09-0042-cr(L)

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-0042-cr(L)
09-1387-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

SHONTA MCPHERSON, also known as Shont Boogie,
LEE MITCHELL, also known as Harry-O,
Defendants-Appellants.

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

Statement of Jurisdiction

The district court (Hon. Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court originally entered a final judgment on December 2, 2005. Joint Appendix ("JA") 88.

On February 12, 2008, McPherson filed a motion under 18 U.S.C. § 3582(c)(2) seeking a modification of his sentence. JA89. While that motion was pending, the district court appointed counsel for McPherson, and counsel filed a similar motion on May 6, 2008. JA90. The district court denied both motions in a ruling filed November 21, 2008; that ruling was entered on the docket November 25, 2008. JA91. On December 30, 2008, the district court filed an amended ruling in which it again denied both motions. *Id*. On January 5, 2009, McPherson filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA91-92.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue Presented for Review

McPherson was categorized as a career offender under U.S.S.G. § 4B1.1. At sentencing, the district court granted a downward departure from the career offender guidelines, but the departure was not tied to the drug quantity guidelines. After the Sentencing Commission amended the drug quantity guideline to reduce offense levels for crack cocaine offenses, the defendant requested a sentence reduction under 18 U.S.C. § 3582(c)(2). Did the district court properly deny McPherson's motion when his original sentence was based on the career offender guideline, not the crack cocaine guideline?

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Preliminary Statement

This appeal challenges the district court's denial of Shonta McPherson's motion for sentence reduction under 18 U.S.C. § 3582(c)(2). McPherson entered a plea of guilty to crack cocaine conspiracy charges, and was sentenced pursuant to the career offender provision in

U.S.S.G. § 4B1.1. At sentencing, the district court granted a downward departure, but the departure was not based on, or tied to, the drug quantity guidelines. Subsequently, after the Sentencing Commission reduced the base offense levels for crack cocaine offenses under U.S.S.G. § 2D1.1 and made those changes retroactive, McPherson requested a sentence reduction under 18 U.S.C. § 3582(c), claiming that the Sentencing Commission's reduction of the sentencing guidelines for crack cocaine offenses entitled him to relief. The district court denied McPherson's motion because his sentence was based on the career offender guidelines in U.S.S.G. § 4B1.1, and not on the crack cocaine guidelines in U.S.S.G. § 2D1.1.

The district court's judgment should be affirmed. McPherson was not sentenced based on a sentencing range that was subsequently lowered by the Sentencing Commission, and a reduction of his sentence would be inconsistent with the applicable policy statement of the Sentencing Commission.

Statement of the Case

On April 27, 2004, a federal grand jury in New Haven, Connecticut returned an indictment against 50 individuals, including McPherson, charging McPherson and others with one count of conspiracy to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). JA70.

On December 20, 2004, McPherson pleaded guilty to a one-count substitute information charging him with

conspiracy to possess with intent to distribute at least 150 but less than 500 grams of cocaine base. JA83, 4. On November 29, 2005, the district court (Hon. Janet C. Hall, J.) sentenced McPherson to 150 months of imprisonment and five years of supervised release. JA88.

On February 12, 2008, McPherson filed a motion for a reduction of sentence under 18 U.S.C. § 3582(c)(2). JA89-90. On May 6, 2008, another such motion was filed on his behalf. JA 90. The district court denied those motions in a ruling dated November 21, 2008. JA91. The ruling entered November 25, 2008. *Id*. On December 30, 2008, the district court filed an amended ruling, entered on the same day, in which the motions were also denied. *Id*. McPherson filed a timely notice of appeal on January 5, 2009. JA91-92.

The defendant is in custody serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. McPherson's plea and sentencing

On April 27, 2004, a federal grand jury in New Haven, Connecticut returned an indictment against 50 individuals, including McPherson, charging McPherson and others with one count of conspiracy to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). JA70.

On December 20, 2004, McPherson pleaded guilty to a one-count substitute information charging him with conspiracy to possess with intent to distribute at least 150 but less than 500 grams of cocaine base. JA83, 4.

On November 29, 2005, the district court sentenced McPherson to 150 months of imprisonment and five years of supervised release. JA88. At the time of sentencing in this case, the district court calculated the defendant's base offense level as 37 based on the career offender guideline in U.S.S.G. § 4B1.1(b)(A). On motion of the government, the court reduced the offense level by three in recognition of the defendant's acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b), for an adjusted offense level of 34, Criminal History Category VI, and a resulting guideline range of 262 to 327 months. JA26-27. Thereafter, citing the small quantities of narcotics involved in several prior offenses which had contributed to the defendant's classification as a career offender, and the defendant's cooperation with local authorities, JA44-

45, the court departed downward and imposed a sentence of 150 months. JA49. In calculating the defendant's sentence, the court at no time factored in a Guideline level or range that flowed from the quantity of cocaine base (crack) attributed to the defendant for the offense of conviction.

B. McPherson's motions under 18 U.S.C. § 3582(c)(2)

On February 12, 2008, McPherson filed a *pro se* motion in which he sought the appointment of counsel to pursue a reduction of his sentence. JA89-90, 58. On May 6, 2008, newly appointed counsel filed a motion for a sentence reduction under 18 U.S.C. § 3582(c), JA90, 59, based on Amendment 706 to the Sentencing Guidelines.

The district court denied the defendant's motions in an amended ruling entered December 30, 2008. JA91. In this ruling, the district court noted that it had determined McPherson to be a career offender. JA1. The district court went on to observe that,

> "[b]ecause of McPherson's career offender status, his pre-departure guidelines range is calculated as 262-327 months' imprisonment both before and after the recent amendment [to the crack cocaine guideline]. Accordingly, his 'applicable guideline range' has not been altered and he is ineligible for a reduction in his sentence."

JA2-3.

Summary of Argument

McPherson is ineligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). Under that section, a sentence may be reduced if (1) it was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission," and (2) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* Here, McPherson was sentenced based on a sentencing range set by the career offender guidelines, which have not been lowered by the Sentencing Commission. That the district court afforded McPherson a departure from the career offender guidelines does not change this conclusion, as there is nothing in the record to suggest that McPherson's sentence was in any way "based on" sentencing guidelines which have been lowered by the Sentencing Commission, here, the crack cocaine sentencing guidelines. Further, a sentencing reduction for McPherson would not be consistent with applicable Sentencing Commission policy statements. Accordingly, the district court's decision declining to grant McPherson a sentence reduction under 18 U.S.C. § 3582(c)(2) should be affirmed.

McPherson also suggests that he should be afforded a re-sentencing under *Kimbrough v. United States*, 552 U.S. 85 (2007) and *Gall v. United States*, 552 U.S. 38 (2007). Defendant's Brief at 2. This argument is foreclosed by *Dillon v. United States*, 130 S. Ct. 2683 (2010), in which the Supreme Court held that a proceeding under § 3582(c)(2) is not a full re-sentencing, and not a proceeding to re-consider aspects of a sentence that were

unaffected by the Commission's change to a sentencing guideline.

Argument

I. The district court properly denied McPherson's request for a reduced sentence under 18 U.S.C. § 3582 because his original sentence was not "based on" U.S.S.G. § 2D1.1.

A. Governing law and standard of review

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

"'A district court may not generally modify a term of imprisonment once it has been imposed.'" *United States v. Martinez*, 572 F.3d 82, 84 (2d Cir. 2009) (per curiam) (quoting *Cortorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam)); *see also Dillon*, 130 S. Ct. at 2690. However, under 18 U.S.C. § 3582(c)(2), a district court may reduce a defendant's sentence under very limited circumstances:

> [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.

18 U.S.C. § 3582(c)(2).

In § 1B1.10 of the guidelines, the Sentencing Commission has identified the amendments that may be applied retroactively pursuant to this authority and articulated the proper procedure for implementing the amendment in a concluded case.[1] 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).[2] *See* U.S.S.G. App. C, Amend.

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[1] 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."

A guideline amendment may be applied retroactively only when expressly listed in § 1B1.10(c). *See*, *e.g.*, *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997); *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995) (per curiam).

[2] Subsequently, the Commission further revised § 1B1.10(c) to reflect that a subsequent Amendment to the crack guidelines (changing the way combined offense levels are determined in cases involving crack and one or more other (continued...)

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

> (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

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[2] (...continued)
drugs), effective May 1, 2008, would be applied retroactively. U.S.S.G. App. C, Amend. 715. However, this change has no impact on the current case.

(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.

The amendment in question in this case is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses.[3] On December 11, 2007, the Commission added Amendment 706 to the list of amendments identified in § 1B1.10(c) that may be applied retroactively, effective March 3, 2008. U.S.S.G. App. C, Amend. 713.

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.

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

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.

2. Standard of review

The denial of a motion pursuant to 18 U.S.C. § 3582(c)(2) is reviewed for abuse of discretion. *United States v. Mock*, No. 09-4154-cr, 2010 WL 2802553, at *2 (2d Cir. July 19, 2010) (per curiam). Within that inquiry, "[t]he determination of whether an original sentence was 'based on a sentencing range that was subsequently lowered by the Sentencing Commission,' 18 U.S.C. § 3582(c)(2), is a matter of statutory interpretation and is thus reviewed *de novo*." *Martinez*, 572 F.3d at 84 (quoting *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009)). *See also United States v. McGee*, 553 F.3d 225, 226 (2d Cir. 2009) (per curiam).

B. Discussion

1. McPherson is ineligible for a sentence modification.

Pursuant to 18 U.S.C. § 3582(c)(2), a defendant who was sentenced "based on" on a guideline range that was subsequently lowered may qualify for a reduced sentence. McPherson argues that his original sentence was "based on" the crack cocaine (cocaine base) guidelines within the meaning of § 3582(c)(2) and that he is therefore eligible for a sentence reduction under Amendment 706. The record, and the relevant precedent, however, show that this is not the case. While the district court departed from the career offender guideline at McPherson's sentencing, there is nothing in the record to suggest that the sentence ultimately imposed was in any way derived from U.S.S.G. § 2D1.1. Accordingly, McPherson is ineligible for a sentence reduction under § 3582(c)(2).

This Court's decision in *United States v. Martinez*, controls this case. In *Martinez*, the Court considered the case of a defendant who was convicted of a crack cocaine offense, and sentenced pursuant to the career offender guidelines in U.S.S.G. § 4B1.1. The defendant sought a sentence reduction under 18 U.S.C. § 3582(c) based on the amendment to the crack cocaine guidelines, and the district court denied the reduction. In upholding the district court's denial of relief, this Court observed that

> reducing a defendant's sentence pursuant to § 3582(c) is only appropriate 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 18 U.S.C. § 3582(c)(2)).

With respect to the first prong of this analysis in *Martinez*, this Court held that the defendant was sentenced under the career offender guideline, not the crack cocaine guideline, and thus was not sentenced "based on a Guidelines range that has been 'subsequently lowered' by the Sentencing Commission." *Id.* Relying on its earlier decision in *United States v. Williams*, 551 F.3d 182, 185 (2d Cir. 2009), this Court explained that the defendant's

> career offender designation and § 4B1.1 "subsumed and displaced" § 2D1.1, the "otherwise applicable range" . . . . [and the defendant's] . . . sentence was therefore not "based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

Martinez, 572 F.3d at 85 (quoting *Williams*, 551 F.3d at 185).

Turning to the second question, the Court held that because the amendment to the crack cocaine guidelines did not lower the defendant's applicable guideline range, "[i]t would . . . be inconsistent with § 1B1.10 to permit reduction of [the defendant's] sentence on the basis of

[that] amendment," and accordingly not permitted by § 3582(c)(2). *Id.* at 86. *See also Dillon*, 130 S. Ct. at 2692-93 (holding that the Sentencing Commission's policy statement is binding on district court in § 3582 proceeding); *Mock*, 2010 WL 2802553, at *3 (reaffirming previous holding that courts are bound by the Sentencing Commission's policy statement).

In the course of its decision in *Martinez*, this Court distinguished *United States v. McGee*, in which it held that a defendant who qualified as a career offender but was granted a departure at sentencing could still be eligible for a reduced sentence under § 3582 and the crack guideline amendments if he was "ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." 553 F.3d at 230. As explained by the *Martinez* Court, a reduction in *McGee* was appropriate because there the district court had found that the career offender status overstated the defendant's criminal history and "'explicitly stated that it was departing from the career offender sentencing range to the level that the defendant *would have been in absent the career offender status* calculation and consideration.'" *Martinez*, 572 F.3d at 84 (quoting *McGee*, 553 F.3d at 227). In other words, although " McGee *could have* been sentenced under § 4B1.1," *id.,* a review of the record made it "apparent that McGee was sentenced 'based on' [§ 2D1.1]," *McGee*, 553 F.3d at 227.

A review of the record in this case provides no such "apparent" evidence that McPherson's sentence was based on the crack cocaine guidelines. Similar to the sentencing

court in *McGee*, the district court here departed from the career offender guideline for overstatement of criminal history and cooperation with local authorities. JA44-45. Unlike the *McGee* court, however, the district court did not afford McPherson a vertical departure back down to the crack guideline range. Rather, after the combination departure, and consideration of the sentencing factors in § 3553(a), the court determined that an appropriate sentence was 150 months. JA49, 2. While the court did not specify the range under which McPherson was sentenced, there was no explicit statement – or any other evidence – that the court relied upon the crack cocaine guideline. In fact, no further mention of his sentencing range as computed under § 2D1.1 was made.

Thus, this case is in sharp contrast with the situation in *McGee,* where the sentencing court stated specifically that it was applying the defendant's crack cocaine guidelines range. In the absence of a similar statement here, or indeed of any evidence that the crack guidelines were the touchstone for McPherson's sentence, it cannot be argued that McPherson was "ultimately *explicitly* sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." *McGee*, 553 F.3d at 230 (emphasis added). Therefore, this case does not fall under the narrow holding of *McGee*. The district court did not depart back down to the "defendant's initially applicable crack cocaine guidelines range," *id.* at 229 n.2, nor did it explicitly base McPherson's sentence on Section 2D1.1.

In response, McPherson argues only that the district court mistakenly assumed that it was statutorily barred

from altering his sentence. But the district court was not mistaken. Because McPherson was explicitly sentenced under the career offender guideline, and with no evidence that he was sentenced under the crack guidelines as in *McGee*, this cases fall squarely within the rule of *Martinez*. Under *Martinez*, "a defendant convicted of crack cocaine offenses but sentenced as a career offender under U.S.S.G. § 4B1.1 is not eligible for a sentence modification under the amendments to the crack cocaine guidelines." *Martinez*, 572 F.3d at 85; *see also Dillon*, 130 S. Ct. at 2691 (describing proceedings under § 3582 as two-step inquiry in which the district court must first determine whether the defendant is eligible for a sentence reduction by asking whether such a reduction would be consistent with the Commission's policy statement); *Mock*, 2010 WL 2802553, at *3 (noting that in first step of inquiry, court must decide whether a defendant is eligible for a sentence reduction, and holding that the defendant was ineligible for such a reduction because he was sentenced as a career offender).

As the defendant failed to qualify for relief at the first step of the two-step process prescribed by the *Dillon* Court, the inquiry is ended. *See Mock*, 2010 WL 2803553, at *3. Moreover, because the crack amendments did not lower McPherson's guidelines range, it "would . . . be inconsistent with U.S.S.G. § 1B1.10(a) to permit reduction of [McPherson's] sentence on the basis of the amendments to the crack cocaine guidelines." *Martinez*, 572 F.3d at 86. Accordingly, as a career offender sentenced under the career offender guidelines, McPherson is ineligible for a

sentence reduction under § 3582(c)(2), and the district court did not misapprehend its authority in this regard.

2. Relief under *Kimbrough* and *Gall* is not authorized.

McPherson also suggests that he was entitled to re-sentencing under *Kimbrough v. United States* and *Gall v. United States*. Defendant's Brief at 2. This argument confuses sentencing or re-sentencing with the modification remedy authorized by 18 U.S.C. § 3582(c)(2), and is expressly foreclosed by *Dillon*. As the *Dillon* Court held, § 3582(c)(2) "authorize[s] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." 130 S. Ct. at 2691. Thus, a defendant may not seek to attribute error to the original sentence in a motion under the Section. *Id.* at 2693-94 (rejecting defendant's attempt to correct mistakes from original sentencing because such corrections are outside the scope of a § 3582(c) proceeding and would be inconsistent with the Commission's binding policy statement); *Mock*, 2010 WL 2802553, at *3 ("[B]ecause § 3582(c)(2) does not authorize a sentencing or resentencing proceeding, a defendant may not seek to attribute error to the original, otherwise-final sentence in a motion under that provision.") (internal quotations and citations omitted).

Having failed to qualify for relief under Section 3582(c)(2) on the basis of amendments to the Sentencing Guidelines, McPherson was without further recourse as to the sentence imposed by the district court. The district court's denial of relief should therefore be affirmed.

CONCLUSION

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

Dated: August 12, 2010

Respectfully submitted,

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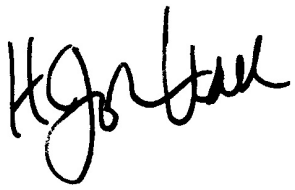

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ADDENDUM

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.