as the government has recognized, other statutory provisions not mentioned or excised by *Booker* nevertheless were affected by its holdings. *See, e.g.*, *United States v. Hecht*, 470 F.3d 177, 182 (4th Cir. 2006) (government conceded §3553(b)(2) violates the rationale of *Booker* and "requires the same remedy-excising and severing").

In any event, the principal statutory provisions at issue here – Sections 994(o), 994(u) and 3582(c)(2) – do not function independently from the severed provisions. As the government recognizes, Section 3582(c)(2) proceedings involve the Commission's "'revised' judgment about the appropriate Guidelines range" (Br. 23 (quoting 28 U.S.C. §994(o)).) The Commission's revised judgments are not, in any meaningful way, independent from its original judgments about Guidelines offense levels and sentencing ranges. Nevertheless, the government proposes a system in which the Commission's Guidelines amendments, promulgated and made retroactive pursuant to §§994(o) and (u), would bind courts even though the Guidelines it promulgates in the first instance under §§994(a) and (b)(1) now serve only to advise them. This approach extends beyond simple "asymmetry," (Br. 33) and is as "laden with 'administrative complexities' and unlikely to promote [Congress'] basic objective of uniformity," (Br. 33 (quoting *Booker*, 543 U.S. at 266)) as the regime proposed by the government and rejected in *Booker*. *See Booker*, 543 U.S. at 266.

3. The government's policy arguments also must fail, both as a matter of common sense, and because policy arguments can never trump the Constitution.

The government advances several policy arguments why *Booker* should not apply in Section 3582

proceedings. Even if policy concerns could trump the Constitution, the government's arguments nevertheless fail.

The government's primary contention is that requiring district courts to comply with *Booker* in Section 3582 resentencings would create an undue burden on, and administrative difficulties for, the courts.[7] (Br. 36-37) However, as the numerous contested hearings and appeals in every district and circuit evidence, the amendments to USSG §1B1.10

[7] In a related argument, the government and its *amicus* suggest that application of *Booker* would interfere with the Commission's ability to make an informed decision about whether amendments should be made retroactive, and that USSG §1B1.10(b)(2)(A) was necessary to preserve that ability. (Br. 36-37; USSC Br. 18-21.) They fail to explain, however, how the possibility of earlier release dates for some prisoners could add to the courts' burdens, and fail to acknowledge the additional burdens §1B1.10(b)(2)(A) itself created. And, although the Commission implies that USSG §1B1.10(b)(2)(A) helped it accurately predict the number of eligible prisoners (USSC Br. 19, 21) that number is unaffected by USSG §1B1.10's limitations on the extent to which their terms of imprisonment may ultimately be reduced. USSG §1B1.10, comment. (n.1); §3582(c)(2). And, to the extent it is relevant to a potential burden on probation or law enforcement officers, thousands of releases have taken place as a result of the retroactive crack amendment without the need for additional resources. *See* Statement of Hon. Julia S. Gibbons, Chair, Committee on the Budget of the Judicial Conference of the United States, Before the Subcommittee on Financial Services and General Government of the Committee on Appropriations of the U.S. House of Representatives at 9 (Mar. 19, 2009), available at http://www.uscourts.gov/Press_Releases/2009/Gibbons2010HouseFinal.pdf.

requiring new fact finding created, rather than relieved, administrative burdens and legal complexities. And, although the government claims that the effects on the criminal justice system from the application of *Booker* at Section 3582(c)(2) resentencings would be "significant," (Br. 36) it does not specifically identify any additional burdens that would result from such a rule. (See Br. 36-37.) It points only to the more than 23,000 motions filed as if the number, itself, establishes an inevitable burden. (Br. 36). In this regard, its arguments against application of *Booker* mirror those it offered in an effort to defeat retroactive application of the crack amendment in the first instance. Testimony of Gretchen C. F. Shappert, United States Attorney for the Western District of North Carolina, Before the United States Sentencing Commission at 100-101, 106, 110-13 (Nov. 13, 2007).[8]

The government also contends that uniformity will be sacrificed if this Court accepts Mr. Dillon's argument. But, maintaining a mandatory Guidelines sentencing system for Section 3582(c)(2) proceedings does not serve Congress's objective of uniformity; rather, it invites disparity among defendants whose sentences are based on the Commission's revised judgments. The government's focus on other defendants sentenced under the mandatory Guidelines regime,

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[8] Available at http://www.ussc.gov/hearings/11_13_07/Transcript 111307.pdf.

who will not have the opportunity for application of *Booker*, is misplaced. Unlike Mr. Dillon's, their sentences are final, and no statutory authority authorizes a court to reopen those previously imposed sentences. The only apt comparison here is to other defendants whose sentences were imposed after *Booker*, as the "[t]he fact is, that when [Mr. Dillon] 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*). When compared with those defendants, uniformity demands that Section 3582(c)(2) resentencings be conducted under *Booker*'s advisory Guidelines regime.

In sum, even if concerns about administrative burdens could prevent courts from complying with the Constitution, which they cannot, any additional work required "to address a fundamental unfairness and to provide the relief . . . to those who are deserving," is "sufficient[ly] justif[ied]." Testimony of the Honorable Reggie B. Walton, United States District Judge for the District of Columbia, Before the United States Sentencing Commission at 30 (Nov. 13, 2007).[9]

[9] Available at http://www.ussc.gov/hearings/11_13_07/Transcript 111307.pdf.

C. Petitioner's Interpretation Of The Relevant Statutes Honors Both The Gatekeeping Role Of The Commission And The Discretion Of The Courts As Set Forth In The Text.

Mr. Dillon and his *amici* have provided an interpretation of the four statutes at issue here – 18 U.S.C. §3582(c)(2), and 28 U.S.C. §§994(a)(2)(C), 994(o) and 994(u) – that is grounded in the text, that preserves the Commission's role in determining whether and to what extent its guideline amendments will have retroactive effect, and that preserves the courts' discretion in deciding whether and to what extent to reduce the term of imprisonment in light of all of the factors set forth in §3553(a) and the Commission's necessarily non-binding policy statements. (Pet. Br. 35 n.18; Fed. Defenders Br. 10-39.)

Although the government appears to concede at times that §994(u) authorizes the Commission only to decide whether and to what extent its amendments will be given retroactive effect (Br. 19, 22) it also contends that §994(u) authorizes the Commission to "direct" the courts to "treat the Guidelines as 'binding' for the purpose of calculating the scope of the benefit" that would otherwise result from consideration of all of the factors set forth in §3553(a). (Br. 34-35.) The premise of this contention, that congressional directives to the Commission are binding on sentencing courts, is incorrect, as the government has argued

elsewhere.[10] Sentencing courts must follow the Commission's instructions only when a statute that is *directed to the courts* requires.[11] Congress directed §994(u) to the Commission and §3582(c) to the courts. Had it intended for §994(u) to operate as a limit on the courts' consideration of the factors set forth in §3553(a) in Section 3582(c)(2) proceedings, it could easily have done so by stating, for example, that "a court may reduce the term of imprisonment after considering the factors set forth in section 3553(a) to the extent that they are applicable, *but only as specified by the Sentencing Commission pursuant to 28 U.S.C. §994(u)*."

Instead, Congress chose the phrase, "if such a reduction is consistent with applicable policy statements

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[10] *See* Brief of the United States at 9, *Vazquez v. United States*, No. 09-5370 (U.S. Nov. 16, 2009); *Vazquez v. United States*, No. 09-5370, 78 U.S.L.W. 3416 (Jan. 19, 2010) (granting *certiorari*, vacating the judgment, and remanding for further consideration in light of the government's position).

[11] *See, e.g.*, *Neal v. United States*, 516 U.S. 284, 296 (1996) ("§841(b)(1) directs a sentencing court to take into account the actual weight . . . even though the Sentencing Guidelines require a different methodology"); *Kimbrough*, 552 U.S. at 102-03 (rejecting argument that sentencing courts must apply 100-to-1 ratio, because "[t]he statute says nothing about the appropriate sentences within these [minimum and maximum] brackets, and we decline to read any implicit directive into that congressional silence."); *United States v. Michael*, 576 F.3d 323, 328 (6th Cir. 2009) ("By its terms, [§994(h)] tells the Sentencing Commission, not the courts, what to do."); *United States v. Sanchez*, 517 F.3d 651, 663 (2d Cir. 2008) ("Section 994(h) . . . by its terms, is a direction to the Sentencing Commission, not to the courts.").

issued by the Sentencing Commission." §3582(c)(2). The government and its *amicus* acknowledge that these "applicable policy statements" were authorized by §994(a)(2)(C), which directs the Commission to promulgate "policy statements regarding" the "sentence modification provisions set forth in [§]3582(c)." (Br. 3, 20; USSC Br. 13.) And, the government's *amicus* acknowledges, as it must, (see Fed. Defenders Br. 22-39) that §994(a)(2)(C) does not authorize binding policy statements. (USSC Br. 13.)[12] Nevertheless, they argue that a §994(a)(2)(C) policy statement – USSG §1B1.10 – is binding on courts in resentencing under §3582(c)(2). The government and its *amicus* do not explain why Congress chose the phrase "consistent with applicable policy statements" issued pursuant to 28 U.S.C. §994(a)(2)(C), if it meant only as specified by the Commission pursuant to §994(u).

Even though §3582(c)(2), the only relevant statute directed to the courts, does not mention §994(u), the Commission's duty and authority under §994(u) are not "pointless." (USSC Br. 12.) Courts deciding whether they have the power to act on a Section 3582(c)(2) motion must look to the Commission's specifications under §994(u) to determine "whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton v. United States*,

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[12] *See also* USSC Br. 14 (arguing that because §1B1.10 "is a policy statement, rather than a Guideline, notice-and-comment procedures were not required").

500 U.S. 344, 348 (1991).[13] The Commission therefore exercises an important gatekeeping role, ensuring that courts do not give retroactive effect to every amendment lowering offense Guidelines ranges. (See Fed. Defenders Br. 14-22.) In addition, the Commission provides the amended advisory Guidelines range, which is "the starting point and initial benchmark" at all sentencing proceedings. *Gall v. United States*, 552 U.S. 38, 49 (2007). These roles – gatekeeping and advising the courts regarding Guidelines ranges – fall directly into the Commission's areas of expertise. *See* 18 U.S.C. §994(o), (u); *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007); *Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 350 (2007).

The government and the Commission claim that the 2008 amendments to USSG §1B1.10, were necessary to prevent application of *Booker* and to carry out the Commission's duty under §994(u) to control "by what amount" a sentence should be reduced. (Br. 35.) However, the Commission fully complied with its responsibilities under §994(u) when it reduced base offense levels for crack cocaine offenses by two, and made the two-level reduction retroactive. *See* §§994(o), (u). Deciding when the Sixth Amendment should apply and whether courts may give full effect to all of

[13] The Commission is directed to "establish a sentencing range [for] each category of offense involving each category of defendant." §994(b)(1). Under §3582(c)(2), a court has the power to act on a motion when a "sentencing range . . . has subsequently been lowered . . . pursuant to 28 U.S.C. §994(o)."

the factors set forth in §3553(a), *see* USSG §1B1.10, exceeds the Commission's authority under §994(u).

D. Even Before *Booker*, The "Consistent With" Phrase In Section 3582(c)(2) Did Not Transform A Non-Binding Policy Statement Into A Binding Rule.

The government and its *amicus* contend that the "consistent with" phrase in the last clause of §3582(c)(2) transforms the "applicable policy statements" referenced there into binding rules. (Br. 20, 21; USSC Br. 13.) The government's *amicus* argues that "[t]he binding nature of §1B1.10 . . . comes not from §994(a)(2), but from §3582(c)(2) itself." (USSC Br. 13.) According to the Commission, "[Section] 3582(c)(2) is unique in expressly requiring a court to act 'consistent with' those policy statements." (Id.) The instruction to courts to act consistently with the Commission's policy statements is not, however, unique to §3582(c)(2). What is different here is the claim that that this phrase transforms a non-binding policy statement into a binding rule. (See Fed. Defenders Br. 33-35.)

Indeed, three of the other statutes listed in §994(a)(2)(A)-(F) expressly call for action in consideration of §3553(a) and "consistent with" the Commission's "policy statements." *See* 18 U.S.C. §§3582(c)(1), 3582(c)(2), 3583(d), 3622; *see* 28 U.S.C. §§994(a)(2)(B), (C), (F). The Commission has issued policy statements for two of them – conditions of supervised release, §3583(d), and reduction in term of imprisonment based on age or other extraordinary and

compelling reasons, §3582(c)(1)(A). The Commission's policy statements regarding conditions of supervised release do not purport to bind or otherwise limit the extent to which the §3553(a) factors may be considered, *see* USSG §§5D1.3(c), (d), (e), p.s., and courts routinely stray from the express terms of these policy statements when related to the factors and purposes set forth in §3553(a).[14]

Courts were always able – indeed, were always mandated – when acting under §3582(c)(2), to consider the §3553(a) factors to the extent that they are applicable in the individual case. To the extent courts imported §3553(b) into §3582(c)(2), there was no textual basis for, but only a habit of, doing so.[15] If, as the government argues (Br. 34-35) *Booker* does remove

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[14] *See, e.g.*, *United States v. Sicher*, 239 F.3d 289 (3d Cir. 2000) ("The fact that a special condition of supervised release is not explicitly authorized by the policy statements of the United States Sentencing Commission does not cause the condition to be inconsistent with the policy statements."); *id.* at 293 ("Courts have regularly approved of special conditions not explicitly contained on this list, so long as those conditions met the general requirements of §3553.") (collecting cases); *see also, e.g.*, *United States v. Dupes*, 513 F.3d 338, 342 (2d Cir. 2008) (same); *United States v. McKissic*, 428 F.3d 719, 723 (7th Cir. 2005) (upholding total ban on alcohol as reasonably related to the §3553(a) factors, though policy statement recommends only "no excessive use").

[15] After *Booker*, several courts appear to have recognized that §3582(c)(2) does not mention §3553(b). *See, e.g.*, *United States v. Blakely*, 2009 WL 174265 **4-5, 11-13 (N.D. Tex. Jan. 23, 2009); *United States v. Jones*, 2008 WL 5101139 *1 (D. Colo. Nov. 25, 2008); *United States v. Ragland*, 568 F.Supp.2d 19, 23, 25, 27 (D.D.C. 2008).

the assumed importation of §3553(b) into Section 3582(c)(2), the Commission cannot now replace it with a "policy statement" intended to operate as its binding equivalent. *See* Part I.B, *supra*.

II. THE COURT SHOULD REMAND MR. DILLON'S GUIDELINES CHALLENGE TO THE DISTRICT COURT WITH INSTRUCTIONS THAT THE COURT HAS JURISDICTION TO CORRECT ANY IDENTIFIED ERROR.

The government does not dispute that district courts should begin all sentencing proceedings by correctly calculating the Guidelines range, and that failing to do so constitutes reversible error. (Br. 38-44.) It claims, however, that, because §3582(c)(2) and USSG §1B1.10 do not authorize district courts to "revisit sentencing decisions unrelated to the Guidelines amendment on which sentence reduction proceedings are based," nothing allowed the court to comply with its duty to begin with a correct Guidelines calculation. (Br. 41.) It also claims that Mr. Dillon failed to object and, therefore, cannot attack the court's criminal history calculation, and that, in any event, he cannot show that the district court "clearly err[ed]." (Br. 40.) The government's arguments, all but one of which are newly-presented, are without merit.[16]

[16] Insofar as the government reasserts that Section 3582(c)(2) proceedings are not resentencings at which a new

(Continued on following page)

A. Mr. Dillon Preserved A Challenge To The District Court's Criminal History Calculation By Asking The District Court To Revisit Its Prior Criminal History Determination.

The government explicitly acknowledged that Mr. Dillon's claim "was preserved" in its brief before the Third Circuit (Gov't C.A. Br. 3) thereby waiving any argument here that the claim was not properly preserved for appeal. *United States v. Olano*, 507 U.S. 725, 733-34 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' "). Accordingly, the government cannot now complain that Mr. Dillon forfeited the issue. *Olano*, 507 U.S. at 731.

Even if the government could assert forfeiture to defeat Mr. Dillon's challenge to his criminal history calculation, its argument would fail because Mr. Dillon's *pro se* Section 3582(c)(2) pleadings specifically asked the district court to reconsider his criminal history category as enhanced by the California misdemeanor resisting arrest conviction and requested a new presentence report. (Docket Entry 217.) Liberally interpreted, as they must be, Mr. Dillon's *pro se* pleadings sufficiently preserved a challenge to the criminal history calculation. *Erickson v. Pardus*, 551

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sentence is imposed (Br. 41-42) Mr. Dillon disagrees for the reasons set forth, *supra*, in Point I.A.

U.S. 89, 94 (2007) (*per curiam*) (noting that *pro se* filing is "to be liberally construed"). Moreover, the district court addressed the issue and found it could not revisit its prior determination.[17] (J.A. 42.)

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[17] The government claims that Mr. Dillon's failure to object to the district court's original criminal history calculation resulted in forfeiture. (Br. 39-40.) His complaints both here and in the Third Circuit, however, relate to the new sentence imposed under §3582(c)(2), and the fact that he did not object to the court's original calculation does not affect preservation for this appeal. In the context of the Section 3582(c)(2) proceedings, however, the district court's initial criminal history determination nevertheless constitutes the law of the case, which prevents reconsideration of the issue unless, as here, an exception exists. (See Pet. Br. 47-48.)

Notably, the government also has asked the district court to revisit an original Guidelines calculation during a Section 3582(c)(2) resentencing. *See United States v. Hughes*, Criminal No. 97-670-1 (N.D. Ill. Dec. 30, 2009) (Government's Response to Motion for Reduction of Sentence and Motion for Relief Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure; order denying motion for sentence reduction). There, the district court found the defendant responsible for "at least 1.5 kilograms" but less than 4.5 kilograms of crack at the initial sentencing. *Id*.; *see* USSG §2D1.1 (Drug Quantity Table). At the Section 3582(c)(2) resentencing, the court, at the government's urging, reconsidered its drug quantity determination and found that the defendant trafficked in no less that 11 kilograms of crack. *Id*. Based on its new finding, the court found Hughes ineligible for relief under §3582(c)(2), as his offense involved 4.5 kilograms or more of crack. *Id*.; USSG §2D1.1 comment. (n.10 (D)(ii)(I)).

B. The Government Waived Any Argument That The District Court's Criminal History Determination Was Not Erroneous.

In the district court, the Government chose not to address Mr. Dillon's request for reconsideration of the court's prior criminal history determination. (J.A. 206, 212, 217.) And, in the Third Circuit, it did not dispute whether the criminal history point was warranted under USSG §4A1.2(c)(1)(A). (Gov't C.A. Br. 43-45.) Its newly asserted argument – that the district correctly assessed a criminal history point under USSG §4A1.2(c)(1)(A) – makes its first appearance in the Brief for the United States. (Br. 38.)

Because the government's argument that the district court did not err in calculating Mr. Dillon's criminal history score was presented for the first time in its merits brief, it is waived. *See, generally*, *United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir. 2009) ("[A]s with any other argument, the government can forfeit a waiver argument by failing to raise it in a timely fashion.").

Even if the government's omissions below did not constitute waiver, the Court should exercise its discretion and find the government's argument waived under this Court's Rule 15.2. Supreme Court Rule 15.2 ("[a]ny objection to consideration of a question presented based on what occurred in the proceedings below . . . may be deemed waived unless called to the Court's attention in the brief in opposition."); *see, e.g.*,

Baldwin v. Reese, 541 U.S. 27, 34 (2004) (deeming argument not raised in Court of Appeals or in brief in opposition waived under Rule 15.2).

C. Because The Courts Below Did Not Address The Merits Of Mr. Dillon's Claim, This Court Should Remand For The District Court To Consider The Issue In The First Instance.

Neither the district court nor the Third Circuit reached the merits of Mr. Dillon's attack on his criminal history calculation, as each court found the district court lacked the authority under §3582(c)(2) and USSG §1B1.10 to reexamine its prior determination. (J.A. 42, 54-55.) Therefore, the only question this Court must answer is whether, *assuming* there was error in the Guidelines calculation, the district court was required to impose a sentence based on an erroneously calculated Guidelines range. *See Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136-37 (2007) (finding reversal and remand for further proceedings proper and declining to consider reasons raised for the first time in Respondent's merits brief). Insofar as this Court "ordinarily [does] not decide in the first instance issues not decided below," *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004), it should defer ruling on the merits of the Guidelines calculation error issue and remand with instructions that the district court be given an opportunity to decide the issue in the first instance.

In sum, this Court should find the government forfeited its waiver argument and that it waived its newly asserted claim that the district court correctly calculated Mr. Dillon's criminal history score. The government has provided no reason why the Court should overlook its many failures to present the arguments it raises for the first time here.

If the Court agrees that the district court had the duty and authority to correct an erroneous criminal history calculation during a Section 3582(c)(2) re-sentencing, it should vacate the sentence and remand to give the district court an opportunity to make a determination in the first instance.[18]

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[18] The government asserts for the first time that Mr. Dillon "identifies nothing in California law that would permit a court to impose probation and then suspend it[,]"calling such a disposition "unorthodox." (Br. 43, 44.) In support, the government attempts to distinguish *United States v. Mejia*, 559 F.3d 1113 (9th Cir. 2009), by erroneously asserting that the defendant's California probation in that case "had not been suspended, but rather was terminated three days after it was imposed." (Br. 43.) The decision in *Mejia*, however, rested as much on the suspended nature of the sentence as on its shortened term: "[S]uspension of Mejia's [California] probationary sentence combined with his actual service of only a three-day probationary term was less than the one year required by §4A1.2(c)(1)(A) for inclusion in this criminal history." *Id*., 559 F.3d at 1116. Thus, *Mejia* supports, rather than undercuts, Mr. Dillon's right to have the matter assessed by the district court on remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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