No. 09-6338

In the Supreme Court of the United States

PERCY DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Under 28 U.S.C. 994(u), if the Sentencing Commission reduces the recommended term of imprisonment for a category of defendants, "it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." Under 18 U.S.C. 3582(c)(2), a district court has discretion to reduce a defendant's term of imprisonment based on an amendment to the Sentencing Guidelines that the Sentencing Commission has made retroactive, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The applicable policy statement, Sentencing Guidelines § 1B1.10, sets forth the Guidelines amendments that permit sentence reduction and further provides that the reduction in any individual case should not exceed the extent of the reduction called for by the relevant change to the Guidelines. The questions presented are:

1. Whether, in a sentence-reduction proceeding under 18 U.S.C. 3582(c)(2), the district court has authority to reduce a sentence of imprisonment in a manner inconsistent with the Commission's policy statement by relying on *United States* v. *Booker*, 543 U.S. 220 (2005).

2. Whether petitioner's sentence rested on an incorrectly calculated Sentencing Guidelines range, and if so, whether the district court in petitioner's Section 3582(c)(2) sentence-reduction proceeding had the authority to revisit Guidelines determinations that were unaffected by the retroactive change in the lowered Guidelines range.

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OPINION BELOW

The opinion of the court of appeals (J.A. 47-55) is reported at 572 F.3d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2009. The petition for a writ of certiorari was filed on September 1, 2009, and was granted on December 7, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted in 1993 of conspiracy to distribute and possess with the intent to distribute more than 500 grams of cocaine and more than 50 grams of cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 846; use of a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1); and possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to terms of imprisonment of 262 months on the narcotics counts and 60 consecutive months on the firearms count. The court of appeals affirmed.

In 2007, the United States Sentencing Commission amended the Sentencing Guidelines to lower the base offense level for drug-trafficking offenses involving crack cocaine. The Commission subsequently made the amendments retroactively applicable to defendants serving sentences of imprisonment and specified "in what circumstances and by what amount" sentences could be reduced. 28 U.S.C. 994(u). Petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(2) based on those amendments. Consistent with the Commission's applicable policy statement, the district court reduced petitioner's term of imprisonment on the narcotics convictions to 210 months based on the Commission's crack cocaine amendments, but rejected petitioner's request for a further sentence reduc-

tion pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), as beyond its authority under Section 3582(c)(2). J.A. 32-43. The court of appeals affirmed. J.A. 47-55.

A. Background

1. In the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.*, 28 U.S.C. 991 *et seq.*, Congress created the United States Sentencing Commission and charged it with promulgating sentencing guidelines and policy statements "regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U.S.C. 994(a)(1) and (2). Congress also charged the Commission with periodically reviewing and revising the Sentencing Guidelines. 28 U.S.C. 994(*o*). When the Commission's revisions result in a reduced sentencing range, Congress granted the Commission the authority to specify "in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. 994(u). The SRA thus gives the Commission "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (emphasis omitted). The Commission has implemented those responsibilities in Sentencing Guidelines § 1B1.10, a policy statement governing reduction of terms of imprisonment based on amended Guidelines ranges. See *Braxton*, 500 U.S. at 348; see also 28 U.S.C. 994(a)(2)(C) (authorizing policy statements "regarding * * * the sentence modification provisions set forth in section[] 3582(c)").

Although the SRA generally forbids a court from "modify[ing] a term of imprisonment once it has been imposed," 18 U.S.C. 3582(c), it provides an exception to the rule "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*)," 18 U.S.C. 3582(c)(2). In such a case, a court may reduce the defendant's term of imprisonment after considering the statutory sentencing factors set out in 18 U.S.C. 3553(a), but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

2. This case concerns the Sentencing Commission's 2007 amendments reducing the Guidelines sentencing ranges for offenses involving crack cocaine.

a. The Sentencing Guidelines employ a drug quantity table that sets the base offense levels for drug offenses according to the drug type and weight. See Guidelines § 2D1.1. When the Sentencing Commission first promulgated the Guidelines in 1987, it set the base offense levels for each type of drug in relation to the mandatory minimum sentences for offenses involving the same type of drug set out in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986 Act). See United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 126 (1995), http://www.ussc.gov/crack/exec.htm (1995 Commission Report). Based on Congress's concerns about the heightened dangers of offenses involving crack cocaine, the 1986 Act had "adopted a '100-to-1 ratio' that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough* v. *United States*, 552 U.S. 85, 96 (2007). By setting base offense levels under the Guidelines to correlate with the basis of mandatory minimum sentences set out in the 1986 Act, the Guidelines effectively adopted the same 100-to-1 ratio. *Id.* at 96-97.

b. The Commission later reexamined the crack/powder sentencing disparity. See *Kimbrough*, 552 U.S. at 97-99.

After Congress rejected its initial effort in 1995 to amend the Guidelines to reduce the 100-to-1 ratio, the Commission several times issued reports urging Congress to take action to address the disparity. See *id.* at 99-100. In May 2007, the Commission issued another such report. United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, http://www.ussc.gov/rcongress/cocaine2007.pdf. At the same time, the Commission amended the Guidelines to ameliorate the crack/powder disparity without awaiting congressional action. See *id.* at 9; 72 Fed. Reg. 28,571-28,572 (2007); see also *Kimbrough*, 552 U.S. at 100. The 2007 crack cocaine amendments reduce the base offense level associated with each quantity of crack cocaine by two levels. See Guidelines App. C, Amend. 706 (Supp. 2008), amended by Guidelines App. C, Amends. 711 and 715 (Supp. 2008). In promulgating the crack cocaine amendments, the Commission described them "only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio," noting that "[a]ny comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress." 72 Fed. Reg. at 28,573.

c. The Sentencing Commission thereafter considered whether to apply the crack cocaine amendments retroactively to defendants serving sentences of imprisonment. See 72 Fed. Reg. 41,794 (2007) (request for public comment). In December 2007, after receiving comments and holding a public hearing, the Commission voted to amend Guidelines § 1B1.10 to make the crack cocaine amendment retroactive. 73 Fed. Reg. 217 (2008); see Guidelines App. C, Amend. 713 (Supp. 2008).

At the same time, the Sentencing Commission amended Guidelines § 1B1.10 to "clarify when, and to what extent, a reduction in the defendant's term of imprisonment is con-

sistent with the policy statement and is therefore authorized under 18 U.S.C. 3582(c)(2)." 73 Fed. Reg. at 219; see Guidelines App. C, Amend. 712 (Supp. 2008). As amended, Guidelines § 1B1.10 states that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." Guidelines § 1B1.10(a)(3). It provides that a court evaluating a motion for sentence reduction under Section 3582(c)(2) should determine "whether, and to what extent, a reduction" is warranted by substituting the amended Guideline for the Guideline in effect at the time the defendant was sentenced, leaving "all other guideline application decisions unaffected." Guidelines § 1B1.10(b)(1). The policy statement further provides that the court may not reduce a defendant's within-Guidelines sentence "to a term that is less than the minimum of the amended guideline range." Guidelines § 1B1.10(b)(2)(A); cf. Guidelines § 1B1.10(b)(2)(B) (providing that a below-Guidelines sentence may warrant a "reduction comparably less than the amended guideline range").

d. Since the Commission voted to make the crack cocaine amendments retroactive, more than 23,000 defendants have sought sentence reductions based on the amendments, and more than 15,000 such reductions have been granted. See United States Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report* Tbl. 1 (2010), http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_January.pdf (2010 Data Report). The sentences of successful defendants have been decreased by an average of 25 months. *Id.* Tbl. 8.

B. Facts And Proceedings Below

1. In August 1992, petitioner entered a conspiracy to distribute crack and powder cocaine. The cocaine was either flown or mailed from California, often in quantities of one kilogram or more, for distribution in Pittsburgh. A portion of the proceeds was then mailed to the California suppliers. Petitioner's role in the conspiracy was to assist in directing the transportation of the cocaine into Pittsburgh, cooking it into crack, and distributing it. Gov't C.A Br. 7; Presentence Report ¶¶ 9-20 (PSR).[1]

In March 1993, postal inspectors intercepted a suspicious package bound for Pennsylvania, determined through the use of a drug detecting dog that the package contained narcotics, and arranged a controlled delivery to an address in Monroeville, Pennsylvania. Petitioner and two of his co-conspirators arrived at that address in a rented white Dodge Dynasty, retrieved the package, and drove off toward the apartment petitioner had rented for the purpose of cooking cocaine into crack. The police lost the Dodge Dynasty during a high-speed chase that caused two motorists to crash into each other. Three days later, the authorities apprehended petitioner and his two co-conspirators in McKeesport, Pennsylvania. Gov't C.A. Br. 7-9; PSR ¶¶ 21-27.

2. A grand jury in the Western District of Pennsylvania returned a superseding indictment charging petitioner with conspiracy to distribute and to possess with the intent to distribute in excess of 500 grams of cocaine and more than 50 grams of cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 846; possession of more than 500 grams of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1);

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[1] The PSR is reprinted in Volume II of the Joint Appendix, which has been filed in this Court under seal.

and using a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1). Gov't C.A. Br. 9. Following a jury trial, petitioner was convicted of all of the charges against him. J.A. 49. Petitioner's convictions exposed him to a statutory sentencing range of ten years to life on the crack-cocaine conspiracy count, see 21 U.S.C. 841(b)(1)(A)(iii); five years on the cocaine possession count, see 21 U.S.C. 841(b)(1)(B)(ii); and a mandatory consecutive sentence of five years on the firearm count, see 18 U.S.C. 924(c)(1)(A)(I).

3. At petitioner's sentencing in November 1993, the district court found that petitioner was responsible for 1.5 kilograms of cocaine base and 1600 grams of cocaine powder, which resulted in a base offense level of 38 under Sentencing Guidelines § 2D1.1. C.A. App. 83 & n.2, 89 (tentative findings); J.A. 10 (adopting tentative findings). After adjustments for reckless endangerment during flight under Guidelines § 3C1.2, and acceptance of responsibility under Guidelines § 3E1.1, petitioner's total offense level remained 38. See C.A. App. 89; J.A. 7, 10.

In its PSR, the Probation Office had found that petitioner's criminal history score placed him in criminal history category II. The PSR relied on two prior misdemeanor convictions: a 1989 Louisiana conviction for possession of marijuana and a 1990 California misdemeanor conviction for resisting arrest. PSR ¶¶ 46-48. The PSR recited that, as to the 1990 resisting arrest conviction, imposition of sentence was suspended, and petitioner was sentenced to two years of probation and credit for two days served. The PSR also recited that petitioner had been charged with possession of crack cocaine and successfully completed a six-month diversion program in 1990. PSR ¶ 47. Petitioner did not contest the PSR's calculation of his criminal history

score, and the district court adopted the PSR's calculation at sentencing. C.A. App. 90.

With a total offense level of 38 and a criminal history category II, petitioner's Guidelines range for the narcotics offenses was 262 to 327 months of imprisonment. J.A. 12. The court sentenced petitioner to 262 months of imprisonment on the narcotics counts, to be followed by the mandatory 60-month consecutive sentence on the firearms count, for a total sentence of 322 months of imprisonment. J.A. 11. The court stated that it "personally [did not] believe that [petitioner] should be serving 322 months," but that it was "bound by th[e] Guidelines." J.A. 12-13; accord J.A. 22.

4. Petitioner appealed, again raising no objection to the calculation of his criminal history category. In 1996, the court of appeals summarily affirmed petitioner's convictions and sentence. *United States* v. *Dillon*, 100 F.3d 949 (3d Cir. 1996) (Table). He thereafter filed a number of unsuccessful postconviction challenges to his conviction and sentence, including a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. See J.A. 24; *Dillon* v. *United States*, 525 U.S. 1160 (1999) (No. 98-7429) (denying a petition for a writ of certiorari). Petitioner's Section 2255 motion raised no objections concerning the calculation of his criminal history category. See Mot. to Vacate, Set Aside, and Correct Sentence or Conviction Under 28 U.S.C. 2255 (filed Sept. 8, 1997).

5. In 2005, this Court held that the mandatory application of the Sentencing Guidelines regime violated the Sixth Amendment by permitting judges, rather than juries, to find facts necessary to support a sentence. *United States* v. *Booker*, 543 U.S. 220, 244 (2005). As a remedial matter, *Booker* severed and excised the provisions of the SRA that had made the Guidelines mandatory in sentencing decisions, resulting in a statutory scheme that directs courts to

"consider Guidelines ranges," but permits them "to tailor the sentence in light of other statutory concerns as well." *Id.* at 245-246 (citing 18 U.S.C. 3553(a)). The Court in *Booker* applied both its constitutional and its remedial holdings to all cases that were not yet final when it was decided. *Id.* at 268 (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). The courts of appeals have unanimously held that *Booker* is not retroactively applicable to cases that had become final on direct review before the Court's decision. See note 5, *infra*.

6. In December 2007, after the Sentencing Commission promulgated the crack cocaine amendments to the Guidelines, petitioner filed a pro se motion seeking a sentence reduction under 18 U.S.C. 3582(c)(2). Consistent with the Commission's policy statements, he argued, *inter alia*, that the total offense level calculated at his 1993 sentencing should be decreased under the crack cocaine amendments by two levels, resulting in an amended Guidelines range of 210 to 262 months. C.A. App. 109-115.

Petitioner also argued, however, that the court should consider additional reductions pursuant to the sentencing factors set out in 18 U.S.C. 3553(a), citing *United States* v. *Hicks*, 472 F.3d 1167 (9th Cir. 2007). C.A. App. 114. In *Hicks*, the Ninth Circuit held that a district court in Section 3582(c)(2) sentence modification proceedings has authority to impose a new sentence below the Guidelines range resulting from the relevant Guidelines amendment, based on its consideration of the sentencing factors in Section 3553(a). *Hicks*, 472 F.3d at 1169. The *Hicks* court reasoned that *Booker* "excised the statutes that made the Guidelines mandatory and rejected the argument that the Guidelines might remain mandatory in some cases but not in others." *Id.* at 1171-1172. The *Hicks* court thus concluded that *Booker* applies in sentence-reduction proceed-

ings under Section 3582(c)(2). *Ibid.* In connection with his *Hicks* argument, petitioner emphasized his significant institutional rehabilitation and education. C.A. App. 114. He also attached a 1999 California Superior Court order dismissing the charges in his 1990 resisting arrest case under California Penal Code § 1203.4, based on his successful completion of probation. C.A. App. 132-133. Referring to the dismissal order, petitioner argued that his criminal history category "overstate[d]" the seriousness of his criminal record. *Id.* at 114 (citing Guidelines § 4A1.3(b)(1)). Petitioner requested a new PSR and a new sentencing hearing. *Id.* at 193.

The district court granted petitioner's motion in part and denied it in part. J.A. 32-43. The court granted petitioner's motion for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2), and reduced petitioner's term of imprisonment to 270 months of imprisonment: 210 months on the narcotics counts and 60 consecutive months on the firearms count. J.A. 33-36; see J.A. 44-46. But the district court denied petitioner's motion to the extent it sought a further reduction under *Booker*. J.A. 36-42. The court explained that such a reduction would be inconsistent with Section 3582(c)(2) and Guidelines § 1B1.10, which provides that a within-Guidelines sentence may not be reduced to a term of imprisonment less than the lower limit of the amended Guidelines range. J.A. 39-40. The court also rejected petitioner's argument that the court should disregard his prior California resisting arrest conviction, explaining that the court had no authority to reexamine Guidelines determinations unrelated to the crack cocaine amendments. J.A. 41-42.

7. On appeal, petitioner renewed his claim that, under *Booker*, the district court had authority to reduce his sentence beyond the two-level reduction in base offense level

authorized by the crack cocaine amendments, regardless of the limitations set out in Section 3582(c)(2) and Guidelines § 1B1.10. Pet. C.A. Br. 16-47. Petitioner also argued for the first time that his 1990 resisting arrest conviction had been improperly scored at his initial sentencing because it had not resulted in a sentence of probation of more than one year, as required by Guidelines § 4A1.2(c)(1). Pet. C.A. Br. 48-51. Petitioner argued that, by declining to revisit his criminal history score, the district court had committed procedural error under *Gall* v. *United States*, 552 U.S. 38 (2007). Pet. C.A. Br. 50.

The court of appeals affirmed. J.A. 47-55. Agreeing with the "overwhelming majority" of courts of appeals to consider the issue, the court concluded that the district court lacked authority to reduce petitioner's sentence to a term of imprisonment less than the lower limit of his amended Guidelines range. J.A. 54. The Court rejected petitioner's argument that the limitations on the scope of sentence reductions in Section 3582(c)(2) and Guidelines § 1B1.10 are invalid under *Booker*, explaining that "*Booker* applies to full sentencing hearings—whether in an initial sentencing or in a resentencing where the original sentence is vacated for error, but not to sentence modification proceedings under § 3582(c)(2)." J.A. 52-53 (quoting *United States* v. *Doe*, 564 F.3d 305, 313 (3d Cir.), cert. denied, 130 S. Ct. 563 (2009)). The court further explained that "[n]othing in *Booker* purported to obviate the congressional directive in § 3582(c)(2) that a sentence reduction pursuant to that section be consistent with Sentencing Commission policy statements," including Guidelines § 1B1.10. J.A. 53 (quoting *Doe*, 564 U.S. at 313). Finally, the court rejected petitioner's challenge to the district court's calculation of his criminal history score, concluding that the district court in Section 3582(c)(2) proceedings "had no authority to re-

consider its prior criminal history determination." J.A. 54-55.

SUMMARY OF ARGUMENT

When a district court reduces a defendant's sentence of imprisonment under 18 U.S.C. 3582(c)(2) based on a Guidelines amendment made retroactive by the Sentencing Commission, the court may not reduce the term of imprisonment by more than the amount called for by the relevant amendment, nor may it make new Guidelines determinations unrelated to the amendment.

I. Although petitioner frames the question presented in this case as whether the Sentencing Guidelines are binding when a district court resentences a defendant under Section 3582(c)(2), that formulation of the issue misapprehends the nature of Section 3582(c)(2) sentence-reduction proceedings and the role the Sentencing Guidelines play in them.

A Section 3582(c)(2) proceeding to reduce a sentence of imprisonment based on a retroactive Guidelines amendment is not a de novo sentencing under 18 U.S.C. 3553(a), or a resentencing after an earlier-imposed sentence has been found to be unlawful. Rather, Section 3582(c)(2) provides a limited exception to the statutory rule that sentences of imprisonment may not be modified. It gives district courts discretion to reduce a defendant's sentence when the Sentencing Commission has determined that a sentencing-lowering amendment should apply retroactively, provided that such a reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The applicable policy statement—which implements the Commission's statutory responsibility to "specify in what circumstances and by what amounts" sentences may be reduced, 28 U.S.C.

994(u)—provides that a sentence generally may not be reduced to a term that is less than the minimum of the amended Guidelines range. Guidelines § 1B1.10(b)(2).

The limited nature of sentence reductions under Section 3582(c)(2) and Guidelines § 1B1.10 raises no concerns under *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* applies when a court engages in a plenary sentencing. Section 3582(c)(2), in contrast, provides a one-way rachet to lower a defendant's otherwise-final sentence, not because of legal error, but because of the Sentencing Commission's discretionary decision to permit a Guidelines amendment to be applied retroactively to prisoners serving otherwise-final sentences. This limited reduction of the term of imprisonment of a defendant who was sentenced under mandatory Guidelines does not implicate the Sixth Amendment rule applied in *Booker*. The court does not impose an enhanced sentence based on judicially found facts, but exercises the limited discretion to decide whether to reduce an existing sentence otherwise immune from modification. Nor does *Booker*'s decision to render the Guidelines advisory for purposes of sentencing under 18 U.S.C. 3553(a) have any application to Section 3582(c)(2) proceedings. *Booker*'s remedial holding did not address sentence-reduction proceedings, and its reasoning has no application to this limited exception to otherwise-binding finality rules. Congress directed the Commission to "specify in what circumstances and by what amount" sentences "may be reduced," 28 U.S.C. 994(u), and it permitted reductions only to the extent "consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2). A policy statement that specifies the "amount" of the permitted reduction in a manner that corresponds to the Guidelines amendment itself permissibly implements the limited retroactive leniency that Congress authorized. Indeed, the Commission

would have had no authority to issue policy statements that contemplated a full-scale advisory-Guidelines sentencing under *Booker*, because such an approach would have failed to specify "by what amount" sentences should be reduced.

Were this Court to accept the proposition that district courts must be granted unlimited discretion to make sentence adjustments in Section 3582(c)(2) proceedings, every retroactive Guidelines amendment would carry the potential to reopen thousands of sentences of imprisonment for reevaluation under the statutory sentencing factors set out in Section 3553(a). Petitioner's proposed rule not only would undermine principles of finality that are essential to the operation of the criminal justice system, but also would inevitably affect the Sentencing Commission's calculus in deciding whether to make its Guidelines amendments retroactive in the first place. That result would diminish Section 3582(c)(2)'s value as a mechanism for the exercise of leniency.

II. Because Section 3582(c)(2) sentence-reduction proceedings do not reopen the defendant's sentence for all purposes, petitioner's contention that the district court erred in failing to correct the criminal history determination it had made at petitioner's sentencing in 1993 lacks merit. Petitioner in any event fails to establish that the determination was erroneous, much less so clearly erroneous that it would warrant correction based on petitioner's exceedingly delayed objection.

ARGUMENT

I. A REDUCTION OF A PRISONER'S SENTENCE OF IMPRISONMENT BASED ON A RETROACTIVE AMENDMENT TO THE SENTENCING GUIDELINES MUST BE CONSISTENT WITH THE COMMISSION'S POLICY STATEMENTS

Congress has provided a general rule of finality for criminal sentences, subject to limited exceptions. See 18 U.S.C. 3582(c). One such exception is based on the Sentencing Commission's determination, after its periodic review and revision of the Guidelines, 28 U.S.C. 944(*o*), to reduce a Guidelines range and make the reduction retroactive, 28 U.S.C. 944(u). When the Commission makes such a determination, it must "specify in what circumstances and by what amount" a sentenced prisoner's term of imprisonment may be reduced. *Ibid.* Section 3582(c) then gives a district court discretion to reduce the prisoner's sentence "after considering the factors set forth in section 3553(a) [of Title 18] to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The Commission's policy statement implementing those requirements provides that a sentence reduction may not exceed the extent of the reduction in the relevant Guidelines sentencing range, which remains the same but for the amended, retroactive Guideline. Guidelines § 1B1.10.

Petitioner contends that this limitation conflicts with *United States* v. *Booker*, 543 U.S. 220 (2005). In petitioner's view (Pet. Br. 17-20), a district court "cannot be forced to adhere to an unconstitutional and unjust Guidelines range when imposing a new sentence under § 3582(c)(2)." Instead, petitioner contends, the court must have the plenary power to impose what is effectively a new sentence under the advisory *Booker* regime—applying the

statutory sentencing factors and revisiting any previous Guidelines errors, even if unrelated to the retroactive change that triggered the Section 3582(c)(2) motion. Petitioner would thus 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 Sentencing Commission elects to make a particular Guidelines amendment retroactively applicable. As nine courts of appeals have correctly held,[2] *Booker* does not command that anomalous result.

A. Section 3582(c)(2) Represents A Narrow Exception To The Rule That A Sentence Of Imprisonment May Not Be Modified

1. As this Court has repeatedly recognized, finality is an important attribute of criminal judgments, and one "es-

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[2] See J.A. 47-55; *United States* v. *Washington*, 584 F.3d 693, 698-701 (6th Cir. 2009); *United States* v. *Doublin*, 572 F.3d 235, 238-239 (5th Cir.), cert. denied, 130 S. Ct. 517 (2009); *United States* v. *Savoy*, 567 F.3d 71, 73-74 (2d Cir.) (per curiam), cert. denied, 130 S. Ct. 342 (2009); *United States* v. *Fanfan*, 558 F.3d 105, 109-110 (1st Cir), cert. denied, 130 S. Ct. 99 (2009); *United States* v. *Melvin*, 556 F.3d 1190, 1192-1194 (11th Cir.), cert. denied, 129 S. Ct. 2382 (2009); *United States* v. *Cunningham*, 554 F.3d 703, 707 & n.2 (7th Cir.), cert. denied, 129 S. Ct. 2826 (2009); *United States* v. *Starks*, 551 F.3d 839, 842 (8th Cir.), cert. denied, 129 S. Ct. 2746 (2009); *United States* v. *Dunphy*, 551 F.3d 247, 254 (4th Cir.), cert. denied, 129 S. Ct. 2401 (2009); *United States* v. *Rhodes*, 549 F.3d 833, 840-841 (10th Cir. 2008), cert. denied, 129 S. Ct. 2052 (2009). But see *United States* v. *Hicks*, 472 F.3d 1167 (9th Cir. 2007). The Ninth Circuit granted initial hearing en banc to consider whether to overrule *Hicks*. *United States* v. *Fox*, 583 F.3d 596 (2009). Proceedings in *Fox* have been stayed pending the Court's resolution of this case.

sential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments."). Once a district court has pronounced sentence and the sentence becomes final, the court may not alter that sentence except as Congress allows. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 189 & n.16 (1979); see also, *e.g.*, *United States* v. *Smartt*, 129 F.3d 539, 540 (10th Cir. 1997) ("A district court does not have inherent authority to modify a previously imposed sentence; it may do so only pursuant to statutory authorization.") (citation omitted); *United States* v. *Caterino*, 29 F.3d 1390, 1394 (9th Cir. 1994) ("The authority to change a sentence must derive from some federal statutory authority.").

Consistent with those principles of finality, the SRA provides that a court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). That rule is subject to three exceptions, collectively designed to serve as "safety valves" for prisoners serving already-imposed sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 121 (1983) (1983 Senate Report). The exception at issue in this case provides that a court "may reduce the term of imprisonment" of a defendant who had been "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2).[3] The stat-

[3] Another exception permits a court to reduce an imposed term of imprisonment, on motion of the Director of the Bureau of Prisons, if "extraordinary and compelling reasons warrant such a reduction" or the defendant is, *inter alia*, at least 70 years old and has served at least 30 years in prison, provided that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

ute directs the court, before granting such a reduction, to consider the statutory sentencing factors set out in 18 U.S.C. 3553(a) "to the extent that they are applicable." 18 U.S.C. 3582(c)(2). And the statute instructs that the court may grant such a reduction only if it "is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

2. Section 3582(c)(2)'s requirement that a sentence reduction be consistent with the Sentencing Commission's policy statements works together with other provisions of the SRA describing the Commission's duties and powers. In particular, the SRA charges the Commission with periodically reviewing and revising the Sentencing Guidelines. 28 U.S.C. 994(*o*). If in the course of its revisions the Commission "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," another provision of the SRA directs the Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. 994(u). That provision gives the Commission "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect."

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18 U.S.C. 3582(c)(1)(A). That exception applies "to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner." 1983 Senate Report 121.

The final exception permits a court to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." 18 U.S.C. 3582(c)(1)(B). Rule 35, among other things, permits a district court, on the government's motion, to reduce a sentence if the defendant after sentencing has "provided substantial assistance in investigating or prosecuting another person." Fed. R. Crim. P. 35(b).

Braxton v. *United States*, 500 U.S. 344, 348 (1991) (emphasis omitted).

3. The Sentencing Commission has implemented its statutory authority in this area by promulgating Guidelines § 1B1.10, a policy statement governing reduction of sentences under Section 3582(c)(2). See *Braxton*, 500 U.S. at 348; see also 28 U.S.C. 994(a)(2)(C) (directing the Sentencing Commission to issue policy statements regarding "the appropriate use" of the sentence modification provisions in Section 3582(c)).

Guidelines § 1B1.10 sets out the Guideline amendments that apply retroactively. Guidelines § 1B1.10(c). As amended in 2007, Section 1B1.10 also sets out instructions for determining the maximum permissible reduction for an appropriately sentenced defendant based on a Guidelines amendment. It provides that, "[i]n determining whether, and to what extent, a reduction in the defendant's term of imprisonment * * * is warranted," a district court should begin by "determin[ing] the amended guideline range that would have been applicable to the defendant if the amendment[] to the guidelines * * * had been in effect at the time the defendant was sentenced," while "leav[ing] all other guideline application decisions unaffected." Guidelines § 1B1.10(b)(1). If a defendant received a within-Guidelines sentence, a court may not reduce the defendant's term of imprisonment "to a term that is less than the minimum of the amended guidelines range." Guidelines § 1B1.10(b)(2)(A); accord *id.* comment. (n.3).[4]

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[4] If a defendant was originally sentenced to a term of imprisonment less than the term provided by the Guidelines range, Guidelines § 1B1.10 provides that the court may reduce the defendant's sentence by an amount "comparably less than the amended guideline range," but states that a sentence reduction under Section 3582(c)(2) and Guidelines § 1B1.10 generally is not appropriate "if the original term of imprison-

Although petitioner repeatedly characterizes Guidelines § 1B1.10 as an instruction to district courts to impose sentences based on a newly calculated, mandatory Guidelines range, see, *e.g.*, Pet. Br. 22, 27, the effect of Guidelines § 1B1.10 is more limited: it simply instructs district courts how to calculate the scope of the benefit a retroactive Guidelines amendment offers a particular defendant. See 28 U.S.C. 994(u). Notably, the Sentencing Commission could have exercised its statutory power to "specify * * * by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced," *ibid.*, by other means. The Commission could have instructed, for example, that sentence reductions are not to exceed a specified percentage of the defendant's original Guidelines sentence. It also could have issued a set of tables prescribing the maximum number of months to be subtracted from Guidelines sentences of various lengths under various amendments (*e.g.*, 52 months from a sentence of 262 months under the crack cocaine amendments). The mechanism the Sentencing Commission chose, however, results in a relatively simple, precise determination in individual cases of the scope of the relevant changes associated with a particular Guidelines amendment.

4. Because Section 3582(c)(2) requires that a sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2), Guidelines § 1B1.10 binds courts in determining whether, and to what extent, a Guidelines amendment warrants a reduction in a defendant's final term of imprison-

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ment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005)." Guidelines § 1B1.10(b)(2)(B).

ment. See, *e.g.*, *United States* v. *Fanfan*, 558 F.3d 105, 109 (1st Cir.), cert. denied, 130 S. Ct. 99 (2009); *United States* v. *Cunningham*, 554 F.3d 703, 708 (7th Cir.), cert. denied, 129 S. Ct. 2826 (2009); *United States* v. *Walsh*, 26 F.3d 75, 77 (8th Cir. 1994) ("Congress has made the policy statements set forth in § 1B1.10 the applicable law for determining whether a district court has the authority to reduce a sentence [under Section 3582(c)(2).").

Petitioner (Pet. Br. 35 n.18), and his amici (Fed. Defenders Br. 10-22), argue that, although the Sentencing Commission's decision whether a particular Guidelines amendment reducing sentences should be applied retroactively is binding under the SRA, a district court is not bound by the Commission's determination as to the extent of the permissible reduction. But the statute charges the Commission with specifying both "in what circumstances" and "by what amount" a sentence of imprisonment may be reduced in accordance with an amendment to the Guidelines. 28 U.S.C. 994(u); see *Braxton*, 500 U.S. at 348 (describing Section 994(u) as giving the Commission "the unusual explicit power to decide whether *and to what extent* its amendments reducing sentences will be given retroactive effect") (emphasis omitted and added). Neither petitioner nor his amici offer a persuasive reason for distinguishing as a statutory matter between the effect of the Commission's specification "whether" a Guideline amendment justifies reducing already imposed sentences and its specification about the "extent" of the permissible reduction.

5. The combined effect of Section 3582(c)(2) and Guidelines § 1B1.10 is to require that, when a district court reduces a sentence of imprisonment based on a Guidelines amendment reducing sentencing ranges, the reduction not exceed the extent of the change to the relevant sentencing

range. That is a logical implementation of statutory provisions that make a limited inroad on finality only in recognition of a lowered Guidelines range. The sole purpose of the proceeding is to give the court discretion to lower the term of imprisonment in view of the Commission's "revise[d]" judgment about the appropriate Guidelines range. 28 U.S.C. 994(*o*). Congress did not empower the Commission to license courts to engage in wholesale, plenary resentencings.

B. Limitations On The Amount By Which A Term Of Imprisonment May Be Reduced Under Section 3582(c)(2) Do Not Implicate *Booker*

Petitioner contends (Pet. Br. 21-38) that the limitation on sentence reductions under Section 3582(c)(2) and Guidelines § 1B1.10 are invalid under *Booker*. Petitioner's contention lacks merit.

1. In Booker*, the Court addressed imposition of sentences under Section 3553, not discretionary reductions of otherwise-final judgments*

In *Booker*, this Court held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. 543 U.S. at 226-244. To remedy the constitutional defect in the Guidelines scheme, the Court severed two provisions of the SRA: 18 U.S.C. 3553(b)(1), which had required courts to impose a Guidelines sentence, and 18 U.S.C. 3742(e), which required de novo review of decisions to depart from the Guidelines and cross-referenced Section 3553(b)(1). *Booker*, 543 U.S. at 245-246, 259-261. In so doing, the Court made "the Guidelines effectively advisory." *Id.* at 245. Now, as modified in *Booker*, the SRA "requires a sentencing court to consider Guidelines ranges" but "permits the court to tailor the sen-

tence in light of other statutory concerns as well." *Id.* at 245-246 (citing 18 U.S.C. 3553(a)). Accord *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007) ("A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," but "should then consider all of the § 3553(a) factors to determine whether they support a sentence requested by a party.").

The Court in *Booker* applied both its constitutional and its remedial holdings to all cases that were not yet final when it was decided. 543 U.S. at 268 (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). The Court did not, however, apply its holdings to cases that were already final and unappealable when the decision issued, and it is undisputed in this case that *Booker* does not apply retroactively to cases that were final as of 2005.[5]

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[5] Every court of appeals to address the issue has so held. See *Cirilo-Muñoz* v. *United States*, 404 F.3d 527, 532-533 (1st Cir. 2005); *Guzman* v. *United States*, 404 F.3d 139, 141-144 (2d Cir.), cert. denied, 546 U.S. 1035 (2005); *Lloyd* v. *United States*, 407 F.3d 608, 613-616 (3d Cir.), cert. denied, 546 U.S. 916 (2005); *United States* v. *Morris*, 429 F.3d 65, 66-67 (4th Cir. 2005), cert. denied, 549 U.S. 852 (2006); *United States* v. *Gentry*, 432 F.3d 600, 602-605 (5th Cir. 2005); *Humphress* v. *United States*, 398 F.3d 855, 860-863 (6th Cir.), cert. denied, 546 U.S. 855 (2005); *McReynolds* v. *United States*, 397 F.3d 479, 481 (7th Cir.), cert. denied, 545 U.S. 1110 (2005); *Never Misses a Shot* v. *United States*, 413 F.3d 781, 783-784 (8th Cir. 2005); *United States* v. *Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005), cert. denied, 546 U.S. 1155 (2006); *United States* v. *Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Varela* v. *United States*, 400 F.3d 864, 867-868 (11th Cir.), cert. denied, 546 U.S. 924 (2005); *In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007). Petitioner does not contend otherwise.

2. A reduction of a defendant's sentence under Section 3582(c)(2) is not the equivalent of imposition of a new sentence under Section 3553(a)

Petitioner's sentence became final in 1996, well before *Booker* was decided. See p. 9, *supra*; see also, *e.g.*, *Clay* v. *United States*, 537 U.S. 522, 527 (2003) (a criminal judgment becomes final after appeal when the time for filing a petition for a writ of certiorari expires). Petitioner does not dispute that, absent the Sentencing Commission's decision to make its crack cocaine amendments retroactive, he would not be entitled to reevaluation of his sentence under *Booker*. He argues, however, that once the Sentencing Commission opened the door to a sentence reduction under Section 3582(c)(2), the resulting proceeding, like "any other resentencing," must comport with *Booker*, and thus must permit the district court to impose a new sentence under the advisory Guidelines regime *Booker* announced. Pet. Br. 22-23.

a. Petitioner's argument fails at the outset because a Section 3582(c)(2) proceeding to reduce a sentence of imprisonment is not, as petitioner would have it (Pet. Br. 18, 22-25), the equivalent of the imposition of a new sentence under 18 U.S.C. 3553(a). Despite petitioner's description of Section 3582(c)(2) as "resentencings," see, *e.g.*, Pet. Br. 22, 25, numerous procedural and substantive distinctions establish that Section 3582(c)(2) proceedings are not equivalent to initial sentencings or resentencings after an original sentence has been found to be unlawful. See, *e.g.*, *United States* v. *Bravo*, 203 F.3d 778, 781 (11th Cir.) ("[A] sentencing adjustment undertaken pursuant to Section 3582(c)(2) does not constitute a de novo resentencing.") (citation omitted), cert. denied, 531 U.S. 994 (2000); *United States* v. *Tidwell*, 178 F.3d 946, 949 (7th Cir.) (a motion pursuant to Section 3582(c)(2) "is not a do-over of an original sentencing

proceeding"), cert. denied, 528 U.S. 1023 (1999); *United States* v. *Torres*, 99 F.3d 360, 362 (10th Cir. 1996) (describing Section 3582(c)(2) as "a different animal" than de novo resentencing), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) ("A § 3582(c)(2) motion is not a second opportunity to present mitigating factors to the sentencing judge, nor is it a challenge to the appropriateness of the original sentence. Rather, it is simply a vehicle through which appropriately sentenced prisoners can urge the court to exercise leniency to give certain defendants the benefits of an amendment to the Guidelines.").[6]

A court in a Section 3582(c)(2) proceeding does not impose a "new sentence" under 18 U.S.C. 3553(a), as it would at an initial sentencing or plenary resentencing. Pet. Br. 23. The court has no power to increase the defendant's sentence based on its consideration of the statutory sentencing factors in Section 3553(a); it lacks authority to modify components of a sentence other than the term of imprisonment (such as the length or conditions of supervised release, fines, or restitution); and its discretion to reduce the defendant's sentence is expressly limited by "applicable policy statements" issued by the Sentencing Commission. 18 U.S.C. 3582(c)(2).

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[6] Petitioner quotes *United States* v. *Byfield*, 391 F.3d 277 (D.C. Cir. 2004), for the proposition that there is "no material distinction, for these purposes, between initial sentencings and § 3582(c)(2) revisions." Pet. Br. 23. The "purposes" in question in *Byfield* concerned a defendant's entitlement under Guidelines § 6A1.3 to a hearing to present expert evidence on a disputed question about the application of the Guidelines amendment at issue in his case. 391 F.3d at 279-280. *Byfield* did not suggest, contrary to the overwhelming weight of authority, that Section 3582(c)(2) sentence reduction proceedings are essentially identical in nature to initial sentencing decisions.

Those critical substantive differences carry with them a host of equally important procedural differences. At sentencing, the defendant has the right to counsel, *Mempa* v. *Rhay*, 389 U.S. 128, 137 (1967), and the right to be present, see *United States* v. *DeMott*, 513 F.3d 55, 58 (2d Cir. 2008). In contrast, the defendant has neither right in Section 3582(c)(2) proceedings. See Fed. R. Crim. P. 43(b)(4) (a defendant need not be physically present for a sentence modification pursuant to Section 3582(c)(2)); *United States* v. *Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (a defendant has no right to the assistance of counsel in a sentence modification proceeding under Section 3582(c)(2)); *United States* v. *Webb*, 565 F.3d 789, 794 (11th Cir. 2009) (same); *United States* v. *Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (same), cert. denied, 531 U.S. 1080 (2001); *Tidwell*, 178 F.3d at 949 (same); *United States* v. *Townsend*, 98 F.3d 510, 512-513 (9th Cir. 1996) (same); *Whitebird*, 55 F.3d at 1011 (same); *United States* v *Reddick*, 53 F.3d 462, 464-465 (2d Cir. 1995) (same). Although, as one court of appeals recently held, a defendant should be afforded notice of, and an opportunity to respond to, new information on which a district court relies in deciding whether to reduce the defendant's sentence under Section 3582(c)(2), the court of appeals also explained that, "[b]ecause a § 3582(c)(2) proceeding is not a *de novo* resentencing, courts need not permit re-litigation of any information available at the original sentencing," and that the opportunity to contest new information generally need not take the form of a hearing. *United States* v. *Jules*, No. 08-13629, 2010 WL 348044, at *5 (11th Cir. Feb. 2, 2010); see *id.* at *1, *5-*6 (remanding to allow the defendant to contest a prison sanctions report on which the district court had relied in denying the defendant's Section 3582(c)(2) motion, but noting that the district court could

"allow the parties to contest new information in writing" rather than holding a hearing).

And unlike the proceedings in the cases on which petitioner relies (Pet. Br. 23-24), a Section 3582(c)(2) proceeding is not the equivalent of resentencing after a court has found an earlier-imposed sentence unlawful on direct appeal, see 18 U.S.C. 3742(g) (on remand following appeal, the district court "shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals"), or resentencing following collateral review. When 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. *United States* v. *Arrous*, 320 F.3d 355, 359 (2d Cir. 2003). That sentence, of course, must comport with current law. See *Griffith*, 479 U.S. at 328. Under Section 3582(c)(2), in contrast, a district court merely decides whether to exercise its discretion to reduce an otherwise final sentence of imprisonment based on a specifically listed amendment to the Guidelines. Section 3582(c)(2) is not a mechanism for incorporating all subsequent legal developments into the sentence. Indeed, if it were, any defendant eligible to invoke Section 3582(c)(2) could insist on retroactive application of all sentence-reducing amendments, whether or not the Commission had designated them as retroactive. See *Torres*, 99 F.3d at 362-363 (explaining that, if "a § 3582(c)(2) motion require[d] resentencing under all then-current sentencing guidelines[, it] would negate the limit on retroactivity provided by § 1B1.10").

b. Petitioner argues (Pet. Br. 22-23, 24-25) that a Section 3582(c)(2) proceeding is nevertheless similar to a resentencing after remand because the statute directs district courts to "consider[] the factors set forth in section

3553(a) to the extent they are applicable," 18 U.S.C. 3582(c)(2); cf. 18 U.S.C. 3742(g) (directing district courts on remand to resentence a defendant in accordance with Section 3553). Section 3582(c)(2)'s reference to Section 3553(a) does not, however, mean that the "discretionary aspects of resentencings under § 3582(c) and § 3742 are the same." Pet. Br. 25. A court properly considers Section 3553(a) factors only "to the extent they are applicable" in deciding whether to grant the maximum permissible sentence reduction consistent with the applicable policy statements, to grant a lesser reduction, or to leave the defendant's sentence as is. See, *e.g.*, *Cunningham*, 554 F.3d at 708; *Dunphy*, 551 F.3d at 255; cf. *United States* v. *Shelby*, 584 F.3d 743, 748-749 (7th Cir. 2009) (Posner, J.) (applying a similar rule to sentence reductions under Federal Rule of Criminal Procedure 35(b)). 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 Section 3553(a) factors.[7]

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[7] Petitioner also contends (Pet. Br. 25) that the SRA "puts resentencings under § 3582(c) and those following reversal under § 3742 on an equal footing" in 18 U.S.C. 3582(b). That provision states that, notwithstanding that a sentence of imprisonment can be modified, corrected, or appealed, "a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." 18 U.S.C. 3582(b). The affirmation that an otherwise final sentence may be modified, corrected, or appealed does not suggest that the modification contemplated by Section 3582(c)(2) is, in effect, the equivalent of resentencing following a remand on appeal.

*3. A district court does not violate the Sixth Amendment when it uses a defendant's final, pre-*Booker *sentence as a baseline for a sentence reduction under Section 3582(c)(2)*

Contrary to petitioner's contention (Pet. Br. 28-31), a district court does not violate the Sixth Amendment when it reduces a sentence under Section 3582(c)(2) without undertaking a plenary resentencing under *Booker*.

Booker's constitutional holding applied the rule that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Booker*, 543 U.S. at 231 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). That rule has no direct application to proceedings under Section 3582(c)(2), since the statute permits a district court only to reduce—not increase—the defendant's sentence.

Petitioner contends that, "[w]hen a court binds itself to 'a defendant's previous, unconstitutional sentence as a baseline for a new sentence,' it reoffends the Sixth Amendment." Pet. Br. 29 (quoting *United States* v. *Lafayette*, 585 F.3d 435, 438 (D.C. Cir. 2009)). But when a district court acts on a Section 3582(c)(2) motion to reduce a sentence of imprisonment, it never "start[s] from scratch." *Lafayette*, 585 F.3d at 438. Any "constitutional infirmities" that may inhere in the sentence are "features of earlier sentencing decisions," rather than of the district court's subsequent decision whether to reduce the sentence under Section 3582(c)(2). *Ibid.* (rejecting the defendant's argument that, "by denying his section 3582(c)(2) motion, the district court effectively reimposed his sentence and unearthed its latent defects"). A court no more commits a Sixth Amendment violation by reducing a sentence under Section 3582(c)(2) to

account only for a retroactively applicable Guidelines amendment than it does when it exercises its discretion under Section 3582(c)(1) to reduce a sentence, on motion of the Director of the Bureau of Prisons, for "extraordinary and compelling reasons," or because the defendant is over the age of 70 and has served 30 years or more. 18 U.S.C. 3582(c)(1)(A). Either reduction represents only the exercise of leniency for a defendant with no legal entitlement.

The analysis does not change, as petitioner appears to suggest, simply because "a section 3582(c)(2) sentence reduction requires a new Guidelines calculation." Pet. Br. 29 (quoting *Lafayette*, 585 F.3d at 438). As explained above, to the extent a "new" Guidelines calculation is required in Section 3582(c)(2), it is only to determine the extent of the benefit offered to a particular defendant because of a retroactive amendment to Guidelines sentencing ranges. The Commission could just as well have required the district court simply to subtract from the defendant's term of imprisonment a specified number of months, or a specified percentage of the total sentence, keyed to the scope of the relevant change in the Guidelines. See p. 21, *supra*. The constitutionality of the limitations on sentence reductions under Section 3582(c)(2) cannot turn on the particular procedural mechanism the Sentencing Commission has chosen to "specify * * * by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced" because of a Guidelines amendment. 28 U.S.C. 994(u).

4. Limitations on the permissible extent of sentence reductions under Section 3582(c)(2) are not inconsistent with the SRA as modified in Booker

Finally, petitioner errs in asserting (Pet. Br. 31-38) that the limitations on sentence reductions in Section 3582(c)(2)

and Guidelines § 1B1.10 are inconsistent with the statutory scheme as modified in *Booker*'s remedial opinion.

a. In *Booker*, this Court excised and severed 18 U.S.C. 3553(b), the provision that made the Guidelines mandatory on district courts in sentencing proceedings, as well as the related provision governing appellate review, 18 U.S.C. 3742(e), which cross-references the excised Section 3553(b)(1). The Court held that, "[w]ith these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements." *Booker*, 543 U.S. at 259.

Petitioner contends (Pet. Br. 31-34) that, under *Booker*'s remedial holding, Guidelines § 1B1.10, "[l]ike all other Guidelines," should be regarded as advisory. *Id.* at 32 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 91 (2007). But *Booker* severed and excised only provisions of the SRA that made the Guidelines mandatory in district courts' initial sentencing decisions and appellate review of those decisions. *Booker* did not address Section 3582(c)(2), much less did it hold that Section 3582(c)(2)'s requirement that sentence reductions be consistent with "applicable policy statements" is no longer in force. And nothing in the reasoning of *Booker* casts any doubt on Congress's ability to rely on the Sentencing Commission's policy statements to define the scope of sentence reduction warranted by the Commission's amendments to the Guidelines. That limitation on district courts' discretion to reduce sentences under Section 3582(c)(2) raises no Sixth Amendment concerns. See pp. 30-31, *supra*. It "function[s] independently" from those provisions that *Booker* did sever and excise. 543 U.S. at 259. And to preserve Section 3582(c)(2) as Congress wrote it is certainly consistent with "Congress' basic objectives" in enacting the SRA. *Ibid.*

b. In *United States* v. *Hicks*, 472 F.3d 1167, 1171-1172 (2007), the Ninth Circuit suggested that this Court's conclusion that the Guidelines could not remain mandatory in some contexts and advisory in others compels the conclusion that policy statements cannot be binding in Section 3582(c)(2) proceedings. See *Booker*, 543 U.S. at 265-266; see also Pet. Br. 33. That suggestion is mistaken. In the passage on which *Hicks* relied, the Court responded to the government's contention that, if the Court reached the issue of remedy, it should make "the Guidelines advisory in 'any case in which the Constitution prohibits' judicial factfinding," but should "leave them as binding in all other cases." *Booker*, 543 U.S. at 266. The Court rejected that approach because of its asymmetry: it would leave the Guidelines in place as a mandatory floor, but would allow judges to sentence above the range without limit. The Court did "not believe that such 'one-way lever[s]' are compatible with Congress' intent." *Ibid.* It also believed that Congress would not have authorized a system so laden with "administrative complexities" and so unlikely to promote its basic objective of uniformity. *Ibid.*

Section 3582(c)(2) proceedings do not implicate the concerns raised by the two-track approach rejected in *Booker*. Unlike plenary sentencings, Section 3582(c)(2) proceedings are inherently asymmetrical: a defendant can receive a sentence reduction, but never an increase. Congress thus deliberately adopted a "one-way lever" in this context, with applicable limitations to be set by the Commission. See 28 U.S.C. 994(u); 18 U.S.C. 3582(c)(2). And while the Court's adoption of a wholly advisory system avoided "administrative complexities" in *Booker*, extension of that remedy to a context the Court never considered—sentence-reduction proceedings for defendants whose Guidelines ranges were lowered—would engender considerable administrative

complexities. See pp. 36-37, *infra*. Finally, Congress's basic objective of uniformity would be seriously compromised by converting Section 3582(c)(2) proceedings into full-scale advisory Guidelines sentencing proceedings. Virtually all defendants sentenced in the mandatory-Guidelines era have lacked any opportunity for application of the *Booker* remedy because it is not retroactive to cases on collateral review. See note 5, *supra*. No principled reason justifies an exception for only those defendants who can seek limited statutory relief because the Commission reduced one component of their Guidelines sentences and made that change retroactive.

c. Petitioner also argues (Pet. Br. 32-33, 35-36) that, even if Section 3582(c)(2), as written, survived *Booker*'s remedial decision, Guidelines § 1B1.10 does not, because it directs district courts in Section 3582(c)(2) proceedings "to treat the Guidelines range as binding," and "prevent[s] 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.'" *Id.* at 35-36 (quoting *Kimbrough*, 552 U.S. at 101). But as explained above, see pp. 25-29, the purpose of Section 3582(c)(2) proceedings is not to "fashion[]" an entirely new sentence under the statutory sentencing factors set out in Section 3553(a). It is, rather, to permit district courts to give defendants serving sentences of imprisonment the benefit of the Sentencing Commission's decisions to alter Guidelines ranges.

To the extent that Guidelines § 1B1.10 directs district courts to treat the Guidelines as "binding" for the purpose of calculating the scope of the benefit offered to defendants in particular cases, the Commission is only fulfilling its obligation under 28 U.S.C. 994(u) to specify "by what amount the sentences of prisoners serving terms of imprisonment

for the offense may be reduced." The Commission would have had no authority to authorize a free-form resentencing under *Booker*, in which a court's consideration of the Section 3553(a) factors would result in an unpredictable sentence, varying from case to case and court to court. Such an approach would fail to say "by what amount" a sentence should be reduced and thus fall short of the requirements of Section 994(u). And the calculation methodology the Commission selected raises none of the constitutional concerns underlying *Booker*'s remedial holding.[8]

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[8] Petitioner's analogy (Pet. Br. 36-38) to Rule 35(b) does not help his argument. Much as in Section 3582(c)(2) proceedings, a court in Rule 35(b) sentence reduction proceedings has no authority to "redo the sentence from the ground up," consulting "factors that he would consider in initial sentencing under the *Booker* regime." *Shelby*, 584 F.3d at 744, 746, 748-750. But see *United States* v. *Grant*, 567 F.3d 776, 781-784 (6th Cir.), reh'g en banc granted, No. 07-3831 (6th Cir. Oct. 16, 2009). That Rule 35(b) has been amended to omit reference to the Guidelines, see Pet. Br. 37, is unremarkable, given that Rule 35(b), unlike Section 3582(c)(2), is not designed to give defendants a benefit based on changes to the Guidelines. It is instead designed to reward previously sentenced defendants who have rendered substantial assistance to the government. See *Shelby*, 584 F.3d at 745; see also *United States* v. *Williams*, 474 F.3d 1130 (8th Cir. 2007) (court may not reduce a sentence below the mandatory minimum after a government motion based on substantial assistance under 18 U.S.C. 3553(e) by invoking Section 3553(a) factors and *Booker*).

C. Petitioner's Proposed Rule Would Have Adverse Consequences For The Application Of Section 3582(c)(2)

The rule petitioner proposes is not only unjustified by *Booker*, but inconsistent with the policy objectives underlying Section 3582(c)(2).

1. To begin with, the rule petitioner proposes would undermine the principles of finality that underlie Section 3582(c). It would convert a proceeding designed as a limited exception to the final judgment rule into the equivalent of de novo resentencing, and thus would turn every retroactive Guidelines amendment into "a significant collateral windfall to all affected prisoners, reopening every aspect of their original sentences." *Lafayette*, 585 F.3d at 438.

The effects on the criminal justice system would be significant. The crack cocaine amendments alone have already prompted more than 23,000 motions for sentence reductions under Section 3582(c)(2), more than 15,000 of which have been granted. 2010 Data Report Tbl. 1. More than 13,000 motions have been filed by prisoners sentenced before *Booker* was decided in 2005. *Id.* Tbl. 3. It is unlikely that Congress, already concerned about the potential burden on the courts associated with the Sentencing Commission's power to declare amendments retroactive, see 1983 Senate Report 180, would have intended application of Section 3582(c)(2) to permit broadly reopening the sentences of thousands of previously sentenced defendants.

2. Equally important, petitioner's rule would inevitably affect the Sentencing Commission's consideration of whether to make its Guidelines amendments retroactive in the first place.

The prospect of reopening sentences for all purposes was a central concern in the deliberations that led to the Commission's decision to make the crack cocaine amendments retroactive. The Commission had estimated

that some 19,500 defendants would be eligible to seek sentence reductions if the amendments were made retroactive. See Memorandum from Glenn Schmitt et al. to Chair Hinojosa et al. 4 (Oct. 3, 2007), http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf. The Commission was, moreover, aware of the Ninth Circuit's decision in *Hicks*, *supra*, which had held that a defendant in sentence reduction proceedings under Section 3582(c)(2) was entitled to reevaluation of his sentence under *Booker*. See, *e.g.*, United States Sentencing Commission, *Public Hearing on Retroactivity* 29 (Nov. 13, 2007), http://www.ussc.gov/hearings/11_13_07/Transcript111307.pdf (Commissioner Horowitz); *id.* at 76 (Commissioner Steer); *id.* at 163 (Judge Castillo). When the Commission ultimately decided to make the crack cocaine amendments retroactive, it did so in reliance on the well-settled principle that Section 3582(c)(2) proceedings do not constitute full resentencings, see pp. 24-28, *supra*, and simultaneously amended Guidelines § 1B1.10 to reflect that understanding, 73 Fed. Reg. at 218.

To forbid the Sentencing Commission from limiting the scope of Section 3582(c)(2) sentence reduction proceedings to the scope of the amendments themselves would inevitably discourage the Sentencing Commission from ever authorizing sentence reductions. Cf. *Shelby*, 584 F.3d at 746-747 ("Allowing the judge to redo the sentence from the ground up when a Rule 35(b) [sentence-reduction] motion is filed would almost certainly reduce the number of such motions filed."). The consequence would be to diminish Section 3582(c)(2)'s value as a mechanism for granting leniency to defendants who, like petitioner, would seek the benefit of the Sentencing Commission's decision to lower Guidelines ranges.

II. THE COURTS BELOW DID NOT ERR IN FAILING TO CORRECT A PURPORTED ERROR IN PETITIONER'S CRIMINAL HISTORY CATEGORY UNDER THE GUIDELINES

Petitioner contends (Pet. Br. 39-49) that the district court erred in failing to correct a purported error it had made in calculating his Guidelines criminal history category at his original sentencing in 1993, and that the court's failure to do so independently warrants vacating his sentence and remanding for resentencing. Petitioner's contention lacks merit.

To begin with, petitioner's argument furnishes no independent ground for relief: it depends critically on the contention that the Section 3582(c)(2) proceedings entitled him to sentence adjustments wholly unrelated to the Guidelines amendment that authorized him to seek a sentence reduction in the first place. For the reasons explained above, that contention fails. In any event, petitioner fails to establish any error in the calculation of his criminal history category, much less an error that would warrant correction despite petitioner's marked tardiness in raising the objection.[9]

1. a. Petitioner's claim of error rests on the district court's treatment of his 1990 California misdemeanor con-

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[9] In his petition for a writ of certiorari, petitioner claimed (without citation) that "[t]he parties agree that at the original sentencing, the probation officer improperly assessed [petitioner] one point." Pet. 39; accord Pet. i (phrasing the second question presented as "Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range."). That claim is incorrect, and petitioner notably does not repeat it in his opening brief on the merits. The government did not concede in the courts below that petitioner's criminal history score was incorrectly calculated, and as explained below, petitioner has failed to establish that the score was in fact erroneous. See pp. 42-44, *infra*.

viction for resisting arrest. In the PSR prepared in connection with his 1993 sentencing, the Probation Office reported the disposition of the charges as follows: "Pled guilty. Imposition of sentence suspended. 2 years' probation, credit for 2 days' time served." PSR ¶ 47. The PSR further reported that petitioner had been charged with possession of crack cocaine in addition to resisting arrest; that he had been placed in a six-month diversion program; and that he successfully completed that program in December 1990. *Ibid.* The PSR assigned one criminal history point for the resisting arrest conviction based on Guidelines § 4A1.1(c), which prescribes one point for each prior criminal sentence not involving a term of imprisonment of at least 60 days. The PSR also noted that counting the conviction was consistent with Guidelines § 4A1.2(c)(1), which provides that a sentence for certain misdemeanor offenses, including resisting arrest, are counted only if, as relevant here, "the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days." Sentencing Guidelines §§ 4A1.1(c), 4A1.2(c)(1) (1993); see PSR ¶ 47.

Petitioner did not object to the PSR's calculation of his criminal history score, see PSR Addendum 80-83, and the district court adopted that calculation at sentencing, C.A. App. 90, J.A. 10-11. Petitioner did not challenge his criminal history score on appeal, nor did he raise any objection based on the miscalculation of his criminal history category in his Motion to Vacate, Set Aside, and Correct Sentence or Conviction under 28 U.S.C. 2255 (filed Sept. 8, 1997).

In 1999, petitioner filed a postconviction motion to review his sentence; in a supplement to the motion, he reported that the Superior Court of California that year had issued an order permitting him to withdraw his guilty plea to the resisting arrest conviction and dismissing charges pursuant to California Penal Code § 1203.4, and he argued

that his sentence should be recalculated accordingly. J.A. 27. The district court denied the motion, explaining, *inter alia*, that "the setting aside of a conviction under California Penal Code Section 1203.4 has no effect on the calculation of his sentence under the federal sentencing guidelines." J.A. 28; see Guidelines § 4A1.2 comment. (n.10) (directing that convictions set aside under state law are to be counted in computing the defendant's criminal history category); Cal. Penal Code § 1203.4 (providing that "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed").

b. In his Section 3582(c)(2) motion in district court, petitioner again raised the dismissal of his resisting arrest charges under California Penal Code § 1203.4, and argued that his criminal history category accordingly "overstate[d]" the seriousness of his criminal record. C.A. App. 114 (citing Guidelines § 4A1.3(b)(1)). The district court rejected the argument, explaining that it had no authority to reexamine Guidelines determinations not affected by the crack cocaine amendments. J.A. 41-42.

On appeal, petitioner for the first time raised the argument he now makes in this Court: that petitioner's criminal history category had been incorrectly calculated from the start because petitioner had not been sentenced to "a term of probation of at least one year or a term of imprisonment of at least thirty days," as required by Guidelines § 4A1.2(c)(1). See Pet. C.A. Br. 48-51.

c. Because petitioner failed to present the argument to the district court, the district court's failure to correct that purported error in petitioner's Section 3582(c)(2) proceedings is reviewable, at most, for plain error under Federal Rule of Procedure 52(b). Under the plain-error rule, a de-

fendant must demonstrate that he suffered obvious error resulting in prejudice, and that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 469 (1997). Petitioner cannot make that showing.

2. As an initial matter, petitioner's argument that the district court in his Section 3582(c)(2) proceedings was not only permitted, but obligated, to correct the purported error in the calculation of his criminal history score rests critically on the proposition that *Booker* invalidates the limitations on sentencing reduction proceedings embodied in Section 3582(c)(2) and Guidelines § 1B1.10.

Contrary to petitioner's argument (Pet. Br. 46-47), Section 3582(c)(2) and Guidelines § 1B1.10, by their terms, confer no authority to revisit sentencing decisions unrelated to the Guidelines amendment on which sentence reduction proceedings are based. Indeed, Guidelines § 1B1.10 specifically directs that district courts, in calculating the amount of reduction authorized by a Guidelines amendment, "shall leave all other guideline application decisions unaffected." Guidelines § 1B1.10(b)(1).[10] Thus, if the district court was

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[10] Petitioner cites (Pet. Br. 47) *United States* v. *Adams*, 104 F.3d 1028 (8th Cir. 1997), for the proposition that Guidelines § 1B1.10 does not "'prohibit' the district court from reconsidering prior decisions." Petitioner's reliance on *Adams* is misplaced for at least two reasons. First, in the passage on which petitioner relies, the Eighth Circuit addressed only whether Section 1B1.10's instruction that "[a]ll other guidelines application decisions remain unaffected," Guidelines § 1B1.10, comment. (n.2) (1995), barred the district court from reconsidering factual findings relevant to the Guidelines amendment at issue. *Adams*, 104 F.3d at 1030. The Eighth Circuit did not hold, as petitioner now urges, that the district court would be free to reconsider Guidelines determinations wholly unrelated to the amendment. Second and in any event, the Eighth Circuit ultimately concluded, based in part on another portion of Section 1B1.10, that even limited reconsideration of factual find-

compelled to reconsider the criminal history category calculation it had made at petitioner's sentencing in 1993, it can only be because *Booker* overrides the limitations embodied in Section 3582(c)(2) and Guidelines § 1B1.10 and requires that district courts be permitted to reopen all aspects of the defendant's sentence in the course of Section 3582(c)(2) sentence-reduction proceedings. For all the reasons explained above, *Booker* does not command that result. See pp. 16-38, *supra*.

3. In any event, petitioner's assignment of error fails even on the terms of his own argument. As noted above, because petitioner did not raise the argument in the district court, it is reviewable only for plain error. Further, as petitioner acknowledges (Pet. Br. 47-48), even if the district court in petitioner's Section 3582(c)(2) proceedings otherwise had authority to consider sentencing issues unrelated to the application of the crack cocaine amendments, the court's calculation of petitioner's criminal history category at his 1993 sentencing is the law of the case. That calculation is therefore not subject to reconsideration unless petitioner can demonstrate that it was "clearly erroneous and would work a manifest injustice." Pet. Br. 48 (quoting *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983)).

Petitioner has not demonstrated that his criminal history category was based on error at all, much less an error that should have been obvious to the district court. His argument depends on a factual premise unsupported by the record: that the California court that sentenced petitioner following his resisting arrest conviction in 1990 suspended

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ings directly relevant to the application of the Guidelines amendment would be inappropriate. *Id.* at 1030-1031 ("We think it implicit in [Guidelines § 1B1.10(b) (1995)] that the district court is to leave all of its previous factual decisions intact when deciding whether to apply a guideline retroactively.").

his two-year sentence of probation. See Pet. Br. 40, 41.[11] The record indicates only that imposition of sentence had been suspended and that petitioner had received two years of probation. PSR ¶ 47. The reference to the suspension of imposition of sentence does not, as petitioner suggests, establish that "the probationary portion of [petitioner's] sentence was suspended." Pet. Br. 40, 41. In California, "probation" *is* "the suspension of the imposition or execution of a sentence," accompanied by an "order of conditional and revocable release in the community under the supervision of a probation officer." Cal. Penal Code. § 1203(a). California law empowers trial courts in misdemeanor cases "to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed three years." *Id.* § 1203a.[12]

Petitioner identifies nothing in California law that would permit a court to impose probation and then suspend it.[13]

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[11] Petitioner notes (Pet. Br. 40) that he had been placed in, and successfully completed, a six-month diversion program. Petitioner was placed in that program in connection with a later-dismissed charge for possession of crack cocaine. See PSR ¶ 47. The disposition of the possession charge has no bearing on the district court's treatment of petitioner's conviction for resisting arrest.

[12] Whether the court suspends imposition of sentence or imposes sentence but suspends its execution determines the scope of sentencing options in the event the court subsequently revokes probation. See *People* v. *Wagner*, 201 P.3d 1168, 1174 (Cal. 2009); *People* v. *Howard*, 946 P.2d 828, 830 (Cal. 1997).

[13] In *United States* v. *Mejia*, 559 F.3d 1113 (9th Cir. 2009), on which petitioner relies (Pet. Br. 41), the defendant's probation following his California resisting arrest conviction had not been suspended, but rather was terminated three days after it was imposed. *Mejia*, 559 F.3d at 1115-1116. The record in this case contains no indication that petitioner's probation was terminated before the probation period expired.

And in any event, he offers no persuasive reason to think that such an unorthodox disposition occurred in his case. Thus, even if, as petitioner argues (Pet. Br. 41), assigning a criminal history point based on a suspended two-year period of probation would have been "plainly" or "clearly" erroneous under Guidelines § 4A1.2(c)(1), see *United States* v. *Mejia*, 559 F.3d 1113, 1116 (9th Cir. 2009); but see *United States* v. *Gonzales*, 506 F.3d 940, 950-951 (9th Cir. 2007) (en banc) (Ikuta, J. dissenting), petitioner has not established that any such error occurred here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. 18 U.S.C. 3553(a) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

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

(2) the need for the sentence imposed—

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

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

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

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

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

3. 18 U.S.C. 3582(c) provides:

Imposition of a sentence of imprisonment

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of

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

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

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

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

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

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the

court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

4. 28 U.S.C. 994 provides in pertinent part:

Duties of the Commission

(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—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

* * * * *

(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—

* * * * *

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

* * * * *

(*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. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

* * * * *

(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.

5. Sentencing Guidelines § 1B1.10 (2008) provides:

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

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

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

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

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

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

(b) Determination of Reduction in Term of Imprisonment.—

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

(2) Limitations and Prohibition on Extent of Reduction.—

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

(B) Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defen-

dant 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 au-

thorize 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 section 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines[*] or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).

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