No. 09-6338

IN THE
Supreme Court of the United States

PERCY DILLON,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES SENTENCING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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March 3, 2010

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QUESTION PRESENTED

Amicus will address the following question:

Whether, in a sentence reduction proceeding under 18 U.S.C. § 3582(c)(2), the district court has authority to reduce a sentence of imprisonment in a manner inconsistent with the United States Sentencing Commission's policy statement at § 1B1.10 of the Guidelines Manual.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

INTEREST OF *AMICUS CURIAE*[1]

The Sentencing Reform Act of 1984 ("SRA") charged the United States Sentencing Commission (the "USSC" or the "Commission") with the duty to create, review, and revise the Federal Sentencing Guidelines ("Guidelines"), 28 U.S.C. §§ 991-994, and "granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u)." *Braxton v. United States*, 500 U.S. 344, 348 (1991). The Commission accordingly has a direct interest in this case, which concerns sentence modification proceedings conducted in response to its decision to make an amendment to the Guidelines retroactive. The Commission previously submitted briefs in this Court as *amicus curiae* on issues of paramount importance to the Commission's mission and functions in *Rita v. United States*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005); and *Mistretta v. United States*, 488 U.S. 361 (1989).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

STATEMENT

A. The Commission's Amendment To The Guidelines Applicable To Crack Cocaine Offenses

Under the SRA, the Commission is charged with "establishing sentencing policies and practices" that "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). The SRA directs the Commission to ensure that federal sentencing policies "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process" and to measure the effectiveness of sentencing practices in meeting the purposes of sentencing. *Id.* § 991(b)(1)(C). The Commission accordingly has the obligation periodically to "review and revise" the Guidelines "in consideration of comments and data coming to its attention." *Id.* § 994(*o*). The Commission must submit to Congress its amendments to the Guidelines; the amendments are subject to disapproval by Congress for 180 days, after which time they take effect. *See id.* § 994(p).

The amendment to the Guidelines at issue in this case concerns offenses involving crack cocaine. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007). Under the Anti-Drug Abuse Act of 1986, Congress set mandatory minimum penalties for crack cocaine (or "cocaine base") offenses that "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007). The Commission initially incorporated that "100-to-1" ratio into the Guidelines, but, based on further research and study, came to the view that the extent of this disparate treatment was

no longer supportable.[2] In the absence of any legislative action by Congress, in 2007, the Commission adopted an amendment that reduced the base offense level for most crack cocaine offenders by two levels. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007).

B. The Commission's Determination To Make The Crack Cocaine Amendment Retroactive

1. When a Guideline amendment "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the SRA requires that the Commission "specify in what circumstances and by what amount" the sentences of prisoners serving terms of imprisonment for those offenses should be lowered. 28 U.S.C. § 994(u). Section 1B1.10 of the Guidelines Manual implements that directive and provides that a sentence reduction is appropriate only if one of the amendments "listed in subsection (c) [of § 1B1.10] is applicable to the defendant" and "ha[s] the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2). Section 1B1.10(c) thus identifies those amendments that the Commission has determined, pursuant to § 994(u), should be applied retroactively.

Section 1B1.10 also explains the criteria that the Commission uses for deciding whether to give an

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[2] *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), *available at* http://www.ussc.gov/crack/exec.htm; USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf.

amendment retroactive effect. Those criteria include "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." *Id.* § 1B1.10 cmt. background. In considering the difficulty of applying an amendment retroactively, the Commission considers not only how difficult applying the amendment would be in an individual case, but also the overall impact of a potential retroactivity decision on the federal criminal justice system.

To inform the Commission's deliberations, particularly with respect to that third enumerated factor, the Commission typically performs an analysis that estimates the number of offenders potentially eligible to seek a reduced sentence if the Commission were to make the amendment retroactive. It then projects release dates for those eligible offenders.[3] Using those criteria, the Commission has exercised its authority to make an amendment retroactive judiciously. Prior to *Booker*, the Commission had voted to apply only 24 of its amendments retroactively.

2. Following its submission of the crack cocaine amendment to Congress, the Commission published a Federal Register notice seeking public comment on whether the amendment should be given retroactive effect. *See* 72 Fed. Reg. 41,794 (July 31, 2007). Cognizant of the potential impact that Amendment 706 could have on the federal criminal justice system if applied retroactively, the Commission also requested comment regarding "whether, if it amends § 1B1.10(c)

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[3] *See*, *e.g.*, USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008); *see also* USSC Rules of Practice and Procedure 4.1 (2007).

to include [the crack cocaine] amendment, it also should amend § 1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively under 18 U.S.C. 3582(c)(2)." *Id*.

The Commission received "more than 33,000 pieces of public comment concerning the issue of retroactivity," representing each of the major participants in the federal criminal justice system.[4] Although many comments favored making the amendment retroactive, they also reflected concern for the procedures that would apply in the event of retroactive application. As the Committee on Criminal Law of the Judicial Conference of the United States stated: "[t]he Committee's recommendation [in favor of retroactive application of the crack cocaine amendment] rests on the hope that the Commission will implement procedures to reduce the administrative burden on the federal judiciary associated with the resentencings that would attend retroactive application."[5]

In addition to soliciting public comment, the Commission held a full-day hearing in Washington, D.C., where it heard testimony from many participants in the federal criminal justice system, including the judicial branch, representatives of the executive branch, private practitioners and representatives of federal public defenders, academics, and various community groups.

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[4] U.S. Sentencing Commission Public Meeting Minutes at 6 (Dec. 11, 2007), *available at* http://www.ussc.gov/MINUTES/20071211_Minutes.pdf.

[5] Letter from Hon. Paul Cassell, Chair, Committee on Criminal Law, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 1 (Nov. 2, 2007) ("Cassell Letter"), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_004.pdf.

3. The Commission also analyzed and considered the potential impact on the prison population and the federal court system of applying the crack cocaine amendment retroactively.[6] The Commission's analysis was based expressly on its understanding of "the constraints imposed by 18 U.S.C. § 3582(c)(2) and § 1B1.10" limiting "the extent of any reduction under § 3582(c)(2) to the amended guideline range." Schmitt Memorandum at 4. Accordingly, the data considered by the Commission when it voted on retroactivity of the crack cocaine amendment "account[ed] only for the application of the two-level reduction provided by the crack cocaine amendment and [did] not assume any other reduction in the sentence." *Id.*

The Commission's analysis estimated that, of the 31,323 crack cocaine offenders sentenced between October 1, 1991, and June 20, 2007, and who were identified as imprisoned, 19,500 "would be eligible to seek a reduced sentence if the Commission were to make the 2007 crack cocaine amendment retroactive" and that "[t]hese offenders would be released over a period of more than three decades." *Id.* at 4-5. Further, the Commission estimated that "the average sentence reduction for those offenders who appear to be eligible to seek a reduced sentence would be 27 months (from 152 months to 125 months)." *Id.* at 23.

4. After considering the data and public input, the Commission voted on December 11, 2007, to give the crack cocaine amendment retroactive effect as of March 3, 2008. *See* USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The

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[6] *See* Memorandum from Glenn Schmitt et al., USSC, to Hon. Ricardo H. Hinojosa, Chair, USSC (Oct. 3, 2007) ("Schmitt Memorandum"), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

Commission also voted to amend § 1B1.10 to "clarify when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2)." *Id.*, amend. 712, Reason for Amendment (effective Mar. 3, 2008).

5. Since its decision to make the crack cocaine amendment retroactive, the Commission has compiled "data concerning recent court decisions considering motions to reduce the length of imprisonment for certain offenders convicted of offenses involving crack cocaine prior to November 1, 2007."[7] As of January 13, 2010, district courts had addressed and decided 23,471 motions brought under 18 U.S.C. § 3582(c)(2) during the approximately 22 months that the amendment had been in effect. *See* 2010 Report, Table 1. Of those 23,471 motions, district courts had granted 15,501 sentence reductions pursuant to the Commission's crack cocaine amendment and denied an additional 7,970 such motions. *See id.*[8] The average reduction in sentence was 25 months, compared to the 27 months the Commission had projected. *See id.*, Table 8.

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[7] USSC, *Preliminary Crack Cocaine Retroactivity Data Report* 1 (Jan. 2010) ("2010 Report"), *available at* http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_January.pdf.

[8] Of those 7,970 motions, 6,763 were denied because the defendant was not eligible for a sentence reduction; 944 of those motions were brought by defendants whose offense(s) did not involve crack cocaine. *See id.*, Table 9.

SUMMARY OF ARGUMENT

I.A. Under 28 U.S.C. § 994(u), if the Commission reduces the recommended Guideline range applicable to a certain offense, it must "specify in what circumstances and by what amount" those sentences should be reduced for those serving terms of imprisonment for that offense. The Commission's policy statement at § 1B1.10 of the Guidelines Manual carries out those tasks by providing that a court may grant a sentence reduction under a Guideline amendment only if the Commission has designated that amendment as appropriate for retroactive application ("in what circumstances") and that a court may not reduce a defendant's sentence below the amended Guideline range ("by what amount"). *Amici*'s various arguments that courts are free to regard those limitations as non-binding are unpersuasive and contradicted by the express terms of 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2).

B. The Commission properly adhered to procedural requisites in formulating its decision. The Commission correctly forecast the thousands of requests for sentence modification that have been filed in response to the retroactive effect of the crack cocaine amendment. The Commission's amendments to § 1B1.10 were adopted to clarify any ambiguities in the policy statement that could lead to unnecessary litigation and confusion, and in turn could hinder the federal courts' ability to process the cases and to release those prisoners who would benefit from retroactive application of the amendment.

In amending § 1B1.10, the Commission was not required to use the notice-and-comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. The Commission's organic statute is clear

that the APA applies only to promulgation of Guidelines and that the Commission should implement its authority under 18 U.S.C. § 3582(c)(2) through promulgation of a policy statement. Nevertheless, the Commission sought and received public comment on the changes to § 1B1.10 using the same procedures through which it obtained public comment on the crack cocaine amendment itself. Furthermore, the revisions merely clarified the appropriate circumstances for sentence modifications.

II. A significant factor in the Commission's consideration of whether to make a Guideline amendment retroactive is the effect retroactivity would have on the court system's ability to administer justice. Because courts of appeals have generally treated sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) as having a limited scope that does not entail a complete resentencing, the Commission has been able to predict with a high degree of accuracy what consequences to the judicial system are likely to flow from retroactive treatment of specific Guideline amendments. That assessment would be extremely difficult, if not impossible, to conduct if the Commission could not reasonably predict the extent of the reduction that could be granted to an eligible defendant or the nature and extent of the resulting proceedings. The regime that petitioner seeks – in which any amendment made retroactive would potentially afford each eligible defendant a full resentencing – likely would have the effect of diminishing retroactivity's usefulness as a tool for promoting fairness in sentencing and avoiding unwarranted disparities.

ARGUMENT

I. THE COMMISSION PROPERLY CARRIED OUT ITS STATUTORY DUTIES UNDER 28 U.S.C. § 994(u) BY PROMULGATING THE POLICY STATEMENT AT USSG § 1B1.10

By its terms, § 3582(c)(2) grants a district court authority to reduce a sentence only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The Commission joins in respondent's arguments as to why applying § 3582(c)(2) as written is consistent with the Sixth Amendment and this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005).[9] The Commission will address here certain of the non-constitutional, alternative arguments advanced by the Federal Defenders as *Amici Curiae*

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[9] That is the "nearly unanimous position" of the courts of appeals, which have held that "*Booker* does not alter the mandatory character of Guideline § 1B1.10's limitations on sentence reductions." *United States v. Doublin*, 572 F.3d 235, 238 (5th Cir.) (per curiam), *cert. denied*, 130 S. Ct. 517 (2009); *see also United States v. Fanfan*, 558 F.3d 105, 109-10 (1st Cir.), *cert. denied*, 130 S. Ct. 99 (2009); *United States v. Savoy*, 567 F.3d 71, 73 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 342 (2009); *United States v. Doe*, 564 F.3d 305, 313-14 (3d Cir.), *cert. denied*, 130 S. Ct. 563 (2009); *United States v. Dunphy*, 551 F.3d 247, 252-55 (4th Cir.), *cert. denied*, 129 S. Ct. 240 (2009); *United States v. Cunningham*, 554 F.3d 703, 706-07 (7th Cir.), *cert. denied*, 129 S. Ct. 2826, 2840 (2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir.), *cert. denied*, 129 S. Ct. 2746 (2009); *United States v. Rhodes*, 549 F.3d 833, 839-41 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2052 (2009); *United States v. Melvin*, 556 F.3d 1190, 1192-93 (11th Cir.), *cert. denied*, 129 S. Ct. 2382 (2009). *But see United States v. Hicks*, 472 F.3d 1167, 1169-72 (9th Cir. 2007). In *United States v. Fox*, 583 F.3d 596 (9th Cir. 2009), the Ninth Circuit granted initial hearing en banc to consider whether to overrule *Hicks*; that review has been stayed pending the Court's resolution of this case.

in Support of Petitioner ("*Amici*"). *Amici*'s arguments are unpersuasive.

A. Section 1B1.10 Specifies "In What Circumstances" And "By What Amount" Sentences May Be Reduced Based On A Guideline Amendment

1. Section 994(u) specifically directs that, "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). In response to that directive, the Commission promulgated § 1B1.10.

Section 1B1.10(a) specifies "in what circumstances" (28 U.S.C. § 994(u)) an amendment may be applied retroactively, by providing that a defendant is eligible for a § 3582(c)(2) reduction only if an "amendment[] listed in subsection (c) [of § 1B1.10] is applicable to the defendant" and "ha[s] the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2). Section 1B1.10(c) lists those amendments that the Commission has determined are appropriate for retroactive application. Petitioner and his *Amici* do not dispute that § 1B1.10 is binding in this respect – a court is not free to grant a sentence reduction under § 3582(c)(2) based on an amendment to the Guidelines that the Commission has not listed in § 1B1.10(c).

Section 1B1.10(b) specifies, in conjunction with the substantive amendment itself, "by what amount" (28 U.S.C. § 994(u)) the amendment should be given retroactive effect. Section 1B1.10(b)(2)(A) provides generally that "the court shall not reduce the defen-

dant's term of imprisonment . . . to a term that is less than the minimum of the amended guidelines range," as determined with the benefit of the amendment. Section 1B1.10 thus carries out precisely what § 994(u) directs the Commission to do when a Guideline amendment has the effect of reducing the recommended sentencing range for an offense or category of offenses.

2. Despite that direct relationship, *Amici* argue that the Commission's authority under § 994(u) is merely a "supplement" to its authority to amend the Guidelines under § 994(*o*) and that § 994(u) does not confer on the Commission any authority to issue policy statements that are "applicable" under the last clause of § 3582(c)(2). *Amici* Br. 14-19. In short, *Amici* acknowledge (at 18-19) that the Commission is authorized to "specify" in what circumstances and by what amount an amendment shall have retroactive effect, but argue that the Commission lacks authority to make such a specification in a way that matters – through a "policy statement" that is "applicable" under § 3582(c)(2). The argument thus implies that, in § 994(u), Congress charged the Commission with a pointless duty. That construction is untenable.

Any suggestion that § 1B1.10 does not *implement* § 994(u) is foreclosed by this Court's decision in *Braxton v. United States*, 500 U.S. 344 (1991). As this Court explained, "Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). This power *has been implemented in USSG § 1B1.10*, which sets forth the amendments that justify sentence reduction." *Id.* at 348 (second emphasis added). Although § 1B1.10 has been amended

since *Braxton*, it was then – and is now – a "policy statement," which is "applicable" under § 3582(c)(2).

3. *Amici* next make the (seemingly contradictory) argument that, *because* § 1B1.10 is a policy statement, it cannot be binding on district courts under § 3582(c)(2). *Amici* point out that § 994(a)(2)(C) expressly authorizes the Commission to issue policy statements regarding, among other issues, "the sentence modification provisions set forth in section[] . . . 3582(c) of title 18," 28 U.S.C. § 994(a)(2)(C), and contend that, because certain other of the policy statements authorized by § 994(a)(2) are "non-binding," § 1B1.10 should be regarded as non-binding by association. *Amici* Br. 27-29. That argument is similarly unpersuasive.

Although petitioner's *Amici* are correct that § 994(a)(2) authorizes the Commission to issue policy statements regarding a number of other statutory provisions, § 3582(c)(2) is unique in expressly requiring a court to act "consistent with" those policy statements. The binding nature of § 1B1.10 thus comes not from § 994(a)(2), but from § 3582(c)(2) itself.

Amici seek to avoid § 3582(c)(2)'s consistency requirement by re-writing it. *Amici* suggest (at 12) that Congress must have contemplated that the policy statements referenced in § 3582(c)(2) would contain only general "guidance in the exercise of discretion," rather than any specific binding directives. In *Amici*'s view, therefore, "consistent with" can be read to require merely that the court "consider" the Commission's policy statements, as would be the case under 18 U.S.C. § 3553(a). But Congress expressly directed the Commission to "*specify* in what circumstances and *by what amount*" an otherwise final sen-

tence could be reduced. 28 U.S.C. § 994(u) (emphases added). That directive clearly instructed the Commission to supply concrete and binding limits on a district court's discretion to reduce a sentence. Moreover, had Congress intended the court only to "consider" the Commission's policy statements, it knew how to say so. Section 3582(c)(2) requires a court to "consider[] the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(2). But Congress chose instead to make *consistency* with the Commission's policy statements a condition to the court's power to act regarding sentence reductions: a court may grant a reduction only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

B. *Amici*'s Procedural Challenge To § 1B1.10 Has No Merit

Amici's final argument is that § 1B1.10 is invalid because the Commission failed to comply with the notice-and-comment provisions of the APA, 5 U.S.C. § 553. That argument fails for at least three reasons.

1. Because § 1B1.10 is a policy statement, rather than a Guideline, notice-and-comment procedures were not required when the statement was amended in 2007. The Commission's organic statute, 28 U.S.C. § 994(x), makes clear that "[t]he provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure," are applicable only "to the promulgation of guidelines pursuant to this section," not to the issuance of policy statements. By *Amici*'s own argument, the Commission's amendments to § 1B1.10 are not "guidelines" and therefore are not subject to the notice-and-comment requirements of the APA.

2. Although in no way required, the Commission nevertheless sought and received public comment on changes to § 1B1.10 during its retroactivity deliberations. Consistent with its Rules of Practice and Procedure, the Commission twice requested public comment on possible changes to § 1B1.10 that would prevent motions seeking sentence reductions under the amended Guideline from unnecessarily burdening the courts and the probation system. The Commission received comment on possible changes from a variety of groups and individuals in the federal criminal justice system. As noted, the Committee on Criminal Law of the Judicial Conference of the United States recommended that the Commission give the crack cocaine amendment retroactive application and urged the Commission to "implement procedures to reduce the administrative burden on the federal judiciary." Cassell Letter at 1. In particular, the Committee emphasized its view that "a defendant's presence is *not* required for a reduction of sentence under 18 U.S.C. § 3582(c)" and that the reduction "could be a simple, clerical procedure." *Id.* at 5.

Contrary views were expressed as well. For example, the Practitioners Advisory Group, one of the Commission's standing advisory groups, stated that "motions under section 3582(c)(2) are uniquely committed to the discretion of the courts" and, as such, "it would be better to leave the courts with the greatest possible flexibility in applying section 1B1.10."[10] The Federal Public and Community Defenders also weighed in on the issue, recommending

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[10] Letter from David Debold and Todd Bussert, Co-Chairs, Practitioners Advisory Group, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 4 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_002.pdf.

only that the Commission "include in the commentary to § 1B1.10 a general recommendation that courts should at least reduce each eligible defendant's offense level by two levels in accordance with the amendment and to the extent consistent with § 3582(c)."[11] In their view, any other changes that would "provide specific guidance to courts in applying the amendment – or to limit its applicability in any way – would intrude upon the district court's statutory authority."[12] Indeed, contrary to *Amici*'s argument, every interested party, including *Amici* themselves, had the opportunity to provide comment and in fact did so.

The Commission took all of those views into account in adopting the 2007 amendments to § 1B1.10. To the extent notice-and-comment procedures were required, the Commission satisfied any such obligation here.

3. More fundamentally, the 2007 revisions to § 1B1.10 did not require notice-and-comment procedures because they did not alter the substance of that provision. Rather, the 2007 amendments "clarif[ied] when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2)." USSG App. C, amend. 712, Reason for Amendment (effective Mar. 3, 2008). In large measure, those changes consisted of moving existing language from the "commentary" section

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[11] Letter from Jon M. Sands, Federal Public and Community Defenders, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 10 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_003.pdf.

[12] *Id.*

into the body of the policy statement itself for ease of reference.

A comparison of the amended version of § 1B1.10 with the prior version of the policy statement on a provision-by-provision basis demonstrates the Commission's intent to clarify the application of the policy statement. Each of the critical portions of the policy statement that affects the extent of the reduction available to an eligible defendant has a substantially equivalent predecessor in the previous version of § 1B1.10. In particular, the provision at issue here that limits the available reduction to the minimum of the amended Guideline range, § 1B1.10(b)(2)(A), effective March 3, 2008, provides:

> 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.

The 2007 version of § 1B1.10 contained the following statement in the commentary at Application Note 3:

> Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2).

There is no substantive difference between the statement that the amended Guideline limits the permitted reduction and the statement that a court may not reduce a sentence below the amended Guideline range. Because the prior version of § 1B1.10 also would have prevented the district court from reducing petitioner's sentence below the amended Guide-

line range, *see United States v. Hasan*, 245 F.3d 682, 686 (8th Cir. 2001) (en banc) (interpreting prior version of § 1B1.10 to limit "the relief which can be given to a prisoner at a § 3582(c)(2) resentencing" to the amended Guideline range unless a departure had been granted at the original sentencing), *Amici*'s procedural challenge to the 2007 amendments fails.

II. THE LIMITED SCOPE OF § 3582(c)(2) PROCEEDINGS PERMITS THE COMMISSION TO MAKE INFORMED RETROACTIVITY DECISIONS

A. Given the extraordinary nature of the remedy and the impact it has on the finality of sentences, the Commission exercises its authority regarding retroactivity with great care. The Commission has articulated three primary factors it considers when assessing whether a particular amendment should be applied retroactively: "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." USSG § 1B1.10 cmt. background.

The last two factors take into account any burdens that might be imposed on the judicial system. As noted in the Senate report on the SRA, frequent grants of retroactivity to small changes in the Guidelines could present a burden to the judicial system.[13] A difficult calculation not only can increase the burden on courts as to the decision required in each individual case, but also can lead to a large number of motions from ineligible defendants because of un-

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[13] *See* S. Rep. No. 98-225, at 180 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3363.

certainty as to which defendants are eligible to seek a reduction under § 3582(c)(2).

In exercising its authority under § 994(u), the Commission carefully considers such possible effects in conjunction with the purpose of the amendment. With regard to the crack cocaine amendment, the Commission estimated that almost 20,000 defendants would be eligible for retroactive application of the crack cocaine amendment. The Commission nonetheless decided that retroactive application was appropriate because (among other reasons) "the magnitude of the change in the guideline range, i.e., two levels, is not difficult to apply in individual cases" and because "the Commission received persuasive written comment and testimony . . . that the administrative burdens of applying Amendment 706 retroactively are manageable." USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The Commission's estimates of these impacts have proved remarkably accurate. As noted, the Commission projected that 19,500 offenders would be eligible for the reduction, and 15,501 sentence reductions have been granted thus far; the average reduction has been 25 months, compared to the 27 the Commission predicted. *See* 2010 Report, Tables 1, 8; Schmitt Memorandum at 4-5, 23. Moreover, the clarity of § 1B1.10's limitations on eligibility for, and the extent of, any reduction assisted the courts in disposing of 6,763 motions by defendants who did not qualify for a sentence reduction. *See* 2010 Report, Table 9.

B. The Commission's analysis of the effects of retroactivity was based on the Commission's view that § 1B1.10 would continue to apply as written – *i.e.*, defendants would get the benefit of the new amendment, but no other aspects of their sentences

would be subject to review. In that respect, the Commission relied on the near-consensus of circuit precedent regarding § 3582(c)(2) proceedings, which has long held that sentence modifications under that statute are not a "do-over of an original sentencing proceeding." *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (internal quotation marks omitted).[14]

In particular, the defendant has no right to a hearing and no right to be present in court for the sentence modification. *See id.*; *United States v. Edwards*, No. 97-60326, 1998 WL 546471, at *3 (5th Cir. Aug. 6, 1998) (judgment noted at 156 F.3d 182 (table)); *see also* 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).").

Nor does the Sixth Amendment right to counsel extend to such proceedings. *See United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam); *see also Legree*, 205 F.3d at 730 (holding that due process did not require court to appoint counsel or hold a hearing to resolve § 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. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (holding that 18 U.S.C. § 3006A(c) did not entitle a defendant to appointed counsel for purposes of filing a § 3582(c)(2)

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[14] *See also*, *e.g.*, *United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) ("[A] sentencing adjustment undertaken pursuant to Section 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 that [the defendant] is arguing that . . . there is fully *de novo* resentencing under § 3582(c)(2), that is surely wrong.").

motion); *United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (same).

C. These (and similar) considerations make § 3582(c)(2) proceedings quite different from plenary sentencing proceedings. The flexibility attendant to such § 3582(c)(2) proceedings significantly reduces the systemic burdens the Commission must weigh in considering whether to make an amendment retroactive. The narrowly limited scope of § 3582(c)(2) proceedings also enables the Commission to evaluate more accurately the effects of deciding to make an amendment retroactive.

The dramatic expansion and alteration in the scope of § 3582(c)(2) proceedings sought by petitioner would shift that balance in important ways. Accurate assessments about the effects of retroactivity decisions would be very difficult, if not impossible, for the Commission to make. And increased uncertainty as to the likely effects of making an amendment retroactive would weigh against making Guideline amendments retroactive in the future. Thus, as respondent correctly points out, the consequence of the regime that petitioner seeks "would be to diminish Section 3582(c)(2)'s value as a mechanism for granting leniency to defendants who, like petitioner, would seek the benefit of the Sentencing Commission's decision to lower Guidelines ranges." Resp. Br. 37.

For the foregoing reasons, and for those stated in the Brief for the United States, the Court should hold that a district court's exercise of discretion to reduce an otherwise final sentence must be consistent with 18 U.S.C. § 3582(c)(2) and therefore with § 1B1.10 of the Guidelines Manual.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 3, 2010

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