

# 09-3636-cr

To Be Argued By:  
H. GORDON HALL

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3636-cr

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

ALBERT REED SR.,

*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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## Statement of Jurisdiction

The district court (Hon. Alvin W. Thompson, C.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 November 4, 2003, and then entered a corrected judgment on November 6, 2003. Joint Appendix (“JA”) 9.

On November 13, 2003, Reed filed an appeal. *Id.* The case was remanded for a sentence modification pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and this Court’s mandate of August 31, 2005 was entered in the district court on September 15, 2005. JA10. Thereafter, counsel was appointed for Reed, and filed a motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). *Id.* The motion was granted and on May 16, 2008, the district court reduced Reed’s sentence in an order entered on May 19, 2008. JA11. By motion filed on July 21, 2008, Reed sought further relief pursuant to Section 3582(c)(2). JA12. The district court denied Reed’s motion in an order entered on July 2, 2009. *Id.* On August 24, 2009, Reed filed a notice of appeal pursuant to Fed. R. App. P. 4(b).<sup>1</sup> *Id.*

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

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<sup>1</sup> The appeal was not timely. Reed alleges in his *pro se* notice that he was not advised by his attorney of the adverse decision in the district court. *See* JA24-25. In any event, the government waives the apparent defect.

**Statement of Issue  
Presented for Review**

. Did the district court properly deny Reed's second motion for relief under 18 U.S.C. § 3582(c)(2) where the sentence under consideration was based on the career offender guideline, not the crack cocaine guideline, and where the relief he sought extended beyond consideration for a sentence affected by a Guideline amendment?

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-3636-cr

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

ALBERT REED SR.,

*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 challenges the district court's denial of Reed's second motion for sentence reduction under 18 U.S.C. § 3582(c)(2). Reed entered a plea of guilty to crack cocaine conspiracy charges, and was sentenced based on the crack cocaine Guideline in U.S.S.G. § 2D1.1(c)(1). At sentencing, the district court granted a downward departure, but the departure was neither based on, nor tied

to, the drug quantity guidelines. Subsequently, after the Sentencing Commission reduced the base offense levels for crack cocaine offenses under § 2D1.1 and made those changes retroactive, Reed requested a sentence reduction under 18 U.S.C. § 3582(c)(2), claiming that the Sentencing Commission's reduction of the sentencing guidelines for crack cocaine offenses entitled him to relief. The district court granted Reed's motion in this regard because his sentence was based on the crack guidelines in U.S.S.G. § 2D1.1. However, the crack cocaine Guideline amendment had the effect of reducing the crack-driven base offense level below the otherwise applicable career offender base level in U.S.S.G. § 4B1.1(b)(A), making the career offender base offense level the applicable base level under U.S.S.G. § 4B1.1(b). The district court then used this base offense level to compute Reed's reduced sentence.

Thereafter, Reed sought an additional reduction in his sentence, again pursuant to 18 U.S.C. § 3582(c)(2), on the basis of Amendment 715 to the Guidelines. The district court denied Reed's motion because his modified sentence was based on the career offender Guideline, rather than the crack Guideline.

The denial of the motion by the district court should be affirmed. Reed's reduced sentence was not based on a sentencing range that was subsequently lowered by the Sentencing Commission, and a further reduction of his sentence would be inconsistent with the applicable policy statement of the Sentencing Commission. Further, the additional sentence reduction Reed sought was not within

the authority of the district court to grant. The district court's decision should therefore be affirmed.

### Statement of the Case

On September 6, 2002, a federal grand jury in Hartford, Connecticut returned an indictment against 13 individuals,<sup>2</sup> including Reed, charging Reed 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)(iii). Reed was also charged with two counts of possession of cocaine base in violation of 21 U.S.C. § 841(a)(1). JA3, 13-16.

On May 12, 2003, Reed pleaded guilty to Count One of the indictment charging him with conspiracy to possess with intent to distribute 50 grams or more of cocaine base. JA8. On October 31, 2003, the district court (Hon. Alvin W. Thompson, C.J.) sentenced Reed to 132 months of imprisonment and five years of supervised release. JA9, 17. On November 13, 2003, Reed filed a notice of appeal. JA9. The case was remanded to the district court for sentence modification pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and this Court's mandate of August 31, 2005 was entered in the district court on September 15, 2005. JA10. Counsel was appointed for Reed, and filed a motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). *Id.* The motion was granted and on May 16, 2008, the district court reduced Reed's

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<sup>2</sup> The charges against one of the original 13 defendants were dismissed, as that individual was found to be a minor.

sentence to 118 months in an order entered on May 19, 2008. JA11.

By motion filed on July 21, 2008, Reed sought further relief pursuant to Section 3582(c)(2). JA12. The district court denied Reed's motion in an order entered on July 2, 2009. *Id.* On August 24, 2009, Reed filed a notice of appeal pursuant to Fed.R.App. 4(b). *Id.*

The defendant is in custody serving the reduced sentence imposed by the district court after the *Crosby* remand.

### **Statement of Facts and Proceedings Relevant to this Appeal**

#### **A. Reed's plea and sentencing**

On September 6, 2002, a federal grand jury in Hartford, Connecticut returned an indictment against 13 individuals, including Reed, charging Reed 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)(iii). Reed was also charged with two counts of possession of cocaine base in violation of 21 U.S.C. § 841(a)(1). JA3, 13-16.

On May 12, 2003, Reed pleaded guilty to Count One of the indictment charging him with conspiracy to possess with intent to distribute 50 grams or more of cocaine base. JA8. On October 31, 2003, the district court (Hon. Alvin W. Thompson, C.J.) sentenced Reed to 132 months of imprisonment and five years of supervised release. JA9,

17. In calculating the applicable Guideline range, the court found a total offense level of 35 with a criminal history category of VI, for a range of 292 to 365 months of incarceration. JA40. The court then granted a motion by the government under U.S.S.G. § 5K1.1, JA63, and departed downward to a total offense level of 27, yielding a range of 130 to 162 months of incarceration. JA64. The court then imposed a sentence of 132 months of incarceration and five years of supervised release. *Id.*

### **B. Appeal, remand and resentencing**

On November 13, 2003, Reed filed a notice of appeal. JA9. The case was remanded to the district court for sentence modification pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and this Court's mandate of August 31, 2005 was entered in the district court on September 15, 2005. JA10. Counsel was appointed for Reed, and filed a motion for sentence reduction pursuant to 18 U.S.C. § 3582(c)(2). *Id.* The motion was granted and on May 16, 2008, the district court reduced Reed's sentence to 118 months of incarceration. JA19. In doing so, the court employed a total offense level of 34 and a criminal history category of VI, for a range of 262 to 327 months incarceration. *Id.* The court then departed downward to the sentence imposed based on the government's motion. *Id.*

### **C. The second Section 3582(c)(2) motion**

By motion filed on July 21, 2008, Reed sought further relief pursuant to Section 3582(c)(2). JA12. The district

court denied Reed's motion in an order entered on July 2, 2009. *Id.* In denying the second Section 3582(c)(2) motion, the court stated that

[a]lthough the defendant was found to be a career offender, his base offense level was originally calculated using the Guideline for crack cocaine, because that Guideline resulted in a higher range than the career offender Guideline. However, after the amendment to the crack Guidelines that became effective on March 1, 2008, the applicable crack Guideline resulted in a lower range than the career offender Guideline. Therefore, the career offender Guideline was used for purposes of recalculating the defendant's sentence in May 2008. *See* U.S.S.G. § 4B1.1(b) . . . . The defendant now seeks a further reduction in his sentence based on Amendment 715, which was enacted to correct an anomaly resulting from Amendment 706. However, because the career offender Guideline was used to recalculate the defendant's sentence in May 2008, Amendment 715, on which the defendant is relying in the instant motion, does not affect his Guidelines calculation. Therefore, the court's departure is still based on a starting point of Amended Offense Level 34 and Criminal History Category VI, and the resulting sentence would still be 118 months of imprisonment.

JA22-23.

#### **D. This appeal and additional claims**

On August 24, 2009, Reed filed a notice of appeal pursuant to Fed.R.App. 4(b). *Id.* In his notice, Reed made additional claims for sentencing relief which he had not made in the district court, based on *Kimbrough v. United States*, 552 U.S. 85 (2007) and *Spears v. United States*, 129 S.Ct. 840 (2009). JA25.

#### **Summary of Argument**

Reed is ineligible for a second 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, after his first Section 3582(c)(2) motion was granted, Reed’s modified sentence was based on a sentencing range set by the career offender Guideline, which has not been lowered by the Sentencing Commission. The fact that the district court afforded Reed a departure from the career offender Guideline does not change this conclusion, as there is nothing in the record to suggest that Reed’s sentence was in any way “based on” a sentencing range which has been lowered by the Sentencing Commission, here, the crack cocaine sentencing Guidelines. Further, an additional sentencing modification for Reed would not be consistent with applicable Sentencing Commission policy statements.

Reed 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). 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.

Accordingly, the district court’s decision declining to grant Reed a second sentence modification under 18 U.S.C. § 3582(c)(2) should be affirmed.

### **Argument**

#### **I. The district court properly denied Reed’s second request for a reduced sentence under 18 U.S.C. § 3582 because his already-reduced 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.<sup>3</sup> On December 11, 2007,

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<sup>3</sup> 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."

(continued...)

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:

- (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—

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<sup>3</sup> (...continued)

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).

- (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.

The amendment in question in this case is Amendment 715, effective May 1, 2008. The Commission added Amendment 715 to the list of amendments identified in § 1B1.10(c) that may be applied retroactively, effective May 1, 2008. *See* U.S.S.G. App. C, Amend. 716.

In Amendment 715, the Commission generally revised the manner in which Guidelines are calculated for poly-drug combinations including crack, to ensure that affected offenders receive the benefit of the two-level reduction contained in Amendment 706, promulgated earlier. *See* U.S.S.G., Supplement to App. C, Amend. 715. Amendment 706 reduced by two levels the offense levels applicable to crack cocaine offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706.

## **2. Standard of review**

The denial of a motion pursuant to 18 U.S.C. § 3582(c)(2) is reviewed for abuse of discretion. *See 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 (citing *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. Relief under Amendment 715 pursuant to Section 3582(c)(2) is not available to Reed**

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. Reed argues that, because Amendment 715 became effective while his case was pending and is included in the list of amendments identified in § 1B1.10(c) that may be applied retroactively, he is therefore eligible for a sentence reduction under Amendment 715. The record, and the relevant precedent, however, show that this is not the case.

First, as Reed concedes in his brief, Amendment 715 has nothing to do with the offense of which he was

convicted or his sentencing on that conviction: the only substance involved in Reed's offense conduct was crack.

Second, at Reed's initial sentence modification, while the district court departed from the career offender Guideline based on the government's motion under U.S.S.G. § 5K1.1, the record makes clear that the sentence ultimately imposed was in no way derived from U.S.S.G. § 2D1.1.

Accordingly, Reed is ineligible for a second sentence modification under § 3582(c)(2).

This Court's decision in *United States v. Martinez*, controls this aspect of the 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 Guideline in U.S.S.G. § 4B1.1. The defendant had sought a sentence reduction under 18 U.S.C. § 3582(c) based on the amendment to the crack cocaine Guidelines, and the district court had 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, this Court held that the defendant was sentenced under the career offender Guideline, not the crack cocaine Guidelines, 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, \*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 Reed's sentence was based on the crack cocaine Guidelines and, in fact, in denying Reed's motion, the district court stated explicitly that it was not. JA23.

This case is in sharp contrast to the situation in *McGee*, where the sentencing court stated specifically that it was

applying the defendant's crack cocaine Guideline range. In light of the district court's express statement to the contrary in this case, it cannot be argued that Reed was "ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the Guidelines." *McGee* 553 F.3d at 230. 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 Reed's sentence on Section 2D1.1.

As Reed was explicitly sentenced under the career offender Guideline, and with no evidence that Reed was sentenced under the crack Guideline as in *McGee*, this case falls 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 to be resentenced under the amendments to the crack cocaine guidelines." *Martinez*, 572 F.3d at 85. Moreover, because the Amendment 715 did not lower Reed's Guideline range, it "would . . . be inconsistent with U.S.S.G. § 1B1.10(a) to permit reduction of [Reed's] sentence on the basis of the amendments to the crack cocaine guidelines." *Id.* at 86. Accordingly, as a career offender sentenced under the career offender Guideline, Reed is ineligible for a reduced sentence under § 3582(c)(2), and the district court did not misapprehend its authority in this regard.

## **2. Other sentencing relief pursuant to Section 3582(c)(2) is unavailable to Reed**

Reed also claims that the district court should have considered other grounds for sentencing reduction in the second proceeding under Section 3582(c)(2). Specifically, he claims that he should have received the benefit of lower crack to cocaine Guideline ratios employed by sentencing courts in the wake of, *United States v. Booker*, 543 U.S. 220 (2005), *Kimbrough v. United States*, 552 U.S. 85 (2007), *Gall v. United States*, 552 U.S. 38 (2007) and *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008). This is not so for two reasons.

First, as is set forth above, the sentence modification afforded Reed by the district court was not based on the crack Guidelines; his modified sentence was based squarely on the career offender Guideline. Accordingly, crack-to-cocaine Guideline ratios, high or low, played no part in the sentence imposed by the district court. Under U.S.S.G. § 4B1.1(b), this would always be the case, no matter how low the crack-to-cocaine ratio preferred by the sentencing court, so long as the career offender Guideline remained higher.

Second, U.S.S.G. § 1B1.10 limits the nature and extent of a sentencing court's inquiry when the court is proceeding under 18 U.S.C. § 3582(c)(2). Section 1B1.10 provides that

[i]n making [a sentence modification] determination, the court shall substitute only the

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

*Id.* Here, the additional grounds for relief urged by Reed in his notice of appeal fall outside this description of what the modifying court is authorized to consider.

Reed argues that, under *Booker*, *Kimbrough* and *Gall*, in “re-sentencing” Reed under Section 3582(c)(2), the district court, through 18 U.S.C. § 3553(a), should have employed crack-to-cocaine Guideline ratios which were not current when Reed originally was sentenced, but have become current since. 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 2591. 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).

**Conclusion**

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

Dated: August 31, 2010

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is written in a cursive, somewhat stylized font.

H. GORDON HALL  
ASSISTANT U.S. ATTORNEY

RAYMOND F. MILLER  
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.

**CERTIFICATE OF SERVICE**

09-3636-cr      USA v. Reed

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First Class Mail to:

Jonathan J. Einhorn  
412 Orange Street  
New Haven, CT 06511

I also certify that the original and five copies were also shipped via Hand delivery to:

Clerk of Court  
United States Court of Appeals, Second Circuit  
United States Courthouse  
500 Pearl Street, 3<sup>rd</sup> floor  
New York, New York 10007  
(212) 857-8576

on this 31st day of August 2010.

Notary Public:

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**Sworn to me this**

August 31, 2010

RAMIRO A. HONEYWELL  
Notary Public, State of New York  
No. 01HO6118731  
Qualified in Kings County  
Commission Expires November 15, 2012

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## ANTI-VIRUS CERTIFICATION

Case Name: United States v. Reed

Docket Number: 09-3636-cr

I, Karen Wrightson, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/31/2010) and found to be VIRUS FREE.

/s/Karen Wrightson

Karen Wrightson  
*Record Press, Inc.*

Dated: August 31, 2010