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## ***A Practitioner's Guide to The Crack Retroactivity Amendment: Overcoming the Many Obstacles to Justice***

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Last spring, the U.S. Sentencing Commission took an affirmative step toward reducing the sentencing disparity between crack and powder cocaine by adopting an amendment to the U.S. Sentencing Guidelines decreasing crack offense levels by two. That amendment, discussed in detail in *The Champion*,<sup>1</sup> became effective on November 1, 2007. Thereafter, the question became whether the equities that drove the decision to amend the Guidelines in the first place would likewise propel the commission to apply the amendment retroactively to all crack offenders ever sentenced. On December, 11, 2007, the commission — to its great credit — voted to make the amendment retroactive. The belief was that all individuals ever sentenced under U.S.S.G. § 2D1.1's crack guideline would be eligible for a two-level reduction in their offense level and a concomitant reduction in their term of imprisonment. This news was greeted with satisfaction by sentencing experts who have long argued that the policies were irrational, by African-American leaders who viewed the policies as insensitive and harsh, and by many inmates who have served more time in prison than necessary and are ready to rejoin their families and communities.

Upon closer review of the amendment language, however, it appears that the commission intends to maintain as many overly severe and unjustifiably harsh crack sentences as possible. Behind the headlines, which told of justice for all, lurked the fine print in the amendment language. This language appears on its face to deny relief to many, allowing their nonsensical crack sentences to remain undisturbed despite the supposedly retroactive reduction of those sentences.

This article discusses the adoption of the retroactivity amendment and litigation strategies for ensuring that your clients receive the maximum possible benefit under it. Beware, however, because the landscape surrounding the retroactivity amendment is changing quickly and frequently. Consult the Federal Defenders' "Sentencing Resources" page at [www.fd.org](http://www.fd.org) for updates to this article.<sup>2</sup>

### **The Impact of the Amendment**

The Sentencing Commission estimates that some 19,500 inmates will benefit from the retroactive application of the amendment over the next three decades.<sup>3</sup> Approximately 1500 of those inmates will be eligible for immediate release, with another thousand eligible before the end of 2008.<sup>4</sup> The average reduction in sentence is expected to amount to 27 months, though some inmates will receive much greater reductions.<sup>5</sup> Those familiar with the commission's studies on crack sentencing will not be surprised to learn that approximately 86 percent of those eligible for relief under the retroactive amendment are African-American.<sup>6</sup>

## **Adoption of the Amendment**

The impact of the amendment was of grave concern to the commission, which worried about the court system's ability to handle such a large number of applications for sentence reductions. In the wake of *United States v. Booker*, the commission expected defendants to seek full resentencing hearings, which the commission feared could overwhelm the courts. In the weeks leading up to the commission's vote on retroactivity, adoption of the amendment was in question because of this concern over judicial economy.

In public comments filed shortly before the vote, judges, probation officers, defenders, and advocacy groups such as NACDL called on the commission to adopt the amendment as a matter of "general fairness."<sup>7</sup> The commission itself was rumored to be divided on the issue but finally reached a consensus by recommending procedures ostensibly designed to reduce the administrative burden on the court system. That compromise — which sounds so benign — produced significant changes to the Guidelines' policy statements on retroactivity and resentencing that are adverse to defendants in myriad ways. As a result, the government will argue that defendants must clear multiple hurdles before realizing the benefit of the amendment. Those hurdles, and the ways to clear them, are discussed later in this article.

On the date of the vote, the commission stated that "the statutory purposes of sentencing are best served by retroactive application of the amendment." At the same time, it announced that the effective date would be delayed until March 3, 2008, to "give the courts sufficient time to prepare for, and process these cases."<sup>8</sup> Although we are now past March 3, it is worth touching on the delay briefly because it was indicative of the commission's whole approach to the amendment.

There was no foundation for the delay — courts, probation officers, and defenders were all prepared to move forward immediately. While the commission specifically referenced the purposes of sentencing as supporting its vote in favor of retroactivity, it did not claim that delaying implementation of the amendment until March 3 advanced any purpose of sentencing. Indeed, requiring a defendant to remain in jail until March 3, 2008, would have resulted in that inmate serving a sentence that was greater than necessary to satisfy the purposes of sentencing.

Fortunately, many courts recognized the arbitrariness of the March 3 date and either granted immediate relief or readied the paperwork ordering immediate release on March 3. Those courts recognized that the advisory nature of the Guidelines post-Booker makes any specific instruction issued by the commission — including the effective date — only a recommendation, which the court need not (and should not) accept, given that clients are being unjustly incarcerated.<sup>9</sup> As the Criminal Law Committee of the Judicial Conference said in its letter to the commission about the amendment: "The main point remains that judicial flexibility is consistent with the long-articulated view of the Judicial Conference that sentencing guidelines should not deprive a judge of the discretion to reach an appropriate sentence." Indeed, courts are required to treat the guidelines and policy statements as advisory after *Booker*, *Rita*, *Kimbrough*, and *Gall*. The commission completely ignored this in adopting the amendment, including the effective date.

Note that the Bureau of Prisons would like to hold clients for 10 days prior to release to ensure that DNA has been collected, an Adam Walsh review has taken place, victims have been notified, and some pre-release planning has been accomplished. U.S. attorneys have been instructed to move for 10-day stays of all release orders to facilitate this process. A defense attorney may want to challenge this on fairness grounds, but it is unclear how receptive courts will be. For those clients whose original release dates are close, all of this may already have been accomplished. This can be ascertained by requesting a progress report from a client's case manager.

## **The Statutory Framework**

To understand the Sentencing Commission's action, one needs to understand the statutory framework that permits reducing sentences based on a retroactive amendment. The authority for such reductions is found in 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) provides that, after considering the § 3553(a) factors, the district court may reduce a term of imprisonment in accordance with a retroactive amendment.<sup>10</sup> Notably, § 3582(c)(2) does not require the court to

grant a reduction; it merely makes inmates eligible for the reduction.

This is where the commission's attempt to limit the reach of the amendment comes in. Section 3582(c)(2) also provides that reductions may be made "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The commission's policy statement on retroactivity is at U.S.S.G. §1B1.10. Until recently, that policy statement merely listed the amendments that had been made retroactive and emphasized § 3582(c)(2)'s language limiting relief to a reduction in the term of imprisonment (as opposed to the term of supervised release or probation). When it made the crack amendment retroactive, the commission added several pages of "limitations and prohibitions" to § 1B1.10 designed to reduce the likelihood that courts will choose to grant sentence reductions.

### **U.S.S.G. § 1B1.10**

The commission basically did four things in revising § 1B1.10. First, it asserted that a resentencing under the guideline does not constitute a full Booker resentencing.<sup>11</sup> Second, it suggested that if a below-Guidelines sentence had been imposed originally, a reduction "comparably" less than the amended guideline range "may be appropriate," but that any further reduction "generally would not be appropriate," at least for variances.<sup>12</sup> Third, the commission recommended that, in deciding whether and how much of a reduction to grant, courts should emphasize those § 3553(a) factors relating to public safety and postsentencing conduct.<sup>13</sup> All of this was done to assure that, fourth, "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."<sup>14</sup> The commission cited no authority for these revisions; indeed, as discussed below, the revisions are contrary to law.

### **DOJ's Response**

The Department of Justice — incidentally, the only institutional player to oppose retroactivity<sup>15</sup> — announced its position at the Crack Retroactivity Summits held in January 2008 that inmates making § 3582(c)(2) motions do not have a right to counsel, a right to a hearing, or a right to be present. The purpose of the summits was to share practical information and get people together to talk about their successful local practices (invitees included district judges, probation officers, federal defenders, U.S. attorneys (AUSAs), sentencing commissioners and staff, as well as representatives of the Administrative Office of the United States Courts). The overall goal was to develop efficient and cooperative methods of handling the complexities of crack resentencing. The centerpiece of the program was the opportunity for each district's prosecutors, defense counsel, and representatives from Probation and the court to sit down together and hash out how best to ensure that all eligible defendants in the district are identified, notified, and able to obtain a more appropriate sentence. Those discussions, however, were hampered by positions taken by the DOJ, which has done everything in its power to resist the reality of the change in the law.

Early on in the retroactivity process, an AUSA sent an e-mail that begins by suggesting that defense attorneys may not even be entitled to see the commission's list of eligible inmates because, among other reasons, defendants in resentencing proceedings under § 3582(c)(2) are not entitled to counsel. It continues by suggesting that AUSAs assure that no defendant automatically gets a sentence reduction and that courts conduct an "independent and particularized" review of each defendant's eligibility for release, as well as the risk to the public from his release. The e-mail concludes by emphasizing the AUSA's position that § 3582(c)(2) proceedings are not full Booker resentencings.

Some U.S. Attorney's Offices began to follow those suggestions as though they were a directive from the DOJ, even as others sought to adopt a more reasonable approach to crack resentencings (for instance, by not opposing the immediate release of eligible defendants). Unfortunately, the DOJ representatives at the Crack Summits made it clear that the Department overall was unwilling to be reasonable. The government's representatives continued to oppose such fundamental protections as the right to counsel as a matter of policy and officially took the position that courts could not resentence a defendant unless the new sentence was in strict compliance with revised 1B1.10, even if revised 1B1.10 was itself in tension with § 3553(a).

### **Litigation Strategies**

Both the revisions to § 1B1.10 and the positions set forth in the e-mail are plainly contrary to law. A summary of strategies and arguments for prevailing against them follows. The Federal and Community Defenders' Sentencing Resource Counsel Project has posted several papers containing and elaborating on these arguments at [www.fd.org](http://www.fd.org). Defense attorneys can consult this Web site for more information to use as a starting point in drafting pleadings. Fortunately, there are already signs that some courts are on our side. Nonetheless, it pays to be prepared to fight.

### **A. The Right to Counsel**

The government has already begun to oppose appointment of counsel for resentencings under § 3582 in some districts. As discussed in more detail by Amy Baron-Evans on page 18 in this issue of *The Champion*, that opposition is both unreasonable and unconstitutional. It is unreasonable because it fails to recognize that defense counsel will assist in efficiently and effectively processing § 3582(c)(2) motions. Among other things, appointment of counsel increases the likelihood of timely, comprehensible filings that present reliable information. It also increases the likelihood of negotiated settlements where appropriate. If DOJ is truly concerned about minimizing the administrative burden on the court system — as it claimed in its comments to the commission opposing retroactivity<sup>16</sup> — it should welcome appointment of counsel.

More importantly, the failure to appoint counsel risks constitutional error. Although every circuit to address the question has held that there is no automatic right to counsel in these proceedings, those cases were decided pre-Booker when the Guidelines were mandatory and resentencings required little more than simple mathematics. Under current sentencing law, those cases no longer make sense; courts are now required to do more than calculate a guideline range. They must evaluate additional facts and ultimately exercise their own discretion in imposing a sentence. The commission itself acknowledges this in application note 1(B) to § 1B1.10, which purports to require courts to make three separate factual determinations in resentencing.

Because new facts must be marshaled and new arguments made in aid of the sentencing decision, the Sixth Amendment requires appointment of counsel.<sup>17</sup> In *Mempa v. Rhay*,<sup>18</sup> the U. S. Supreme Court held that appointment of counsel is required at every critical stage of a criminal prosecution, and that sentencing — including a subsequent change in sentence — is a critical stage. The sentencing procedure in *Mempa* was a probation revocation. Similar to DOJ's position here, the state of Washington argued that “petitioners were sentenced at the time they were originally placed on probation and that the imposition of sentence following probation revocation is . . . a mere formality” that did not require the assistance of counsel.<sup>19</sup> Although the Washington statute did not leave it to the judge to impose sentence, it did require the judge to recommend a sentence to the Parole Board. The Court held: “[o]bviously, to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances, and in general aiding and assisting the defendant to present his case as to sentence is apparent.”<sup>20</sup>

The district court's role in the sentencing procedure under § 3582(c)(2) is almost perfectly analogous to the probation procedure in *Mempa*. Even under the restrictive procedure contained in revised § 1B1.10, whether a person is eligible for a reduction and the extent of that reduction depends on the facts and circumstances of the individual case, e.g., public safety, postsentencing conduct, and all of the other § 3553(a) factors.

Ironically, in arguing that district courts should not grant sentencing reductions automatically, but should carefully review each case, the DOJ e-mail actually supports the analogy and therefore the defendant's right to counsel. The “independent and particularized review” of “whether the offender is actually eligible for a reduction and whether a reduction presents a public safety risk to the community” requires the same marshaling of facts, introduction of mitigating circumstances, and presentation of a defense case as the procedure in *Mempa* did. As a result, there should be no question that defendants are entitled to counsel in seeking sentence reductions.<sup>21</sup>

Moreover, by requiring district courts to consider public safety and postsentencing conduct in determining the new sentence, the commission has created a system permitting a full

resentencing if only for purposes of denying the presumptive two-level reduction. Under new § 1B1.10, the two-level reduction constitutes the sentence floor, the original sentence constitutes the ceiling, and the space in between constitutes the range within which the court may sentence the defendant. The court must find facts relating to public safety and the inmate's postsentencing conduct, but only for purposes of imposing a sentence higher than the floor. This marked departure from proceedings under old § 1B1.10, in which resentencings did not require the court to find additional facts and the new sentences were perfunctory and math-driven, renders obsolete all of the cases discussing the right to counsel and a hearing under that prior version.

## **B. Identifying Clients**

The DOJ's position that defense counsel are not permitted to know which former clients the commission thinks may be eligible for a reduction in sentence is almost not worth acknowledging. The only possible goal in advocating that the commission's list be kept a secret is to prevent counsel from assisting clients in effectively presenting — or presenting at all — their cases for a sentence reduction. We are informed that most Defender offices now have both the Sentencing Commission and Probation lists. As a result, courts are not likely to respond kindly to this effort to interfere with the administration of justice. Courts understand that to help reduce the number of pro se pleadings and to facilitate the processing of cases, defense counsel will need to know who the eligible defendants are.

Still, defense attorneys should keep in mind that the commission's list is in fact only an "estimate" that may both underestimate and overestimate the number of eligible offenders.<sup>22</sup> The Probation list is likely incomplete as well, for a variety of administrative reasons (which are discussed in the "Practice Tips" paper posted on [www.fd.org](http://www.fd.org)). Although the lists will be a good starting point and counsel should coordinate with the courts to get that head start, counsel also will have to consult court records (via PACER, for example) and their own files to identify all of the clients who could benefit from the retroactive application of the amendment.

## **C. Obtaining a Reduction**

The commission has suggested in its revised policy statement that district courts cannot resentence a defendant to a lower sentence than that permitted by the Guidelines' policy statement. The limitations on § 3582(c)(2) proceedings that are proposed by the commission in the revised retroactivity policy statement, and are advocated by DOJ, may be attacked on at least three grounds. First, the limitations violate § 3582(c)(2) by restricting the sentencing court's ability to consider the § 3553(a) factors in imposing a new sentence. Second, they instruct courts to treat § 1B1.10 and § 2D1.1 as mandatory in violation of Booker and Kimbrough. And finally, they violate the commission's own statutory obligations under its enabling statutes (28 U.S.C. § 991 and § 994).

### **1. The proposed changes require courts to violate § 3582(c)(2)'s mandate to "consider the factors set forth in § 3553(a) to the extent that they are applicable" when reducing the sentence.**

The first problem with the proposed changes to § 1B1.10 is that they are designed to limit a court's ability to resentence a crack defendant in accord with the applicable § 3553(a) factors. Thus, the changes would require the court to violate its obligations under § 3582(c)(2) to "consider the factors set forth in § 3553(a) to the extent that they are applicable" when reducing the sentence. In particular, proposed § 1B1.10 would require the district court to grant, at most, a two-level reduction — even if the resulting sentence would still be greater than necessary to serve the purposes of sentencing, create unwarranted disparity, or otherwise contradict an applicable § 3553(a) factor.

The § 3553(a) problems with the crack Guidelines are well-known and well-documented. In *Kimbrough v. United States*, the Supreme Court noted that the Guidelines "yield[ed] sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs."<sup>23</sup> In affirming a sentencing court's right to disagree with those Guidelines, the Court cited the commission's own conclusions that this disparate treatment of crack offenders was "generally unwarranted" and "fail[ed] to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act."<sup>24</sup> The Court then summarized the specific problems with the disparity: (1) it is based on "assumptions about the

relative harmfulness of the two drugs” that “more recent research and data no longer support;”<sup>25</sup> (2) it “leads to the anomalous result that retail crack dealers get longer sentences than the wholesale drug distributors who supply them with powder cocaine from which their crack is produced,” and thus was “inconsistent” with congressional policy to punish major drug dealers more severely than low-level dealers;<sup>26</sup> and (3) due to the disproportionate impact of the disparity on African-American offenders, it “foster[ed] disrespect for and lack of confidence in the criminal justice system.”<sup>27</sup>

The Court also recognized that the amended guideline does not fully rectify these problems. Quoting the commission, the Supreme Court wrote that the “modest amendment [still] yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder.”<sup>28</sup> This is the reality, despite the commission’s own recommendation that the ratio between crack and powder be “substantially reduced.”<sup>29</sup> The Court also noted that the commission itself has described the amendment as “‘only . . . a partial remedy’ for the problems generated by the crack/powder disparity.”<sup>30</sup> And the Court found that the amended guideline still produces irrational and excessive sentencing ranges.<sup>31</sup> As amended, the guideline “now advances a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1,” despite the fact that the commission has recommended ratios of, at most, 20 to 1.<sup>32</sup>

Moreover, in multiple-drug cases, there are further unfair inconsistencies. As anyone who has had a multiple-drug case knows, the offense level in those cases is determined by converting each type of drug into a marijuana equivalency, adding the marijuana quantities, and determining the appropriate marijuana offense level. Section 2D1.1’s application note 10(D) now contains a special chart for determining the marijuana equivalency for crack cocaine. There is no similar separate chart for any other drug.

Predictably, given the commission’s other work on the crack guidelines, the chart makes no sense. James Egan’s paper on the subject is posted on [www.fd.org](http://www.fd.org). Put briefly, the chart gives differing marijuana equivalencies for different amounts of crack so that, for example, the equivalency if the client is at a crack offense level 38 is 6.7 kilograms of marijuana, and if the client is at a crack offense level 28, it is 11.4 kilograms. Worse, the ratios are even higher at some lower base offense levels, so that if the client is at a crack offense level of 22, the equivalency is 15 kilograms of marijuana, and if the client is a level 12, it is 10 kilograms of marijuana. These numbers are much higher than for the most culpable level 38 offender. This produces wildly inconsistent and arbitrary results that are not explained or justified anywhere in the amended guideline. Because the amended guideline still produces sentences that are based on an unwarranted disparity and fail to serve the purposes of sentencing, a district court cannot automatically assume — as the commission would have it do — that a sentence under the amended guideline satisfies § 3553(a). And because the court has a statutory obligation to consider the applicable § 3553(a) factors when imposing a new sentence under § 3582(c)(2), the commission’s policy statement attempting to limit reductions is invalid.<sup>33</sup>

The revised policy statement also contains a “poison pill” in § 1B1.10(b)(2)(B), which suggests that clients are not entitled to relief under the amendment if they were originally sentenced under the constitutionally required Booker remedy. The commission cannot promulgate a policy statement in conflict with § 3582(c)(2) or Supreme Court case law, however. The commission appears to have belatedly recognized this — at least insofar as the poison pill provision is concerned. At the summits, the commission addressed this provision both during presentations and also when fielding questions about its meaning. It explained that the provision was intended to capture the rare cases in which a court did not consider the Guidelines at all in its original sentencing. Indeed, the commission acknowledged at both summits that the provision should not be read as a general prohibition against those who received a Booker variance obtaining the reduction.

This acknowledgement is good news because there should be no instance in which judges ignored the Guidelines. There are two reasons. For most crack retroactivity clients, the Guidelines were still mandatory at the time of their sentencing. In addition, for those who were sentenced post-Booker, as the Supreme Court recently made clear in *Gall* and *Kimbrough*, the judge must “consider” the Guidelines even if the judge then rejects them as unsound policy. Counsel may need to explain the commission’s (re)interpretation to the court to achieve

appropriate resentencing for clients.

## **2. The revisions to §1B1.10 violate Booker by making the crack guideline effectively mandatory.**

The second problem is that even if the crack amendment did resolve the § 3553(a) problems with the crack guideline (which it clearly did not), revised § 1B1.10 would still violate Booker because it renders the crack guideline effectively mandatory. Booker made clear that the right to have a jury find facts essential to punishment “is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant.”<sup>34</sup> Many of the defendants who will be resentenced under § 3582(c)(2) were initially sentenced on the basis of facts that were neither found by the jury nor admitted by the defendant. Requiring a court to impose a new sentence today based on facts that were initially found in violation of the Sixth Amendment simply imports that Sixth Amendment violation into the new sentence.

Booker also made clear that the Guidelines could not be applied as mandatory in some circumstances and not others. In Booker, the Court bluntly rejected the government’s suggestion that it “render the Guidelines as advisory in any case in which the Constitution prohibits judicial factfinding” but “leave them as binding in all other cases.” The Court said, “We do not see how it is possible to leave the Guidelines as binding in other cases. . . . [T]he Government’s proposal would impose mandatory Guidelines-type limits upon a judge’s ability to reduce sentences, but it would not impose those limits upon a judge’s ability to increase sentences. We do not believe that such one-way levers are compatible with Congress’ intent.”<sup>35</sup> The Court recently reaffirmed that view in Kimbrough.<sup>36</sup> Those portions of proposed § 1B1.10 that “would impose mandatory Guidelines-type limits upon a judge’s ability to reduce sentences,” and would render § 2D1.1 “effectively mandatory” for those being resentenced under § 3582(c)(2), thus plainly violate Booker and Kimbrough.

Section 3582(c)(2)’s additional requirement that any sentence reduction be “consistent with applicable policy statements issued by the commission” does not require a different result, because the Supreme Court has repeatedly ruled that the commission cannot use a policy statement to restrict a court’s ability to comply with either its statutory or constitutional sentencing obligations.<sup>37</sup>

A court acts “consistent with applicable policy statements issued by the commission” if it simply considers them in imposing sentence. This is all that the sentencing procedures outlined by the Supreme Court require.<sup>38</sup> From there, as the Ninth Circuit put it in *United States v. Hicks*, “[b]ecause a ‘mandatory system is no longer an open choice,’ district courts are necessarily endowed with the discretion to depart from the Guidelines when issuing new sentences under § 3582(c)(2).”<sup>39</sup> After Booker, Rita, Gall, and Kimbrough, this means that any statement on how courts should retroactively apply the crack amendment must be treated as merely advisory, and the sentencing court must have the discretion to reject that advice. Any other reading would necessarily bind a sentencing court’s discretion, rendering revised § 1B1.10 an unlawful restriction on the court’s sentencing power.

For the same reason, requests for sentence reductions need not be limited to the two levels suggested in the Guidelines — or even to addressing the crack/powder disparity. Rather, defense counsel may move for a lower sentence based upon all of the § 3553(a) factors, just as with an initial sentencing. Indeed, in *Hicks*, the Ninth Circuit’s ultimate conclusion was that the district court could reduce the defendant’s sentence by more than the amount permitted by the guideline amendment in question.<sup>40</sup> Thus, in addition to arguing that the two-level reduction is insufficient to mitigate the crack/powder disparity, counsel should consider any other inequities that were created by the mandatory Guidelines at the time of the client’s original sentencing and move the court to rectify those as well.

Of course, many clients may prefer to accept the flat two levels instead of pursuing a lower advisory sentence, either because of the proclivities of the court conducting the resentencing or because of the facts of the case. It bears repeating: the court is not required to reduce the sentence at all. After reviewing competing filings or conducting an adversary hearing, the court may be less likely to exercise its discretion, not more. Moreover, those clients who have not had

the opportunity to complete education, job training, or drug treatment may wish to continue in those endeavors. On the other hand, for those clients who have made significant progress in prison and for whom imprisonment is little more than warehousing at this point, the Commission's "advice" makes less sense and should be challenged.

DOJ attorneys have indicated their intent to argue, consistent with revised § 1B1.10,<sup>41</sup> that a § 3582(c)(2) resentencing is not a full de novo sentencing to which Booker applies. The e-mail that set forth this position cited two unpublished opinions — *United States v. Swint*<sup>42</sup> and *United States v. Hudson*<sup>43</sup> — as support. Neither is persuasive, and even counsel whose clients choose to accept the bare two-level reduction should not concede that they are.

In *Swint*, the Third Circuit held that a retroactive amendment was not applicable to a defendant who had already sought revisions in his sentence via other procedural mechanisms.<sup>44</sup> In a footnote, the court also rejected the defendant's argument that he had a separate right to a § 3582(c)(2) resentencing under *Apprendi* and *Booker* (a different argument than that made here).<sup>45</sup> In that footnote, the court tossed out this dicta: "[T]he scope of a sentencing court's inquiry under Section 3582(c)(2) is limited to consideration of a retroactive amendment to the Sentencing Guidelines; Section 3582(c)(2) does not entitle a defendant to a full de novo resentencing."

For support, the *Swint* court cited *United States v. McBride*,<sup>46</sup> a pre-*Booker* and pre-*Blakely* case that relied on the then-mandatory Guidelines in refusing to revisit drug quantity under *Apprendi* in § 3582(c)(2) resentencing.<sup>47</sup> *McBride*'s holding was not surprising given that the Third Circuit had already (and, as it turned out, erroneously) held that *Apprendi* did not affect the federal Sentencing Guidelines in any respect.<sup>48</sup> Given that *McBride* addressed a different issue, and was itself following circuit precedent that did not anticipate either *Blakely* or *Booker*, the *Swint* court's reliance on it does not support DOJ's case against full *Booker* resentencings in this context.

The Fourth Circuit's decision in *Hudson* is equally unpersuasive. It is an unpublished, table case that merely finds that the district court did not abuse its discretion or commit reversible error in failing to apply the Guidelines as advisory under *Booker* in a § 3582(c)(2) resentencing. In stark contrast to *Hicks*, it contains no discussion or citation to any authority whatsoever.

In *Hicks*, following lengthy analysis, the Ninth Circuit held (and defense counsel pursuing more than a two-level reduction in sentence should argue):

While § 3582(c)(2) proceedings do not constitute full resentencings, their purpose is to give defendants a new sentence. This resentencing, while limited in certain respects, still results in the judge calculating a new Guidelines range, considering the § 3553(a) factors, and issuing a new sentence based on the Guidelines. The dichotomy drawn by the government, where full resentencings are preformed under an advisory system while "reduction proceedings" or "modifications" rely on a mandatory Guideline system, is false. . . . *Booker* excised the statutes that made the Guidelines mandatory and rejected the argument that the Guidelines might remain mandatory in some cases but not in others.<sup>49</sup>

Regardless of whether § 3582(c)(2) resentencings constitute full *Booker* resentencings, they clearly require the court to impose a sentence based upon its evaluation of the § 3553(a) factors, a process that cannot be circumscribed by a policy statement. As discussed above, the commission simply does not have the authority to amend § 3553(a) or any other statute in ways contrary to Supreme Court precedent. As the Ninth Circuit noted in *Hicks*, "*Booker* was not a mere statutory change which can be set aside to allow us to pretend it is [some other year] for the purpose of modifying [a] sentence; rather, it provides a constitutional standard which courts may not ignore by treating Guidelines ranges as mandatory in any context."<sup>50</sup> In short, whatever label is applied to § 3582(c)(2) resentencings, the district court must still treat the Guidelines as advisory or risk violating *Booker*.

### **3. The revisions violate the Sentencing Commission's own statutory mission.**

The third and final problem with revised § 1B1.10 is that it violates the commission's own statutory obligations under its enabling statutes. The commission has already acknowledged that the crack amendment is a modest, interim measure that does not fully rectify the "fail[ure] [of the crack guideline] to meet the sentencing objectives set forth by Congress" in § 3553(a)(2). In revising § 1B1.10 to restrict a court's ability even to consider this acknowledged failure of the guideline when imposing a new sentence under § 3582(c)(2), the commission has violated its obligation under 28 U.S.C. § 994(a)(2). Section 994(a)(2)(C) requires the USSC to write policy statements regarding "the sentence modification provisions set forth in section[] 3582(c)" that "would further the purposes of sentencing set forth in Section 3553(a)(2)." It has also violated its obligations to avoid unwarranted sentencing disparities, maintain sufficient flexibility to permit individualized sentences, and reflect advancement in the knowledge of human behavior as it relates to the criminal justice process.<sup>51</sup>

If Guideline commentary "is at odds with" the plain language of 28 U.S.C. § 994, the guideline commentary "must give way."<sup>52</sup> Thus, in addition to violating the remedial holding in *Booker*, the proposed amendments are void as an improper exercise of commission authority, and should be rejected for that reason as well.

Moreover, to the extent that revised § 1B1.10 purports to interpret § 3582(c)(2), it is also void under *Stinson v. United States*, which rejected as a violation of separation of powers the notion that commission commentary should be viewed as construing the statutes the commission administers.<sup>53</sup> *Stinson* held that "the functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of [the Guidelines]."<sup>54</sup> In contrast, the clear intent of the proposed revisions to § 1B1.10 is to cabin and control judicial interpretation of § 3582(c)(2), which in turn violates separation of powers principles.<sup>55</sup>

#### **D. Special Cases**

*Career Offenders, etc.* There are lingering questions about whether and how the crack amendment's retroactivity works for those whose terms of imprisonment are not necessarily automatically affected by the reduction in crack offense levels — for example, career offenders, armed career criminals, and those incarcerated on supervised release revocations. The Sentencing Commission has attempted to limit any benefit to those inmates by revisions in § 1B1.10 that purport to render any sentence reduction "unauthorized" under § 3582(c)(2) if the amendment in question "does not have the effect of lowering the defendant's applicable guideline range."<sup>56</sup> For the same reasons as discussed above, this Guideline should be treated as advisory and should not inhibit counsel from filing § 3582(c)(2) motions on behalf of those clients.

Nothing in the statutory language requires that the amendment must actually have the effect of lowering a defendant's guideline range before the sentencing court can revisit the sentence. The statute simply requires that the defendant's sentence have been "based on" a sentencing range that has subsequently been lowered.<sup>57</sup> All sentences involving crack offenses — whether career offender, armed career criminal or other — were "based on" the crack Guideline sentencing ranges because those ranges represented the starting point of the Guideline analysis, both pre- and post-*Booker*, even if the defendant was ultimately sentenced under §§ 4B1.1 or 4B1.4.<sup>58</sup>

In addition, in *Gall v. United States*, the Supreme Court has recently acknowledged that "the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant" to the sentencing decision.<sup>59</sup> Because § 3582(c)(2) requires sentencing courts to consider all applicable § 3553(a) factors, the sentencing court ought to reconsider whether, in light of the retroactive crack amendment, it still considers an advisory career offender sentence (for example) to be "sufficient but not greater than necessary to satisfy the purposes of sentencing" — particularly now that the difference between that sentencing range and the non-career offender Guidelines sentencing range for the same crime is even greater than before.

*Supervised Release Revocation and Reduction.* Application Note 4 of revised § 1B1.10, which prohibits courts from reducing the term of imprisonment for people who are incarcerated on a supervised release revocation, should be treated as advisory. Moreover, it is arguably contrary

to law. In *United States v. Etherton*,<sup>60</sup> the Ninth Circuit interpreted the phrase “term of imprisonment” as used in § 3582(c)(2) to encompass periods of incarceration for supervised release revocations because the supervised release term itself is part of the punishment that was imposed for the defendant’s original crime. After *Booker*, people incarcerated on supervised release revocations can cite *Etherton* in support of a § 3582(c)(2) motion to reduce the term of imprisonment they are currently serving.

Those currently out on supervised release unfortunately wound up serving more time than their amended crack guidelines would have required. These offenders should also be entitled to relief. In contrast to the commission’s position in revised § 1B1.10 that such over-incarceration “shall not, without more, provide a basis for early termination of supervised release,” the Supreme Court has recognized that “equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term,” and that those considerations can properly be addressed by modifying release conditions under § 3583(e)(2) or terminating supervised release at any time after the expiration of one year under § 3583(e)(1).<sup>61</sup>

Indeed, the commission’s “advice” in this context may make the least sense of all. Many low-level drug offenders are successful on supervised release — reconnecting with their families, finding jobs, and becoming involved in church or civic organizations. There is little benefit in continuing to supervise them once they have a year of success behind them. Early termination of their supervised release will not only mitigate the injustice perpetrated by the old guideline, it will free up probation officers to supervise the new releasees and to concentrate on offenders having a more difficult time adjusting.

*Safety Valve.* Counsel should be on the lookout for cases in which the client is eligible for safety valve relief under 18 U.S.C. § 3553(f), but did not receive it at the initial sentencing, or received a Guidelines sentence under the safety valve prior to *Booker*. Multiple circuits have held that courts may consider the safety valve in § 3582(c)(2) resentencings because it is a relevant sentencing consideration in the exercise of discretion under the statute, just like the factors in § 3553(a).<sup>62</sup> Moreover, post-*Booker*, courts have interpreted the safety valve guidelines to be advisory only and have held that they do not mandate a sentence within the Guidelines; courts that felt bound by the limitations on safety valve relief under the Guidelines may now resentence below those Guidelines despite the otherwise mandatory language of § 3553(f).<sup>63</sup> Clients who were sentenced prior to the effective date of the safety valve, clients whose eligibility was not considered at the original sentencing, and clients who received only a Guidelines reduction under the safety valve may receive the benefit of the safety valve during their resentencing under the retroactive crack amendment.

### **Rectifying Past Injustices**

Counsel (and their clients) may be disheartened and discouraged that the U.S. Sentencing Commission and DOJ are taking such irrational and unconstitutional positions regarding implementation of the retroactivity amendment. Still, the victory in achieving retroactivity should not be lost in the quagmire of litigation with those who would deny our clients a fair sentencing process and a fair sentence. Defense attorneys waited more than a decade for the commission to resolve the crack/powder disparity, and it has finally begun to do so. Regardless of the way the commission and the government choose to interpret that move, it presents the opportunity for defense counsel to rectify past injustices for their former clients. The Supreme Court’s repeated and round rejection of mandatory Guideline sentencing and the government’s approach to sentencing matters over the last several years should bolster us in that effort. Although the hurdles may seem high at times, ultimately, defense counsel can clear them.

### **Notes**

1. *The Champion*, June 2007 at 6.
2. Many people have contributed to the litigation strategies discussed here and posted on [www.fed.org](http://www.fed.org). Special thanks are owed to Amy Baron-Evans, Jennifer Coffin and Sara Noonan of the Federal Public and Community Defender’s Sentencing Resource Counsel Project, and Steve Sady, deputy public defender for the District of Oregon.
3. Glenn Schmitt, Lou Reedt & Kenneth Cohen, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* (Oct. 3, 2007) (“Impact Analysis”) at 4-5, available at [www.uscc.gov](http://www.uscc.gov).

4. Id. at [http://www.ussc.gov/general/Impact\\_Analysis\\_20071003\\_3b.pdf](http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf).26.
5. Id. at 23.
6. Id. at 16.
7. Letter from the Honorable Paul Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n (Nov. 2, 2007), available at [www.ussc.gov](http://www.ussc.gov). In its reference to "general fairness," the committee was referring both to the crack/powder cocaine disparity and to the commission's history of adopting amendments that predominately favored white inmates. See, e.g., U.S. Sentencing Comm'n, Annual Report 2003 at 152 (LSD); U.S. Sentencing Comm'n Annual Report 2005 at 103 (marijuana); U.S. Sentencing Comm'n 2003 at tbl. 34 (oxycodone).
8. U.S.S.C. Press Release, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/rel121107.htm>.
9. Other arguments that counsel can make in support of immediate release are: (1) that the court has the inherent equitable power to protect the client from unjust incarceration, see *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944); and (2) that the court has the power under 28 U.S.C. § 2255 and § 1651(a) (the All Writs Act) to vacate the original sentence and impose a new one consistent with the amendment. A full discussion of these arguments is contained in the Sentencing Resource Counsel Memorandum on Sentence Reductions for Crack Clients on the "Sentencing Resources" page of [www.fd.org](http://www.fd.org).
10. The court may do so on its own motion, a motion by the Bureau of Prisons, or a motion by the defendant. 18 U.S.C. § 3582(c)(2).
11. § 1B1.10(a)(3).
12. § 1B1.10(b)(2)(B).
13. § 1B1.10 app. note 1(B).
14. § 1B1.10(b)(2)(A).
15. Letter from Alice Fisher, Assistant Attorney General, to the Honorable Ricardo Hinojosa, Chair, U.S. Sentencing Commission (Nov. 1, 2007), available at [www.ussc.gov](http://www.ussc.gov).
16. Id.
17. The same argument may be made in support of the right to a hearing in these proceedings.
18. 389 U.S. 128 (1967).
19. Id. at 135.
20. Id.
21. Counsel may also cite Due Process concerns with the failure to appoint counsel. See *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) ("[C]ounsel . . . could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner."). And, there are myriad practical reasons that it makes sense for courts to appoint counsel. Cf. *Halbert v. Michigan*, 125 S. Ct. 2582, 2593 (2005) ("Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments.").
22. Impact Analysis at 5-11.
23. *Kimbrough v. United States*, \_\_\_ U.S. \_\_\_, 2007 WL 4292040 at \*6 (Dec. 10, 2007).
24. Id. at \*7-8 (citing U.S. Sentencing Comm'n Report to Congress: Cocaine and Federal Sentencing Policy (1995) at 1 and U.S. Sentencing Comm'n Report to Congress: Cocaine and Federal Sentencing Policy (2002) ("2002 Crack Report") at iv, 91 (internal quotation marks omitted)).
25. Id. at \*8 (citing 2002 Crack Report) and U.S.S.C., Report to Congress: Cocaine and Federal Sentencing Policy at 8 (May 2007) ("2007 Crack Report") (internal quotation marks omitted).
26. Id. (citing U.S.S.C., Special Report to Congress: Cocaine and Federal Sentencing Policy at 66-67, 174 (Feb. 1995) ("1995 Crack Report")) (internal quotation marks omitted).
27. Id. (citing 2002 Crack Report at 103) (internal quotation marks omitted).
28. Id. at \*9 (citing Amendments to the Sentencing Guidelines for U.S. Courts, 72 Fed. Reg. 29571-72 (2007)).
29. Id. (citing 2002 Crack Report at viii).
30. Id. (citing 2007 Crack Report at 10).
31. Id. at \*9 n.10; see also id. at \*7 (noting that the Commission "did not use . . . [an] empirical approach in developing the Guidelines sentences for drug-trafficking offenses" but rather

“employed the 1986 Act’s weight-driven scheme” and adopted the crack/powder disparity “in line with the 1986 Act”).

32. *Id.* at \*12; see also *id.* at \*9 (citing recommendations from the 1995 Crack Report (1 to 1 ratio), the 1997 Crack Report (5 to 1 ratio), and the 2002 Crack Report (20 to 1 ratio)).

33. 18 U.S.C. § 3582(c)(2). See also *Stinson v. United States*, 508 U.S. 36, 38 (1993).

34. See *United States v. Booker*, 543 U.S. 220, 232 (2005) (citation and internal punctuation marks omitted) (emphasis added).

35. *Id.* at 266 (internal punctuation marks and citation omitted) (emphasis in original).

36. 2007 WL 4292040 at \*13.

37. *Id.*; *Stinson*, 508 U.S. at 38 (“commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution”). See also *United States v. Hicks*, 472 F.3d 1167, 1172-73 (9th Cir. 2007) (“to the extent that policy statements are inconsistent with *Booker* by requiring that the Guidelines be treated as mandatory, the policy statements must give way”).

38. See *Gall v. United States*, \_\_\_ U.S. \_\_\_, 2007 WL 4292116 at \*9 (Dec. 10, 2007); *Kimbrough*, 2007 WL 4292040 at \*15, *Rita v. United States*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2456, 2465 (2007).

39. 472 F.3d at 1170 (citing *Booker*, 543 U.S. at 263). See also *United States v. Jones*, 2007 WL 2703122 (D. Kan. Sept. 17, 2007); *United States v. Forty Estremera*, 498 F. Supp. 2d 468, 471-72 (D.P.R. 2007).

40. 472 F.3d at 1172.

41. See also revised U.S.S.G. § 1B1.10(a)(3) (“proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant”).

42. 2007 WL 2745767 (3d Cir. Sept. 21, 2007).

43. 242 Fed. Appx. 16 (4th Cir. 2007).

44. See *Swint* at \*2.

45. *Id.* at \*2 n.1.

46. 283 F.3d 612 (3d Cir. 2002).

47. *Id.* at 614-15.

48. *United States v. Williams*, 235 F.3d 858, 867-68 (3d Cir. 2000).

49. 472 F.3d at 1171-72.

50. *Id.* at 1173.

51. 28 U.S.C. § 991(b)(1)(A)-(C).

52. *United States v. LaBonte*, 520 U.S. 751, 757 (1997).

53. *Stinson*, 508 U.S. at 44.

54. *Id.* at 45.

55. *Marbury v. Madison*, 5 U.S. 137 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”).

56. See revised U.S.S.G. § 1B1.10(a)(2)(B). The application note gives as an example a case in which the defendant is subject to a mandatory minimum sentence, see *id.* at n.1(A), but it likely also reaches people who were sentenced as career offenders or armed career criminals, and possibly others (such as those sentenced to a non-Guidelines sentence under *Booker*).

57. See, e.g., *United States v. LaBonte*, 70 F.3d 1396, 1412 (1st Cir. 1995) (rejecting government’s argument that § 3583(c)(2) resentencing is inappropriate where defendant’s original sentence falls within the amended Guidelines range because “we cannot be confident that, faced with a different range of options, the district court’s choice will remain the same”), overruled on other grounds, 520 U.S. 751 (1997).

58. See *Gall*, 2007 WL 4292116 at \*7 (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range . . . the Guidelines should be the starting point and the initial benchmark. They are not the only consideration, however. . . . [T]he judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party.”).

59. *Id.* at \*2.

60. See *United States v. Etherton*, 101 F.3d 80, 81-82 (9th Cir. 1996).

61. See *United States v. Johnson*, 529 U.S. 53, 56 (2000).

62. See *United States v. Cardenas-Juarez*, 469 F.3d 1331 (9th Cir. 2006); *United States v. Mihm*, 134 F.3d 1353 (8th Cir. 1998); *United States v. Clark*, 110 F.3d 15 (6th Cir. 1997).

63. See *id.* See also *United States v. Duran*, 383 F. Supp. 2d 1345 (D. Utah 2005); *Settembrino*

v. United States, 125 F. Supp. 2d 511 (D. Fla. 2000).

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