# 09-3388-cr

*To Be Argued By*:
PATRICK F. CARUSO

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-3388-cr**

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UNITED STATES OF AMERICA,
*Appellee,*

-vs-

ROBERT THOMAS, also known as Brooklyn,
*Defendant-Appellant,*

(For continuation of Caption, See Inside Cover)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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DAVID B. FEIN
*United States Attorney*
*District of Connecticut*

PATRICK F. CARUSO
SANDRA S. GLOVER *(of counsel)*
*Assistant United States Attorneys*

JULIUS MOORING, also known as Red, EDWARD HINES, also known as Junior, RODNEY NELSON, also known as Cease, MICHELLE GROOM, MARK BENTON, LISA CRAGGETT, JESSICA NICHOLAS, CRAIG MOYE, also known as Craig Mack, JAMEL NOBLES, also known as Dungeon, KYRON DERIEN, also known as K.Y., DENNIS SIMMS, also known as Diner, JOHN NELSON, also known as Joe Doe, GREGORY KEETON, also known as G-Grip, HENRY SMITH, also known as June B, KEVIN CRAFT, also known as Kev, TYRELL EVANS, also known as Rell, HERBERT TISDALE, also known as H.G., BEN TISDALE, also known as Killer, PAUL GRANT, also known as Buddha, RASHAD HARLEY, also known as Hump, MILTON MENAFEE, also known as Milt, also known as Taiwan Stanley, CARLYLE HENRY, also known as C.J., GERALD DRIFFIN, also known as Jarjuan Driffin, also known as Nut, SHONTA MCPHERSON, also known as Shont Boogie, TYRON LABARRON SLEDGE, also known as T.Y., TYWOINE GARY, also known as Pillsbury, TYRECE DAVIS, also known as Ty, TAVARE ATKINSON, also known as Cool V., RONALD DOUGLAS, also known as Puda, ALBERT SUMLER, also known as Wack, TYRELL DORSEY, also known as Relli-Rell, RANDY FRAZIER, also known as Black Cat, JERMAINE NELSON, also known as Half, LUIS LIND, also known as Pretty Lou, AMOS TERRY, also known as Fame, NIJAJUAN HOWARD, also known as Flight, KEEROME SUGGS, MICHAEL EDMUNDSON, also known as Family Mike, ELIAS RIVERS, also known as Crack Baby, LEE MITCHELL, also known as Harry O, JAMES CALHOUN, also known as Barr, TYRONE STOKES, also known as T.Y., WILFREDO RODRIGUEZ, also known as Puerto Rico, ANTHONY LITTLE, MATTHEW MERCER, also known as Mat Mat, and FRANK PINA,

*Defendants.*

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## Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court denied the defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) in an order entered July 28, 2009. Defendant's Appendix ("DA") 4. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on August 3, 2009. DA-4.

This Court has jurisdiction over an appeal of a final order denying a § 3582(c)(2) motion under 28 U.S.C. § 1291. *See United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam).

## Statement of Issue
## Presented for Review

Whether the district court, on a motion to reduce sentence pursuant to 18 U.S.C. §3582(c)(2), correctly declined to engage in a full resentencing and reconsider the defendant's career offender status.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-3388-cr**

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UNITED STATES OF AMERICA,
*Appellee,*
-vs-

ROBERT THOMAS,
*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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## BRIEF FOR THE UNITED STATES OF AMERICA

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### Preliminary Statement

This appeal arises from a motion filed by the defendant, Robert Thomas, to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). Thomas sought to have his sentence reduced in light of amendments to the Sentencing Guidelines that reduced the base offense levels for cocaine base ("crack") offenses. At the same time, however, he also sought to have the district court engage in a full resentencing and reconsider his career offender status.

The district court denied the defendant's motion. It held that, although Thomas was eligible for a reduction of his sentence, his violent criminal history, public safety considerations, and other sentencing factors, counseled against such a reduction. The district court also held that the plain language of U.S.S.G. § 1B1.10(b)(1) precluded it from reconsidering its prior determination that Thomas was a career offender.

On appeal, Thomas only challenges the district court's refusal to reconsider his career offender status. He appears to concede that the district court's decision on this point was consistent with this Court's decision in *United States v. Savoy*, 567 F.3d 71 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 342 (2009), which held that U.S.S.G. § 1B1.10 is binding on sentencing courts. He contends, however, that *Savoy* was wrongly decided and could be overruled by the United States Supreme Court's anticipated ruling in *Dillon v. United States*, No. 09-6338 (U.S., arg. March 30, 2010).

This Court should affirm the district court's ruling. Second Circuit precedent establishes that Thomas was not entitled to reconsideration of his career offender status.

**Statement of the Case**

On April 27, 2004, a federal grand jury sitting in New Haven, Connecticut, returned an indictment charging the defendant and 48 others with various drug-trafficking offenses, including conspiracy to distribute cocaine base.

Government Appendix[1] ("GA") 6. The case was assigned to the Honorable Janet C. Hall, United States District Judge for the District of Connecticut.

On June 24, 2005, a jury convicted Thomas of conspiracy to possess with intent to distribute more than five grams, but less than 50 grams, of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. GA4, 16. On February 16, 2006, the district court sentenced Thomas to 180 months of imprisonment. GA19.

Thomas appealed his conviction, and this Court affirmed on September 18, 2008. *United States v. Evans*, 293 Fed. Appx. 63 (2d Cir. 2008).

On May 15, 2009, the defendant filed a motion in the district court seeking a reduction of his sentence pursuant to 18 U.S.C. § 3582(c)(2) and a full resentencing. GA21, 38-41. The district court denied the motion in an order filed July 24, 2009. GA22, DA-5. The ruling was entered on the docket July 28, 2009, GA22, and the defendant filed a timely notice of appeal on August 3, 2009, GA22, DA-15.

The defendant is currently serving his sentence.

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[1] The government is submitting a proposed Government Appendix with materials, including a complete docket sheet, omitted from the defendant's appendix.

## Statement of Facts and Proceedings Relevant to this Appeal

### A. Conviction and sentence

Thomas was convicted, after trial, for his role in a large-scale cocaine base distribution organization that operated in and around New Haven, Connecticut, in 2003 and 2004. GA23, 29-32. Prior to trial, the government filed a second-offender information pursuant to 21 U.S.C. § 851, because Thomas had been previously convicted of a felony narcotics offense. GA16. Thus, as result of his conviction in the present case, Thomas faced a mandatory minimum term of imprisonment of 120 months, with a maximum of life, when he appeared for sentencing. 21 U.S.C. §§ 841(b)(1)(B), 851.

The Pre-Sentence Report ("PSR") documented Thomas's lengthy and disturbing criminal history and properly classified Thomas as a career offender whose Guidelines range was 360 months to life in prison, based upon a career-offender offense level of 37, and a criminal history category of VI. GA45-46 (describing guidelines calculation), DA-5. Thomas did not object to the career offender classification. GA46.

On February 16, 2006, at Thomas's sentencing hearing, the court adopted the findings contained in the PSR, and concluded that Thomas was, indeed, a career offender. DA-5, GA45. The district court also found that a two-point increase in Thomas's offense level was warranted because he had obstructed justice. DA-5, GA45. The district court,

in addition, concluded that at least five grams, but less than 20 grams, of cocaine base was properly attributable to Thomas as a result of his participation in the conspiracy alleged in the indictment. DA-5.

Thus, without career offender status, Thomas's offense level would have been 28. DA-5, GA45. With a criminal history VI, DA-5, he would have faced a Guidelines range of 140 to 175 months of imprisonment had he not been classified as a career offender. DA-5.

The court granted Thomas a downward departure from his applicable Guidelines range of 360 months to life in prison, pursuant to the reasoning set forth in *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), and sentenced him to 180 months' imprisonment. DA-5, 6. Though he appealed his conviction, Thomas did not appeal any aspect of the 180-month sentenced imposed by the district court. *See* GA38-39. This Court affirmed Thomas's conviction. *Evans*, 293 Fed. Appx. 63.

### B. Motion for reduced sentence under 18 U.S.C. § 3582(c)(2)

On May 15, 2009, Thomas filed a motion seeking a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2) based upon changes to the crack cocaine Guidelines that were passed by the Sentencing Commission on November 1, 2007. GA21, 38. Through this motion, he also requested a "full sentencing hearing" and contended, for the first time, that he was not a career offender. GA41. Specifically, Thomas asked the court to

reconsider his designation as a career offender in light of this Court's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), a decision that came down after his sentencing in 2006.

The district court denied the relief requested in Thomas's motion. First, the court concluded that, although Thomas was sentenced as a career offender and would ordinarily be ineligible for relief under § 3582, he was eligible for a reduction in his sentence consistent with this Court's decision in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam). DA-6-9. This was so because at sentencing, the district court had expressly consulted the Sentencing Guidelines section applicable to cocaine base offenses, U.S.S.G. § 2D1.1, in determining "how far to depart for overstatement of offense level as a function of career offender status." DA-8-9. Having determined that Thomas was eligible for a relief under § 3582, the district court "decline[d] to exercise its discretion to reduce Thomas's sentence." DA-10. It declined to do so because various sentencing "factors and public safety considerations [did] not support a reduction." DA-11.

Second, the district court refused to reconsider Thomas's designation as a career offender. The district court noted that under § 3582(c)(2), its authority to reduce the defendant's sentence was limited by the requirement that any reduction be "'consistent with applicable policy statements issued by the Sentencing Commission.'" DA-9 (quoting 18 U.S.C. § 3582(c)). The policy statement, in turn, provided that "'the court shall substitute only the amendments . . . and shall leave all other guidelines

application decisions unaffected.'" DA-10 (quoting U.S.S.G. § 1B1.10(b)(1)). Therefore, because the new crack guidelines did not alter the career offender guidelines, the court held that it "must leave its determination that Thomas qualified for career offender status 'unaffected.'" DA-10.

Thomas does not appeal the district court's discretionary decision to deny him a sentence reduction. Rather, Thomas appeals only the district court's conclusion that he was not entitled to a full resentencing, at which he could argue, for the first time, that he was not a career offender.

## Summary of Argument

The district court properly declined to reconsider Thomas's designation as a career offender in his motion for a sentence reduction under 18 U.S.C. § 3582. The court's authority to modify the defendant's sentence under that section is limited by the terms of the statute which require that any modification be consistent with the Sentencing Commission's policy statement. The relevant policy statement authorizes a district court to reduce a sentence when it was based on a guideline range that was subsequently reduced, but expressly precludes reconsideration of other guidelines issues. This policy statement is binding, and thus the district court properly refused to reconsider Thomas's status as a career offender.

## Argument

### I. The district court properly declined to reconsider the defendant's status as a career offender when considering his motion to reduce his sentence under 18 U.S.C. § 3582(c)(2).

The defendant's sole argument on appeal is that the district court erred in refusing to reconsider his status as a career offender in light of this Court's decision in *Savage*. The defendant notes that binding precedent from this Court supports the district court's decision, but contends that the Supreme Court's anticipated decision in *Dillon v. United States*, No. 09-6338 (U.S., arg. March 30, 2010) might over-rule that precedent. The district court's judgment should be affirmed.

#### A. Governing law and standard of review

##### 1. Section 3582(c)(2) and the amended crack guidelines

"A district court may not generally modify a term of imprisonment once it has been imposed." *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007). Indeed, this Court has noted that "Congress has imposed stringent limitations on the authority of courts to modify sentences, and courts must abide by those strict confines." *United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998). This has been characterized as a jurisdictional limitation on the power of federal courts. *See United States v. Regalado*, 518 F.3d 143, 150-51 (2d Cir. 2008) (noting in dicta that

§ 3582(c)(2) gives district courts jurisdiction to modify a sentence).

One limited exception to the rule prohibiting district courts from modifying a final sentence is in 18 U.S.C. § 3582(c)(2), which provides:

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

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

Section 1B1.10 is based on 18 U.S.C. § 3582(c)(2), and also implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what

circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

On December 11, 2007, the Commission issued a revised version of § 1B1.10, which emphasizes the limited nature of relief available under 18 U.S.C. § 3582(c). *See* U.S.S.G. App. C, Amend. 712.

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

(a) *Authority*. –

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

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

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

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

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

U.S.S.G. § 1B1.10(a).

Section 1B1.10(b) sets forth procedures for deciding whether a sentence reduction is appropriate and limits the extent of any departure based on a guideline amendment that applies retroactively. Section 1B1.10(b)(1), for instance, provides that, "[i]n determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) . . . is warranted . . . the court shall substitute only the amendments [reducing offense levels for cocaine base offenses] . . . for the corresponding guidelines provisions that were applied when the defendant was sentenced and shall leave all other guidelines application decisions unaffected." U.S.S.G. § 1B1.10(b)(1).

Thus, "the Commission made clear that 'proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.'"

*Savoy*, 567 F.3d at 73 (quoting U.S.S.G. § 1B1.10(a)(3)). Section 1B1.10 of the Sentencing Guidelines is, moreover, "binding on sentencing courts." *Id.*

The amendment in question in this matter is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.[2]

In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine offenses. The Commission reasoned that, putting aside its stated criticism of the 100:1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory mandatory minimum penalties, the Commission could respect those mandatory penalties while still reducing the offense levels for crack offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706.

The final result of the amendment is a reduction of two levels for each of the ranges set in the Guidelines for crack offenses. At the high end, the guideline previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more; a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36. At the low end, the guideline previously assigned level 12 to a quantity of less than 250 milligrams. That offense level now applies to a quantity of less than 500 milligrams.

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

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

**2. Standard of review**

This Court reviews a district court's interpretation of the statute and the Guidelines *de novo*. *McGee*, 553 F.3d at 226; *United States v. Martinez*, 572 F.3d 82, 84 (2d Cir. 2009) (per curiam); *Savoy*, 567 F.3d at 72.

**B. Discussion**

On appeal, Thomas only challenges the district court's refusal to reconsider his designation as a career offender in light of *Savage*. But as Thomas appears to concede, the district court's decision on this point was dictated by this Court's binding decision in *Savoy*.

In denying the defendant's request to reconsider his career offender status, the district court held that it had "no authority" to reconsider the career offender designation and wrote as follows:

> When a guideline change has been made retroactive, the court's sole authority to reduce a defendant's sentence arises from 18 U.S.C. § 3582(c). That statute requires that any sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* Here, the relevant policy statement provides that, in determining whether to reduce a defendant's sentence, "the court shall substitute only the amendments . . . and shall leave all other guidelines application decisions unaffected." USSG § 1B1.10(b)(1). Because the crack-cocaine amendments did nothing to alter the provisions for calculating career offender status, the court must leave its determination that Thomas qualified for career offender status "unaffected."

DA-9-10.

The district court's refusal to reconsider those parts of the defendant's sentence unrelated to the crack cocaine guidelines was fully proper. Section 3582(c)(2) provides a "limited exception[]" to the general rule that "a district court may not generally modify a term of imprisonment once it has been imposed." *McGee*, 553 F.3d at 226 (internal quotation omitted). Under the terms of this limited exception, a defendant is entitled to relief under § 3582(c)(2) "only . . . if (a) the defendant was sentenced 'based on a sentencing range that has subsequently been lowered by the Sentencing Commission' and (b) the reduction is 'consistent with applicable policy statements

issued by the Sentencing Commission.'" *Martinez*, 572 F.3d at 84 (quoting § 3582(c)(2)).

In short, a defendant's right to relief under this statute arises only when the Sentencing Commission lowers a guidelines range. Given this limited triggering event,"it would be quite incongruous, to say the least, if section 3582(c)(2) provided an avenue for sentencing adjustments wholly unrelated to such an amendment." *United States v. Lafayette*, 585 F.3d 435, 438 (D.C. Cir. 2009). If construed this way, "every retroactive Guidelines amendment would carry a significant collateral windfall to all affected prisoners, reopening every aspect of their original sentences." *Id.*

Moreover, such an interpretation would be inconsistent with the Sentencing Commission's policy statement. In its recently revised policy statements, the Sentencing Commission made clear that proceedings under § 1B1.10 and § 3582(c)(2) "do not constitute a full resentencing of the defendant." § 1B1.10(a)(3). Furthermore, in subsection (b)(1) the policy statement explicitly directs that "[i]n determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court . . . shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected."

And as this Court has repeatedly held, the restrictions in § 1B1.10 are mandatory and must be respected. *See Savoy*, 567 F.3d at 73-74 (policy statement's restriction requiring that any sentence reduction be within the amended guideline range when the original sentence was within the pre-amendment range is mandatory; noting that § 3582 not a full resentencing); *United States v. Williams*, 551 F.3d 182, 186 (2d Cir. 2009) (guidelines policy statement mandatory). In *Williams*, for instance, this Court held that the defendant was ineligible for a sentence reduction under § 3582(c)(2) because his sentence ultimately had not been based on the cocaine base guidelines. 551 F.3d at 185-87. The Court referred to the policy statement in § 1B1.10 and its application notes, and held: "We are bound by the language of this policy statement because Congress has made it clear that a court may reduce the terms of imprisonment under § 3582(c) only if doing so is 'consistent with applicable policy statements issued by the Sentencing Commission.'" *Id.* at 186 (quoting 18 U.S.C. § 3582(c)(2)). Similarly, in *Savoy*, this Court rejected the argument that *United States v. Booker*, 543 U.S. 220 (2005), "render[ed] [the] policy statement advisory." 567 F.3d at 72. Reaffirming its decision in *Williams*, the Court held that "§ 1B1.10 is binding on sentencing courts." *Id.* at 73.

This interpretation of § 3582(c)(2) is fully consistent with the holdings of other courts that have made plain that a § 3582(c)(2) sentence-reduction proceeding is not a full resentencing at which a district court may re-examine all prior sentencing issues. Instead, such a proceeding is limited to the court's substitution of the amended guideline

range for the original range used at sentencing, and a determination as to whether to grant a reduction. *See United States v. Styer*, 573 F.3d 151, 153-54 (3d Cir.) (holding that § 3582 proceeding is not a full resentencing and that courts must consider only the retroactive amendment and leave all other guidelines determinations alone; rejecting claim that defendant was entitled to an evidentiary hearing on § 3582 motion), *cert. denied*, 130 S. Ct. 434 (2009); *United States v. Doublin*, 572 F.3d 235, 238-39 (5th Cir.) (per curiam) (noting differences between § 3582 proceeding and full sentencing; holding that § 3582 is not a full resentencing and that § 1B1.10 is mandatory), *cert. denied*, 130 S. Ct. 517 (2009); *United States v. Evans*, 587 F.3d 667, 670-74 (5th Cir. 2009) (citing cases concerning mandatory application of guidelines policy statement; rejecting argument challenging criminal history score because a § 3582 motion is not appropriate vehicle); *United States v. Metcalfe*, 581 F.3d 456, 459 (6th Cir. 2009) ("[W]e emphatically agree that § 3582(c)(2) is not an 'open door' that allows any conceivable challenge to a sentence."); *United States v. Young*, 555 F.3d 611, 614-15 (7th Cir. 2009) (§ 3582 proceeding is not a full resentencing and therefore does not require an evidentiary hearing); *United States v. Harris*, 574 F.3d 971, 972-73 (8th Cir. 2009) (§ 3582 is not a full resentencing and not a "'do-over'" of original sentencing; district court precluded under policy statement from reconsidering other guidelines applications, such as the consecutive nature of the sentence); *Lafayette*, 585 F.3d at 438-39 (holding that § 3582 permits courts only to consider consequences of guidelines changes and does not reopen other elements of a sentence).

In short, as the district court properly held, the defendant may not now attack his career offender designation by invoking the district court's limited jurisdiction under § 3582(c)(2). The binding policy statement precludes reconsideration of guidelines application decisions other than those impacted by the newly lowered guidelines range.

Thomas appears to concede as much, noting that the district court's ruling was in accord with *Savoy*, and that *Savoy* is binding precedent in this Circuit. Defendant's Brief at 3-4. Nevertheless, he suggests that the Supreme Court's anticipated decision in *Dillon* could overrule *Savoy*, and thus asks this Court to delay its decision until after the Supreme Court announces its decision in *Dillon*. *Id.* at 4.

While the government agrees that the Supreme Court's decision in *Dillon* may address issues related to this appeal, for the reasons described above, the government believes that *Savoy* and *Williams* were correctly decided. If the Supreme Court's *Dillon* decision alters the governing law in any way, the government will, of course, notify the Court of this development immediately. In the interim, given the imminent decision in *Dillon* – a decision is expected within the next month – there is no basis for delaying resolution of this case.

## Conclusion

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

Dated: June 1, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

PATRICK F. CARUSO
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

# ADDENDUM

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

* * *

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

**(1)** in any case--

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

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

**(ii)** the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a

> danger to the safety of any other person or the community, as provided under section 3142(g);

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

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

**(2)** in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

**U.S.S.G. § 1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)**

(a) Authority.--

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

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

(A) none of the amendments listed in subsection (c) is

applicable to the defendant; or

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

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

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

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

listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

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

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

(B) Exception.--If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range

determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

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

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

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

* * *

**(u)** If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.