

# 12-441

*To Be Argued By:*  
H. GORDON HALL

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-441

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

JULIUS MOORNING, aka Red, EDWARD  
HINES, aka Junior, RODNEY NELSON, aka  
Cease, MICHELLE GROOM, DE PAUL,  
CRUDUP aka Correctional Officer Pace,

(For continuation of Caption, See Inside Cover)

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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*Defendants,*

SHONTA McPHERSON, aka Shont Boogie,  
*Defendant-Appellant.*

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## 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”) 22.

On February 12, 2008, McPherson filed a motion under 18 U.S.C. § 3582(c)(2) seeking a modification of his sentence. JA24. The district court denied the motion, *see* JA25-26, and McPherson appealed, JA26. On June 17, 2011, this Court vacated the district court’s ruling and remanded for further proceedings. JA94-96.

On November 30, 2011, in open court, the district court again denied McPherson relief under 18 U.S.C. § 3582(c)(2). JA28, JA146-47. This order entered December 1, 2011, JA28, and on December 2, 2011, McPherson filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA28, JA148. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue  
Presented for Review**

On appeal from the denial of the defendant's motion for a sentence reduction under 18 U.S.C. § 3582(c)(2) and the 2007 reductions in the crack cocaine sentencing guidelines, this Court remanded to allow the district court to decide whether the defendant was eligible for a sentence reduction under *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam), which allowed such reductions for the limited class of career offenders whose final guidelines ranges were determined by the crack cocaine guidelines. On remand, did the district court properly conclude that the defendant was ineligible for a sentence reduction under *McGee* because his final guidelines range was not determined by the crack cocaine guidelines?

# United States Court of Appeals

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UNITED STATES OF AMERICA,

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-vs-

SHONTA McPHERSON, aka Shont Boogie,

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

This is the second appeal challenging the district court's denial of defendant Shonta McPher-son's motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) and the 2007 reductions in the crack cocaine sentencing guidelines. In the first appeal, this Court vacated the district court's decision because that court had denied relief under § 3582 before this Court issued its decision in *United States v. McGee*, 553 F.3d 225

(2d Cir. 2009) (per curiam), which authorized sentence reductions for certain career offenders whose final guidelines ranges were determined by the crack cocaine guidelines. Accordingly, this Court remanded to allow the district court to determine whether McPherson was eligible for a reduction under *McGee*. On remand, the district court concluded again that McPherson was ineligible for a sentence reduction because the court had not used the crack cocaine guidelines to set his sentence.

On this record, the district court—again—properly denied McPherson’s motion for a sentence reduction under 18 U.S.C. § 3582(c)(2). The district court’s judgment should be affirmed.

### **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). JA4.

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. JA17. On November 29, 2005, the district court (Hon. Janet C. Hall, J.) sentenced McPherson to 150 months of impris-

onment and five years of supervised release. JA22.

On February 12, 2008, McPherson filed a motion for a reduction of sentence under 18 U.S.C. § 3582(c)(2). JA24. On May 6, 2008, McPherson's lawyer filed another such motion on his behalf. JA24-25. The district court denied both motions in a ruling dated November 21, 2008, JA25, JA91-93, and entered an amended ruling reaching the same result on December 30, 2008, JA25-26. McPherson appealed, JA26, and on appeal, this Court vacated the ruling of the district court and remanded so the court could clarify whether McPherson's sentence was premised on the crack cocaine guidelines. JA26, JA94-96.

On remand, on November 30, 2011, the district court stated in open court that its sentence was not premised on the crack cocaine guidelines and thus again denied the relief sought by McPherson. JA28, JA146-47. That order was entered December 1, 2011, JA28, and McPherson filed a timely notice of appeal on December 2, 2011, JA28, JA148.

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 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. JA17. With this guilty plea, the defendant faced a statutory mandatory minimum term of 10 years' imprisonment. JA31.

On November 29, 2005, the district court sentenced McPherson to 150 months of imprisonment and five years of supervised release. JA22. At the time of sentencing in this case, the district court calculated McPherson's base offense level as 37 based on the career offender guideline in U.S.S.G. § 4B1.1(b)(A). JA51. On motion of the government, the court reduced the offense level by three under U.S.S.G. § 3E1.1(a) and (b) in recognition of McPherson's acceptance of responsibility, for an adjusted offense level of 34, Criminal History Category VI, and a resulting guideline range of 262 to 327 months. JA51-52. Thereafter, citing the small quantities of narcotics involved in several prior offenses which had contributed to McPherson's classification as a career offender, and his cooperation with local authorities, JA69-70, the court departed downward and imposed a sentence of 150 months' imprisonment, JA74. In describing the factors that

influenced the sentence, the court did not mention the guidelines level or range that flowed from the quantity of cocaine base attributed to McPherson for the offense of conviction. *See* JA68-74.

**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 a sentence reduction under 18 U.S.C. § 3582(c)(2) and the appointment of counsel to assist with this motion. JA24, JA82. On May 6, 2008, newly appointed counsel filed a motion for a sentence reduction under 18 U.S.C. § 3582(c), JA24, based on the 2007 amendments to the crack cocaine sentencing guidelines, JA24, JA83-90.

The district court denied McPherson’s motions in a ruling dated November 21, 2008.<sup>1</sup> JA25, JA91-93. In this ruling, the district court noted that it had found McPherson to be a career offender, and that it had departed from that range “based on reasons unrelated to the quantity of cocaine attributable to him.” JA91-93. The district court went on to observe that McPher-

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<sup>1</sup> On December 30, 2008, the court issued an amended ruling reaching the same result. *See* JA25-26. As explained by the court, the amended ruling merely deleted footnote 2 from the original order. *See* Amended Ruling at 1 n.1 (Docket #2257).

son's status as a career offender precluded relief under § 3582(c)(2):

Because 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.

JA92-93.

McPherson appealed, JA26, and on appeal, this Court vacated the ruling of the district court and remanded to give the district court the opportunity to clarify whether McPherson's sentence was premised on the crack cocaine guidelines. JA94-96. Specifically, this Court ruled as follows:

The district court denied McPherson's section 3582(c)(2) motion without the benefit of our decision in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (per curiam), and *United States v. Martinez*, 572 F.3d 82 (2d Cir. 2009) (per curiam). In *McGee*, we held that "a defendant who was designated a career offender but ultimately explicitly sentenced based on a Guidelines range calculated by Section 2D1.1 of the [United States Sentencing] Guidelines is eligible for a reduced sentence under 18 U.S.C.

§ 3582(c)(2) and the crack amendments.” *Id.* at 230. Because the district court believed that McPherson’s eligibility turned on the amendments’ effect on his pre-departure Guidelines range rather than on the range that ultimately served as the basis for his sentence, we vacate its order and remand the case so that it may clarify whether McPherson’s sentence was in fact premised on the crack cocaine guidelines. . . . If it was, then the district court should determine whether and to what extent it will resentence the defendant. Of course, if McPherson’s sentence when imposed was not based on the crack cocaine guidelines, McPherson is ineligible for a sentence reduction. *See United States v. Williams*, 551 F.3d 182, 185-86 (2d Cir. 2009).

JA95-96.

### **C. Proceedings on remand**

On remand, the district court entertained briefing by the parties, JA27-28, and on November 30, 2011, heard argument, JA28.

At the outset of the hearing, the district court explained that it had re-read the sentencing transcript, the Pre-Sentence Report, and all of the memoranda in preparation for the hearing. JA100. The court then went on to explain its rationale for sentencing McPherson in the first place, and to respond to this Court’s mandate to

determine whether McPherson's sentence was based on the crack cocaine guidelines:

I arrived at that sentence in the following way: I thought that the guidelines were way too high. They were disproportionate to the needs of the sentence. I felt I could at that time depart to a lower sentence. I arrived at that lower sentence by taking the mandatory minimum and what I thought as a practical matter he would serve on this State sentence so I think at the time, the expectation was he had three more years on the State. I gave him in effect two and a half more and ran it concurrent. If I recall, I ran it concurrent because I figured he probably would get out of the State sentence in three or slightly less than three. If he didn't get out in the less than three, he had the federal detainer. Therefore, he was kind of being hurt by the federal sentence. That's why I picked the two and a half. That's 30 months that I layered on top of the 10 mandatory minimum so unlike some other cases that are like Mr. McPherson's that have been sent back to me by the circuit where it is clearly my notes and refreshing myself that the guideline, the drug guideline played a role in my deciding where to go. I might not always go down to the original drug level. I was pulled down where I went because of

it. I don't think that drug guidelines had anything to do with Mr. McPherson's sentence. The mandatory minimum did and in my view the need to serve the State sentence. . . . On this one, I'm fairly confident my memory now is accurate that I did not really look at the original drug level or any other kind of drug level. But I worked up from the mandatory minimum without regard to the drug level . . . . I am confident I did not say okay the drug guideline is X, I want to do 80 percent of this or 120 percent of that or I want to go 30 percent down from the career offender or 80 percent down from the distance between the drug sentence and whatever.

JA102-103. In short, the court calculated McPherson's sentence by going up from the statutory mandatory minimum term; the court did *not* base McPherson's sentence on the drug guidelines.

The district court repeated this same message, *i.e.*, that the drug guidelines played no role in McPherson's sentence, multiple times over the course of the hearing. *See* JA114-15 ("The crack range is 120 to 137. But I didn't sentence him based—I really didn't."); JA115 (contrasting McPherson's case with another defendant where the sentence "was basically driven by that crack range," the court states that "I'm afraid to say for Mr. McPherson that wasn't my thinking. I

did not have in mind the range. I had in mind the mandatory minimum.”); JA116 (“I wasn’t thinking about sentencing him based on the drug guideline. I’m fairly confident about that.”); JA120 (“I didn’t look at the drug guideline and say, okay, what sentence will I give him because I’m being driven in my thinking by a drug guideline range. I was driven by a mandatory minimum . . . .”); JA124 (“[T]his record stands as the answer to the Second Circuit as to whether their request to me for the remand was to clarify whether the sentence was premised on the crack cocaine guideline. My answer is no for all of the reasons I repeated several times now.”); JA136 (“Nothing on the record and nothing that went through my mind the day I sentenced Mr. McPherson touched on [the drug guideline]. Let alone relied on the drug guideline range. Nothing.”); JA137 (“But I can say without having hesitation that I did not rely on any drug guideline in this case.”).

The district court also rejected defense counsel’s reliance on *United States v. Rivera*, 662 F.3d 166 (2d Cir. 2011), a then-newly decided case from this Court. In discussing the case with counsel, the court concluded that *Rivera* teaches that “if a judge relies in any way in deriving at a sentence, relies on the drug guideline and that guideline is now lowered because of an amendment, then that the person is entitled to a resentencing.” JA137. Applying its understanding of

*Rivera* to McPherson’s case, the court asserted, “But I can say without having hesitation that I did not rely on any drug guideline in this case. I was driven by a mandatory minimum for the drug crime but it is not a guideline. It was a mandatory minimum.” JA137.

Having revisited the arguments for and against the relief sought by McPherson, and having stated and restated what was and what was not the basis for its imposition of the original sentence, the district court then again denied the relief sought by McPherson. JA143.

### **Summary of Argument**

In McPherson’s first appeal from the denial of his motion for a sentence reduction under 18 U.S.C. § 3582(c)(2), this Court remanded to allow the district court to consider whether McPherson was eligible for such a sentence reduction in light of this Court’s decision in *United States v. McGee*, 553 F.3d 225 (2d Cir. 2009) (*per curiam*). In that case, this Court held that if a career offender was “ultimately explicitly sentenced” based on the crack cocaine guidelines, he was eligible for a sentence reduction. On remand, the district court confirmed repeatedly that McPherson’s sentence was *not* based on the crack cocaine guidelines, but rather was based on the statutory mandatory term of imprisonment. Because McPherson’s sentence was not based on the crack cocaine guidelines, he is not

eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2).

Neither this Court's decision in *United States v. Rivera*, 662 F.3d 166 (2d Cir. 2011) nor the Supreme Court's decision in *Freeman v. United States*, 131 S. Ct. 2685 (2011), compel a different result. In *Rivera*, this Court held that when a defendant's final guideline range was ultimately lowered by the changes to the crack cocaine guidelines, he was eligible for a sentence reduction. But as the district court repeatedly found on remand, McPherson's sentence was *not* ultimately based on the crack cocaine guidelines, and thus *Rivera* does not control. In *Freeman*, the Supreme Court held that a defendant sentenced based on a binding guilty plea under Fed. R. Crim. P. 11(c)(1)(C) could be eligible for a sentence reduction if the negotiated binding sentence was "based on" the crack cocaine guidelines. Here, McPherson was not sentenced based on an 11(c)(1)(C) plea, and in any event, his sentence was not based on the crack cocaine guidelines.

## Argument

### **I. McPherson is ineligible for a sentence reduction under 18 U.S.C. § 3582 because his sentence was not “based on” the crack cocaine guidelines.**

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

##### **1. Section 3582(c)(2) and the revisions to the crack cocaine 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 *Corttorreal v. United States*, 486 F.3d 742, 744 (2d Cir. 2007) (per curiam)); see also *Dillon v. United States*, 130 S. Ct. 2683, 2690 (2010). 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 re-

duction 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 which may be applied retroactively pursuant to this authority, and articulated the proper procedure for implementing the amendment in a concluded case. On December 11, 2007, the Commission issued a revised version of § 1B1.10, which emphasized the limited nature of relief available under 18 U.S.C. § 3582(c).<sup>2</sup> *See*

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<sup>2</sup> The Commission has made subsequent amendments to § 1B1.10, including, most significantly, the changes it adopted in connection with the 2010 revisions to the crack cocaine guidelines. Because this case was remanded to allow reconsideration of a decision applying the 2007 version of § 1B1.10, the government did not argue that the most recent revisions to § 1B1.10 were applicable to this case. *But see* U.S.S.G. § 1B1.10, Application note 6 (2011) (directing court to use “the version of this policy statement that is in effect on the date on which the court reduces the defendant’s term of imprisonment . . .”). The government notes, however, that the 2007 version of § 1B1.10 was more favorable to McPherson because the new version categorically precludes any sentence reduction for McPherson. Under the new version, a defendant is only eligible for a sentence reduction when a guideline amendment lowers the

U.S.S.G. App. C, Amend. 712. Revised § 1B1.10(a), which became effective on March 3, 2008, provided, 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

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defendant’s *pre-departure* guideline range. See U.S.S.G. § 1B1.10, Application note 1(A) (2011). Here, McPherson’s pre-departure range remains at the career offender range originally found at sentencing. In any event, because this case was argued and decided based on the December 1, 2007 version of § 1B1.10, that is the version quoted and relied upon in this brief.

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.

In *Dillon*, the Supreme Court addressed the process for application of a retroactive guideline amendment, emphasizing that § 1B1.10 is binding. The Court declared: “Any reduction must be consistent with applicable policy statements issued by the Sentencing Commission.” 130 S. Ct. at 2688.

The amendments in question in this case are the amendments which reduced the base offense levels for most crack offenses. Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack offenses by two levels, was made retroactive effective March 3,

2008.<sup>3</sup> See U.S.S.G. App. C, Amend. 713. In addition, in Part A of Amendment 750, the Commission further reduced the offense levels applicable to crack cocaine offenses, and those reductions were made retroactive effective November 1, 2011. U.S.S.G. App C., Amend. 759.

## 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. Johnson*, 633 F.3d 116, 118 (2d Cir.) (per curiam), *cert. denied*, 131 S. Ct. 2980 (2011); *United States v. Mock*, 612 F.3d 133, 135 (2d Cir. 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 *McGee*, 553 F.3d at 226.

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<sup>3</sup>Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

## **B. Discussion**

### **1. The district court's findings on remand establish that McPherson is ineligible for a sentence reduction.**

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 sentence reduction. McPherson continues to argue that his original sentence was “based on” the crack cocaine guidelines within the meaning of § 3582(c)(2) and that he is therefore eligible for a sentence reduction under the revised crack guidelines. The record, and the relevant precedent, however, show that this is not the case. McPherson was a career offender, and thus he was not sentenced based on a guideline range that was subsequently reduced. While the district court departed from the career offender guideline at McPherson’s sentencing, the court’s findings on remand establish that the sentence ultimately imposed was not in any way derived from U.S.S.G. § 2D1.1. Accordingly, McPherson is ineligible for a sentence reduction under § 3582(c)(2).

In remanding McPherson’s first appeal, this Court charged the district court to “clarify whether McPherson’s sentence was in fact premised on the crack cocaine guidelines.” JA95. This Court went to observe that “if McPherson’s sentence when imposed was not based on the crack cocaine guidelines, McPherson is ineligible for a

sentence reduction,” citing *Williams*, 551 F.3d at 185-86. See JA95-96.

In the course of the hearing conducted on remand, the district court explained repeatedly and at considerable length that the crack cocaine guidelines played no role in its determination of McPherson’s sentence. See, e.g., JA114-15 (“The crack range is 120 to 137. But I didn’t sentence him based—I really didn’t.”); JA115 (“I did not have in mind the [drug guideline] range.”); JA116 (“I wasn’t thinking about sentencing him based on the drug guideline.”); JA119-20 (“I didn’t get there by saying, okay, the top of the range for the drugs is 131 and I will give him a little bet [sic.] more than that. That’s not what I did. . . . I didn’t look at the drug guideline and say, okay, what sentence will I give him because I’m being driven in my thinking by a drug guideline range.”); JA136 (“Nothing on the record and nothing that went through my mind the day I sentenced Mr. McPherson touched on [the drug guideline]. Let alone relied on the drug guideline range. Nothing.”); JA139 (“There was no effect. Not even a marginal effect of the old crack guidelines on Mr. McPherson’s sentence. . . . I don’t think it had any effect at all on my thinking.”); JA140-41 (“I didn’t start with Mr. McPherson at a drug level. I didn’t say to myself you are at 120 to 131 and now I will go up or down from that. I never said to myself 131, let’s add 19. I didn’t go through that process. I didn’t start at 120 be-

cause it was the bottom of the [drug] guideline range. I went to 120 because Congress said I had to give him 120.”); JA142 (“The drug guidelines do not enter. I calculated them, then I applied career offender and went above them but I didn’t in going away from the career offender guideline, I did not think in terms of, okay, these are the drug guidelines.”).

Given this record, this Court’s decision in *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*, 612 F.3d at 137 (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.

As set forth above, the record here provides no such “apparent” evidence that McPherson's sentence was based on the crack cocaine guidelines, but shows, rather, that his sentence was *not* based on the crack guidelines. Similar to the sentencing court in *McGee*, the district court

here departed from the career offender guideline. JA69-70, JA74. 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 (overstatement of criminal history, cooperation with local authorities), and consideration of the sentencing factors in § 3553(a), the court determined that an appropriate sentence was 150 months. JA74. As explained in detail on remand, the court selected this sentence by adding time to the applicable statutory mandatory minimum term (10 years) to ensure that McPherson would serve 10 years after he completed the state sentence that he was serving at the time. JA102-103. And as explained in further detail on remand, the court did *not* use the crack cocaine guidelines in any way to select this sentence. *See* Statement of Facts, part C.

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. Here, with findings by the district court that it did not apply the crack cocaine guidelines—or even consider them—when selecting 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 (em-

phasis 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.

As McPherson 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*, 612 F.3d at 137. 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.

The response of the district to the mandate of this Court decisively reinforces the original record, and establishes with clarity that McPherson’s sentence was not, in fact, premised on the crack cocaine guidelines. This being the case, McPherson is not eligible for a sentence reduction.

**2. Relief is warranted under neither *Rivera* nor *Freeman*.**

McPherson argues that two decisions rendered after this Court's remand order—*United States v. Rivera*, 662 F.3d 166 (2d Cir. 2011) and *Freeman v. United States*, 131 S. Ct. 2685 (2011)—have a decisive bearing on this case. Neither case helps McPherson, however.

In *Rivera*, the career offender guideline, which the district court applied, borrowed the offense level from the drug guideline, which, because it was higher, “trumped” the original career offender offense level. *See Rivera*, 662 F.3d at 168-69. Thus, the guideline range used by the court was lowered by the amendment on which McPherson relies. *Id.* at 174. In that situation, this Court found that § 3582(c)(2) relief may be appropriate, and remanded for a determination of that issue consistent with its opinion. *Id.* at 184.

*Rivera* is inapplicable here because the crack guidelines did not lower the guideline range applicable to McPherson. The district court did not in any way rely on or employ the drug guideline, so the offense level used by the court was not affected by the Amendment, and relief is not warranted. Indeed, the district court made this same point in response to defense counsel's reliance on *Rivera*. *See* JA135-36.

McPherson argues, nonetheless, that he is entitled to a reduction under *Rivera* because, as he reads that case, anytime the crack guidelines are used in the sentencing process, the defendant is eligible for a sentence reduction. *See* Def. Br. at 20-21. This would mean, however, that *every* crack defendant who was also a career offender would be eligible for a sentence reduction, because the crack guidelines are always *calculated* even if they are subsequently overridden by the career offender guidelines. But this is not the law. *Rivera* did not overrule *Martinez*, and thus it is not the case that every time the crack guidelines are calculated in the sentencing process the defendant is eligible for a sentence reduction. *Rivera* requires, rather, that the amendment to the crack guidelines have some actual effect on the sentencing decision, and as the district court found, there was no such effect here. *See also* JA139-40 (district court rejecting this precise argument by the defendant: “You are trying to say to me anybody who was convicted of a crack offense and who had guidelines calculated that had some relationship to a crack guideline, either pre or post the career offender status determination, that even if the judge never considered the crack guideline, he should still get a reduction. . . . No. *Rivera* isn’t like that.”). In short, *Rivera* is inapplicable to this case.

The Supreme Court’s decision in *Freeman v. United States* is similarly inapplicable. In *Free-*

*man*, a splintered Supreme Court considered whether a defendant who was sentenced under a binding plea agreement under Fed. R. Crim. P. 11(c)(1)(C) was eligible for a sentence reduction under 18 U.S.C. § 3582(c)(2). A plurality of four Justices concluded that in the context of a defendant sentenced under a binding plea agreement, “§ 3582(c)(2) modification proceedings should be available to permit the district court to revisit a prior sentence to whatever extent the sentencing range in question was a relevant part of the analytic framework the judge used to determine the sentence or to approve the agreement.” *Freeman*, 131 S. Ct. at 2692-93. Justice Sotomayor concurred in the judgment and took a narrower view of when the sentence of a Rule 11(c)(1)(C) defendant was based on the guidelines. In her view, a sentence imposed pursuant to a type C agreement generally will be “based on” the agreement itself, not the district court’s guidelines calculations, because a type C agreement is binding once accepted and, “[a]t the moment of sentencing, the court simply implements the terms of the agreement it has already accepted.” *Id.* at 2696 (Sotomayor, J., concurring). Justice Sotomayor, however, concluded that “if a (C) agreement expressly uses a Guidelines sentencing range applicable to the charged offense to establish the term of imprisonment, and that range is subsequently lowered . . . the term of imprisonment is ‘based on’ the range

employed and the defendant is eligible for a sentence reduction under § 3582(c)(2).” *Id.* at 2695.

Because Justice Sotomayor took a narrower view than the plurality of when a Rule 11(c)(1)(C) defendant is eligible for a sentence reduction, her concurrence in *Freeman* sets forth the holding of that case. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (“[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds.” (internal quotation omitted)).

Regardless of which opinion is controlling, however, *Freeman* is inapposite here. Most significantly, of course, McPherson was not sentenced based on a Rule 11(c)(1)(C) plea and thus the holding does not help him. But even reading the decision beyond the context of binding plea agreements does not help McPherson. The *Freeman* plurality’s approach would look to whether a subsequently lowered guideline range was part of the “analytic framework” used in the sentencing process, but as the district court’s findings make clear, the crack guidelines were *not* part of the analytic process here. And while Justice Sotomayor would look to whether the plea agreement “expressly uses a Guideline sentencing range that was subsequently lowered] to establish the term of imprisonment.” *Freeman*, 131 S. Ct. at 2697-98 (Sotomayor, J., concurring), as the district court’s findings establish,

there is no basis for concluding that the crack guidelines were used, much less expressly used, in the sentencing process here. Thus, the Supreme Court's decision in *Freeman* does not help McPherson.

In sum, the district court's findings establish that *Rivera* and *Freeman* are inapposite to this case.

**Conclusion**

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

Dated: August 20, 2012

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, flowing style with a large initial "H" and a long, sweeping underline.

H. GORDON HALL  
ASSISTANT U.S. ATTORNEY

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

## **Addendum**

**18 U.S.C. § 3582(c)(2). 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--

**(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) (effective December 1, 2007)**

(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 lower-

ing 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.