Crack Retroactivity: Procedural Issues

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Introduction

This document collects circuit case law addressing procedural issues that have arisen in the context of motions for sentence reductions under 18 U.S.C. § 3582(c)(2). That statute provides as follows:

> The court may not modify a term of imprisonment once it has been imposed except that . . . 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.

The statute references "the factors set forth in section 3553(a)," which are the same factors courts consider when initially imposing a sentence, as the Supreme Court discussed in *Booker v. United States* and subsequent cases.

The policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) provides as follows:

> (a) Authority.--
>
> (1) In General.--In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. 3582(c)(2). As required by 18 U.S.C. 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.
>
> (2) Exclusions.--A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2) if--
>
> (A) None of the amendments listed in subsection (c) is applicable to the defendant; or

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

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

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

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

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

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

(B) Exception.--If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

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

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

Below are procedural questions that may arise in the course of adjudicating a motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) and the retroactive crack amendment. Following the questions are cases that address the issue, including a parenthetical where additional information, such as a quotation of the pertinent language from the case, may be helpful. The document does not attempt to collect *all* cases addressing these issues; rather, it focuses on circuit precedent with binding force where available and generally includes only one authority from a given circuit even if the same court has addressed a particular issue more than once. Where relevant, the document also cites the guidelines and the Federal Rules of Criminal Procedure.

Does *Booker* apply to a § 3582(c)(2) resentencing?

No.

United States v. Fanfan, 558 F.3d 105, 109-10 (1st Cir. 2009) ("[W]e disagree with the Ninth Circuit's view that *Booker* mandates that district courts have discretion to adjust a sentence below the bottom of the new guideline range at a § 3582(c)(2) resentencing.").

United States v. Starks, 551 F.3d 839, 842 (8th Cir. 2009) ("Although the guidelines must be treated as advisory in an original sentencing proceeding, neither the Sixth Amendment nor *Booker* prevents Congress from incorporating a guideline provision as a means of defining and limiting a district court's authority to reduce a sentence under § 3582(c).").

United States v. Melvin, 556 F.3d 1190, 1192 (11th Cir. 2009) ("We agree with those circuits that have held that *Booker* and *Kimbrough* do not prohibit the limitations on a judge's discretion in reducing a sentence imposed by § 3582(c)(2) and the applicable policy statement by the Sentencing Commission.").

United States v. Dunphy, 551 F.3d 247, 256 (4th Cir. 2009) ("'The language of the statute, 18 U.S.C. § 3582(c)(2), is clear. The factors set forth in § 3553(a) and the applicable policy statements are to be considered only when making the decision whether to reduce a term of imprisonment as a result of the Sentencing Commission's lowering of the sentencing range. The statute does not say that the court may reduce the term of imprisonment below the amended

sentencing range or that the § 3553(a) factors or the applicable policy statements should be considered for such an additional reduction.' The district court here expressly considered the § 3553(a) factors in making the determination (1) that a reduction of Dunphy's term of imprisonment was warranted and (2) that the extent of the reduction for Dunphy should be to the minimum of the amended guideline range. It properly did so in accord with the limits described in U.S.S.G. §1B1.10(b), refusing to go below the minimum of the amended guideline range.") (quoting *United States v. Hasan*, 245 F.3d 682, 685 (8th Cir. 2001) (en banc)).

United States v. Cunningham, 554 F.3d 703, 708 (7th Cir. 2009) ("When Congress granted district courts discretion to modify sentences in section 3582(c)(2), it explicitly incorporated the Sentencing Commission's policy statements limiting reductions. Thus, the Commission's policy statements should for all intents and purposes be viewed as part of the statute. The policy statements make clear that section 3582(c)(2) proceedings are not full resentencings and may not result in a sentence lower than the amended guideline range (unless the defendant's original sentence was lower than the guideline range). This limitation of the district court's power is not constitutionally suspect. Having chosen to create a modification mechanism, *Booker* does not require Congress to grant the district courts unfettered discretion in applying it. Indeed, mandatory minimum sentences-which cabin the district courts' discretion with regard to section 3553(a) factors-have been upheld as constitutional.").

United States v. Rhodes, 549 F.3d 833, 841 (10th Cir. 2008) ("The Sentencing Commission's policy statements regarding modifications of previously imposed sentences are set forth in §1B1.10. Under the current version of that guideline, the Sentencing Commission has clearly indicated that a sentencing court shall not, in modifying a previously imposed sentence on the basis of an amended guideline, impose a sentence below the amended guideline range. Because this policy statement is binding on district courts pursuant to § 3582(c)(2), the district court when sentencing Rhodes correctly concluded that it lacked the authority to impose a modified sentence that fell below the amended guideline range.").

United States v. Wise, 515 F.3d 207, 221 n.11 (3d Cir. 2008) ("Some may argue that, because the Guidelines are no longer mandatory, defendants need not wait to apply for relief under § 3582(c)(2). That fundamentally misunderstands the limits of *Booker*. Nothing in that decision purported to obviate the congressional directive on whether a sentence could be reduced based on subsequent changes in the Guidelines. As we have stated before, '[t]he language of the applicable sections could not be clearer: the statute directs the Court to the policy statement, and the policy statement provides that an amendment not listed in subsection (c) may not be applied retroactively pursuant to 18 U.S.C. § 3582(c)(2).' *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995).").

Yes.

United States v. Hicks, 472 F.3d 1167, 1171 (9th Cir. 2007) (". . . *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. *Booker*, 543 U.S. at 263-66, 125 S. Ct. 738. Mandatory Guidelines no longer exist, in this context or any other.”).

Is a § 3582(c)(2) proceeding a full resentencing?

No.

New USSG §1B1.10(3) (“[P]roceedings under § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.”).

United States v. Johnson, 2008 WL 4183911 (11th Cir. Sept. 12, 2008) (noting that “a district court must engage in a two-part analysis; first the court must recalculate the sentence under the amended guidelines; second, the court must decide whether, in its discretion, it will choose to impose a new sentence or retain the original sentence . . . in light of the factors listed in 18 U.S.C. § 3553(a);” remanding where district court's order “did not . . . explain its ruling . . . [or] demonstrate the district court took the pertinent factors into account.”).

United States v. Hicks, 472 F.3d 1167, 1171 (9th Cir. 2007) (“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 Guideline range, considering the § 3553(a) factors, and issuing a new sentence based on the Guidelines.”).

United States v. Bravo, 203 F.3d 778, 781 (11th Cir. 2000) (“[A] sentencing adjustment undertaken pursuant to § 3582(c)(2) does not constitute a de novo resentencing.”).

United States v. Jordan, 162 F.3d 1, 4 (1st Cir. 1998) (“To the extent [defendant] is arguing that . . . there is fully de novo resentencing under § 3582(c)(2), that is surely wrong.”).

United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000) (stating that § 3582(c)(2) motion “is not a do-over of an original sentencing proceeding”).

United States v. Moreno, 421 F.3d 1217, 1220 (11th Cir. 2005) (“[A] sentencing adjustment undertaken pursuant to Section 3582(c)(2) does not constitute a de novo resentencing.”).

United States v. Suarez, 2007 WL 454773 (11th Cir. Dec. 27, 2007) (“Section 3582(c)(2) ‘does not grant to the court jurisdiction to consider extraneous resentencing issues.’”).

United States v. Swint, 2007 WL 2745767, *2 , n.1 (3d Cir. Sept. 21, 2007) (“[S]ection 3582(c)(2) does not entitle a defendant to a full de novo resentencing.”).

United States v. Tidwell, 178 F.3d 946, 949 (7th Cir. 1999) ("[A] proceeding under 18 U.S.C. § 3582(c) is not a do-over of an original sentencing proceeding where a defendant is cloaked in rights mandated by statutory law and the Constitution.").

United States v. Torres, 99 F.3d 360, 361 (10th Cir. 1996) ("§ 3582(c)(2) and related sentencing guidelines do not contemplate fully de novo resentencing.").

United States v. Whitebird, 55 F.3d 1007, 1011 (5th Cir. 1995) ("A § 3582(c)(2) motion is not a second opportunity to present mitigating factors to the sentencing judge, nor is it a challenge to the appropriateness of the original sentence.").

Does a defendant have the right to a § 3582(c)(2) hearing?

No.

United States v. Brown, 556 F.3d 1108, 1113 (11th Cir. 2009).

United States v. Legree, 205 F.3d 724 (4th Cir. 2000).

United States v. Edwards, 156 F.3d 182 (5th Cir. 1998).

Does a defendant have the right to be present at a § 3582(c)(2) hearing?

No.

Fed. R. Crim. P. 43(b)(4) ("A defendant need not be present [when] [t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).")

United States v. Webb, --- F.3d ----, 2009 WL 973214 (11th Cir. 2009).

United States v. Young, 555 F.3d 611 (7th Cir. 2009).

Does a defendant have a right to counsel for purposes of filing a motion under § 3582(c)(2)?

No.

United States v. Brown, 556 F.3d 1108, 1113 (11th Cir. 2009).

United States v. Hayes, 290 Fed. Appx. 546 (4th Cir. 2008) (per curiam) (unpublished) (affirming denial of relief, denying defendant's motion for appointment of counsel).

United States v. Woodson, 280 Fed. Appx. 568, 569 (8th Cir. 2008) (per curiam) (unpublished) (holding that the district court "properly denied [defendant's] motion for appointment of counsel").

United States v. Legree, 205 F.3d 724, 730 (4th Cir. 2000) (holding that due process did not require court to appoint counsel or hold a hearing to resolve § 3582(c)(2) motion).

United States v. Reddick, 53 F.3d 462, 464 (2d Cir. 1995) (holding that CJA did not require appointment of counsel on § 3582(c)(2) motion).

United States v. Tidwell, 178 F.3d 946, 949 (7th Cir. 1999) ("The judge can appoint counsel for a movant, but need not do so.").

United States v. Townsend, 98 F.3d 510, 512 (9th Cir. 1996) (holding that § 3582(c)(2) defendant was not entitled to counsel under either (a) the rules governing § 2255 motions or (b) the Sixth Amendment).

United States v. Whitebird, 55 F.3d 1007, 1011 (5th Cir. 1995) (holding that § 3006A(c) did not entitle a defendant to appointed counsel for purposes of filing a a § 3582(c)(2) motion).

Maybe.

United States v. Robinson, 542 F.3d 1045, 1052 (5th Cir. 2008) (declining to decide whether defendant has a right to counsel, but exercising discretion to appoint counsel for purposes of arguing appeal).

Must the court order a new presentence report on a § 3582(c)(2) motion?

No.

United States v. Grafton, 2009 WL 757362 (11th Cir. 2009).

No, but if the court orders one, the defendant must be given the opportunity to respond to it.

United States v. Mueller, 168 F.3d 186, 189 (5th Cir. 1999) ("The district court certainly has the discretion to consider a PSR addendum in resolving a § 3582(c)(2) motion if it determines that such an addendum would be helpful. However, a defendant must have notice of the contents of the addendum and notice that the court is considering it such that he will have the opportunity to respond to or contest it."). But see *United States v. Young*, 555 F.3d 611 (7th Cir. 2009) (affirming denial of reduction even though defendant did not have formal opportunity to comment on addendum to PSR; emphasizing district court's discretion in procedural approach to § 3582(c)(2) hearings).

Under what circumstances could a court go below the amended guideline range?

Where a downward departure was given at the original sentence:

Yes.

New USSG § 1B1.10(b)(2)(B) ("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) may be appropriate.").

United States v. Vautier, 144 F.3d 756, 761 (11th Cir. 1998) ("[A] district court, ruling on a defendant's § 3582(c)(2) motion, has the discretion to decide whether to re-apply a downward departure for substantial assistance when considering what sentence the court would have imposed under the amended guideline.").

United States v. Wyatt, 115 F.3d 606, 610 (8th Cir. 1997) ("The district court retains unfettered discretion to consider anew whether a departure from the new sentencing range is now warranted in light of the defendant's prior substantial assistance.").

Where a downward variance was given at the original sentence:

No.

New USSG §1B1.10(b)(2)(B) ("[I]f 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, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), a further reduction generally would not be appropriate.")

United States v. Brown, 556 F.3d 1108 (11th Cir. 2009).

Where a downward departure was not given at the original sentence:

No.

New USSG §1B1.10(b)(2)(A) ("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).").

United States v. Bravo, 203 F.3d 778, 781 (11th Cir. 2000) ("[A]ll original sentencing determinations remain unchanged with the sole exception of the guideline range that has been

amended since the original sentencing. A district court's discretion has, therefore, clearly been cabined in the context of a Section 3582(c) sentencing reconsideration."

United States v. Jordan, 162 F.3d 1 (1st Cir. 1998) (holding that defendant could not benefit on § 3582(c)(2) motion from a departure under USSG §5K2.0 that was not available at the time of sentencing).

United States v. Hasan, 245 F.3d 682 (8th Cir. 2001) (holding that post-sentence extraordinary rehabilitation was no basis for a departure below the amended guideline range).

Yes.

United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007) (holding that court was not bound by amended guideline range on § 3582(c)(2) motion).

Does § 3582(c)(2) authorize a court to reduce a term of imprisonment imposed on a supervised release violation?

No.

New USSG § 1B1.10, comment. (n.4(A)) ("Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.") (same as in old USSG §1B1.10, comment. (n.4).

May a court reduce a term of supervised release based on the new amendment?

Yes, but only pursuant to 18 U.S.C. § 3583(e)(1).

New USSG § 1B1.10, comment (n.4(B)) ("If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).").

18 U.S.C. § 3582(e)(1), (2) (A court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if [the court] is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice" and may "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release.").

United States v. Johnson, 529 U.S. 53, 60 (2000) (stating that under § 3582(e), "[t]he trial court, as it sees fit, may modify an individual's conditions of supervised release.").

If a court wishes to modify terms of supervision at the same time it modifies the sentence pursuant to § 3582(c)(2), is a hearing required?

Maybe, subject to two exceptions.

Fed. R. Cr. P. 32.1(c)(1) ("Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.").

Fed. R. Cr. P. 32.1(c)(2) (a hearing is not required where (1) defendant waives the hearing, (2) relief is favorable to the person and does not extend term of supervision and the government has notice and does not object).

United States v. Fernandez, 379 F.3d 270, 277 n.8 (5th Cir. 2005) (stating that transfer of supervision does not require a hearing).

United States v. Padilla, 415 F.3d 211 (1st Cir. 2005) (recognizing general hearing requirement and its two exceptions).

If a defendant was sentenced as a career offender pursuant to §4B1.1, what impact does Amendment 706 have on his sentence?

None. The reduction in the applicable offense level for crack offenses does not alter their status under the career offender provision as controlled substance offenses, nor does it impact the statutory maximum penalty to which the defendant was subject. Because the court, in sentencing under §4B1.1, does not take into account the offense level applicable to the offense of conviction, Amendment 706 does not impact the defendant's sentence and therefore § 3582(c)(2) is not applicable. This analysis would not apply, however, where the defendant would have been sentenced under §4B1.1 but was actually sentenced under §2D1.1 because that offense level was higher than the offense level from §4B1.1. See §4B1.1(b).

United States v. Mateo, 560 F.3d 152 (3d Cir. 2009).

United States v. Forman, 553 F.3d 585 (7th Cir. 2009).

United States v. Caraballo, 552 F.3d 6 (1st Cir. 2008).

United States v. Sharkey, 543 F.3d 1236 (10th Cir. 2008).

United States v. Moore, 541 F.3d 1323 (11th Cir. 2008).

United States v. Thomas, 524 F.3d 889 (8th Cir. 2008).

United States v. Tyler, 301 Fed. Appx. 265 (4th Cir. 2008).

Yes.

United States v. McGee, 553 F.3d 225 (2d Cir. 2009) (exception to the general rule where defendant would have been a career offender but district court departed downward pursuant to §4A1.3 to defendant's §2D1.1 guideline range; in this case, defendant's sentence was "based on" a range lowered by amendment 706 and he was eligible for relief under § 3582(c)(2)).

Does §3582(c)(2) permit a reduction in sentence if the defendant's sentence was dictated by a statutory mandatory minimum?

No.

United States v. Coleman, 2008 WL 4150018 (11th Cir. 2008) (affirming denial of reduction where guideline range was lower than mandatory minimum, citing §5G1.1(b)).

United States v. Luckey, 2008 WL 3929587 (7th Cir. 2008) (affirming denial of relief where defendant was sentenced to mandatory minimum).

United States v. Jones, 523 F.3d 881 (8th Cir. 2008) (affirming district court's denial of reduction in sentence where defendant's "final originally calculated guidelines range was the statutorily required minimum sentence" pursuant to §5G1.1(b), holding that "district court properly concluded that [the] guidelines range was unaffected by" Amendment 706).

Does § 3582(c)(2) authorize a court to reduce a term of imprisonment where the defendant received a sentence below the mandatory minimum pursuant to 18 U.S.C. § 3553(e)?

No.

United States v. Hood, 556 F.3d 226, 228 (4th Cir. 2009) (affirming district court's order concluding that it did not have jurisdiction to reduce the defendants' sentences because the sentences were based on a statutory mandatory minimum, not the drug guideline).

United States v. Williams, 549 F.3d 1337, 1340-41 (11th Cir. 2008) (affirming denial of sentence reduction where defendant was subject to statutory mandatory minimum for repeat felony drug offenders).

United States v. Johnson, 517 F.3d 1020 (8th Cir. 2008) (affirming the defendant's 126-month sentence for possession with intent to distribute 50 grams or more of cocaine base and for possession of a firearm in furtherance of a drug trafficking crime, which reflected a reduction below the mandatory minimum of 180 months in response to the government's § 3553(e) motion; rejecting defendant's argument that he was entitled to resentencing on the basis of Amendment 706, holding that the defendant would not be entitled to relief: "Since the district court used the 120 month mandatory minimum as its point of departure, resentencing is not warranted.")

Is relief pursuant to § 3582(c)(2) available where, under the revised guidelines, there would be no reduction in the defendant's base offense level?

No.

United States v. Williams, 551 F.3d 182 (2d Cir. 2009) (affirming denial of relief where defendant's sentence was dictated by statutory mandatory minimum higher than guideline range otherwise applicable under §2D1.1)

United States v. Poole, 550 F.3d 676 (7th Cir. 2008) (affirming denial of relief where defendant's sentence was dictated by statutory mandatory minimum higher than guideline range otherwise applicable under §2D1.1).

United States v. James, 548 F.3d 983 (11th Cir. 2008) (affirming denial of sentence reduction where defendant was sentenced prior to increase in offense level at top of drug table, and therefore defendant's offense level would actually be higher than the offense level at his original sentencing).

United States v. Thomas, 545 F.3d 1300 (11th Cir. 2008) (affirming denial of sentence reduction where defendant was sentenced as an armed career criminal pursuant to §4B1.4).

United States v. Herrera, 2008 WL 4060168 (10th Cir. 2008) (affirming denial of relief where defendant's offense level would not change because his offense involved more than 4.5 kilograms of crack).

United States v. Wanton, 525 F.3d 621 (8th Cir. 2008) (summarily affirming district court's denial of reduction in sentence where defendant's sentence was based on a quantity of crack cocaine greater than 4.5 kilograms, citing §1B1.10 in holding that, under these circumstances "[the] guideline range would not be lowered, and [the] original sentence is unaffected by the amendments.").

United States v. Fernandez, 2008 WL 683931 (3d Cir. 2008) (affirming district court's conclusion that the defendant was not eligible for relief under the amended guideline because it would not lower the defendant's guideline range, stating that the defendant's "sentence was not based on the crack cocaine involved in the conspiracy but rather the heroin.").

May a court amend a sentence pursuant to § 3582(c)(2) where the original sentence was imposed pursuant to a plea agreement with a binding sentence recommendation?

No.

United States v. Sanchez, 562 F.3d 275 (3rd Cir. 2009).
United States v. Scurlark, 560 F.3d 839 (8th Cir. 2009).
United States v. Peveler, 359 F.3d 369 (6th Cir. 2004).
United States v. Brown, 71 Fed. Appx. 383 (5th Cir. 2003).
United States v. Moure-Ortiz, 184 F.3d 1 (1st Cir. 1999).
United States v. McKenna, 134 F.3d 380 (9th Cir. 1998).
United States v. Hemminger, 114 F.3d 1192 (7th Cir. 1997).
United States v. Trujeque, 100 F.3d 869 (10th Cir. 1996)

Yes.

United States v. Dews, 551 F.3d 204 (4th Cir. 2008) (rehearing en banc granted February 20, 2009; oral argument scheduled for May 13, 2009) (split panel reverses and remands where district court holds that plea agreement strips it of jurisdiction to reduce the sentence under §3582(c)(2)).

May a court of appeals review a district court's ruling on a defendant's motion for relief under § 3582(c)(2) if the defendant waived his rights to appeal as part of a plea agreement?

No, if the appeal waiver is found to include appeals of motions under § 3582(c)(2). If the defendant explicitly and effectively waived his right to file a §3582(c)(2) motion, the district court has no jurisdiction to act on that motion. To the extent that a defendant explicitly and effectively waives his right to appeal a determination under § 3582(c)(2), that waiver strips the appellate court of jurisdiction to review the district court's determination.

United States v. Chavez-Salais, 337 F.3d 1170 (10th Cir. 2003) ("In this case, however, the plea agreement did not explicitly state that Defendant was waiving his right to bring a later motion to modify his sentence under 18 U.S.C. § 3582(c)(2). Had the agreement contained such language, or language suggesting that Defendant waived the right 'to attack collaterally or otherwise attempt to modify or change his sentence,' we would likely find that Defendant had waived his right to bring the instant motion. The agreement contained no such language, however, and we do not believe that motions under 18 U.S.C. § 3582(c)(2) are clearly understood to fall within a prohibition on "any collateral attack." Defendant's motion under § 3582(c)(2) does not so much

challenge the original sentence as it seeks a modification of that sentence based upon an amendment to the Guidelines. Thus, we find that the language of the plea agreement itself does not clearly reach Defendant's instant motion under 18 U.S.C. § 3582(c)(2).")

United States v. Contreras, 215 F.3d 1334 (9th Cir. 2000) (unpublished) (dismissing appeal of denial of a § 3582(c)(2) motion for lack of jurisdiction on grounds that defendant waived right to appeal "any sentence imposed by the Court and the manner in which the sentence is determined so long as the court determines that the total offense level is 31 or below.")

May a court grant a § 3582(c)(2) motion based on the new crack amendments prior to March 3, 2008, the effective date of the amendment to §1B1.10?

No.

United States v. Tensley, 2008 WL 713674 (11th Cir. Mar. 18, 2008) (per curiam) (affirming district court's denial of defendant's motion for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) on grounds that it was premature - i.e., that it was filed before the amendment became retroactively applicable, on March 3, 2008.). *But see United States v. Moore*, 541 F.3d 1323 (11th Cir. 2008) (declining to address the general issue of jurisdiction before the effective date of retroactivity because the district court ruled on the motions after March 3, and the statute provides that the court may sua sponte take up the issue, concluding that this cured any possible jurisdictional defect).

United States v. Wise, 515 F.3d 207, 221 n. 11 (3d Cir. 2008) ("Some may argue that, because the Guidelines are no longer mandatory, defendants need not wait to apply for relief under § 3582(c)(2). That fundamentally misunderstands the limits of *Booker*. Nothing in that decision purported to obviate the congressional directive on whether a sentence could be reduced based on subsequent changes in the Guidelines. As we have stated before, '[t]he language of the applicable sections could not be clearer: the statute directs the Court to the policy statement, and the policy statement provides that an amendment not listed in subsection (c) may not be applied retroactively pursuant to 18 U.S.C. § 3582(c)(2).' *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995).").

Can a defendant get a sentence reduction pursuant to a retroactive amendment to the guidelines by filing a petition for habeas relief under 28 U.S.C. § 2255?

No. The proper vehicle for seeking a sentence reduction pursuant to an amendment to the guidelines given retroactive application by the Commission is a motion to reduce sentence pursuant to 18 U.S.C. § 3582. *See United States v. Carter*, 500 F.3d 486 (6th Cir. 2007) (holding that "[w]hen a § 3582 motion requests the type of relief that § 3582 provides for - that is, when the motion argues that sentencing guidelines have been modified to change the applicable guidelines used in the defendant's sentencing - then the motion is rightly construed as a motion to amend sentencing pursuant to § 3582" and "when a motion titled as a § 3582 motion otherwise

attacks the petitioner's underlying conviction or sentence, that is an attack on the merits of the case and should be construed as a § 2255 motion"); *United States v. Rios-Paz*, 808 F. Supp. 206 (E.D. N.Y. 1992) (holding relief sought in form of reduction of sentence by reason of subsequent amendment of sentencing guidelines was beyond the scope of a motion for reduction under the habeas statutes because a sentencing court must consider the guidelines in effect at the sentencing date); *United States v. Snow*, 2008 WL 239517 (W.D. Pa. Jan. 29, 2008) (finding that waiver of right to file § 2255 motion would not result in a miscarriage of justice because § 3582(c)(2) "will provide the Court with an avenue for addressing [the retroactivity] issue once the issue is ripe).

Courts have held it is not proper for a court to treat a motion to reduce sentence as a petition for habeas relief. *See Simon v. United States*, 359 F.3d 139 (2d Cir. 2004) (holding that the district court erred in converting motion pursuant to 18 U.S.C. § 3582(c) into petition for writ of habeas corpus). *See also Castro v. United States*, 540 U.S. 375 (2003) (holding that a district court was required to notify defendant prior to recharacterizing motion as motion to vacate, and to provide defendant with certain warnings and an opportunity to withdraw). These decisions are based, in part, upon the limitations for filing a petition under section 2255 established by the Antiterrorism and Effective Death Penalty Act (AEDPA). Pursuant to AEDPA, a petition for habeas relief must be filed within one year of certain specified events. *See* 28 U.S.C. § 2255. Moreover, AEDPA barred the filing of a second or subsequent petition except under specified circumstances. *See* 28 U.S.C. §§ 2244, 2255.

A petition for relief under section 2255 is proper only when it alleges that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." *See* 28 U.S.C. § 2255. *See also Hill v. United States*, 368 U.S. 424, 428 (1962) (discussing types of errors cognizable under a writ of habeas corpus: error that is "jurisdictional" or "constitutional," or that is a "fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure," or presents "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent").

The Supreme Court has held that post-sentencing changes in policy do not support a collateral attack on the original sentence under section 2255. See *United States v. Addonizio*, 442 U.S. 178 (1979) (holding that actions taken by Parole Commission subsequent to sentencing do not retroactively affect the validity of the final judgment, nor do they provide a basis for collaterally attacking the sentence). Other courts have held that changes in the guidelines after the defendant's sentencing did not provide grounds for post-conviction relief under section 2255. *See, e.g.*, *Burke v. United States*, 152 F.3d 1329 (11th Cir. 1998) (holding that defendant's claim that enhancement of his sentence was contrary to a subsequently enacted clarifying amendment to the guidelines was not cognizable on a motion for postconviction relief). Moreover, erroneous application of the guidelines at sentencing do not provide grounds for relief under section 2255. *See Kirkeby v. United States*, 940 F. Supp. 241 (D. N.D. 1996) (holding that, absent a complete miscarriage of justice, claims involving a sentencing court's failure to properly apply the

Sentencing Guidelines will not be considered on a § 2255 motion where the defendant failed to raise them on direct appeal). *See also United States v. Faubion*, 19 F.3d 226, 232-33 (5th Cir.1994) (holding that an erroneous upward departure under sentencing guidelines was not a "miscarriage of justice"); *Knight v. United States*, 37 F.3d 769, 773 (1st Cir.1994) (holding that a misapplication of the sentencing guidelines does not amount to a "complete miscarriage of justice"); *United States v. Schlesinger*, 49 F.3d 483, 484-86 (9th Cir.1994) (acknowledging that nonconstitutional sentencing errors may not be reviewed under § 2255 with possible exception for errors not discoverable at time of appeal); *Scott v. United States*, 997 F.2d 340, 341-42 (7th Cir.1993) (holding that an erroneous criminal history score under sentencing guidelines was not subject to collateral attack); *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir.1992) (holding that an error in technical application of sentencing guidelines was not subject to collateral attack).