

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	No. 2:97-0026
	:	
	:	
EDWARD RIVERA	:	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION FOR REDUCTION OF SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)**

Defendant Edward Rivera respectfully moves the Court for a reduction in his sentence pursuant to 18 U.S.C. § 3582(c). Mr. Rivera was originally sentenced to a term of 262 months' imprisonment after pleading guilty to distribution of crack, possession with intent to distribute crack, and possession with intent to deliver cocaine. For his offenses of conviction, Mr. Rivera's offense level originally was 31 (based on the combined marijuana equivalency amounts of the crack and cocaine) and his criminal history category was VI. The Court, however, sentenced Mr. Rivera as a career offender. That made his offense level 34. The Court then imposed a term of imprisonment of 262 months based on the then-mandatory drug offense level guideline of U.S.S.G. § 2D1.1 and the career offender guideline of § 4B1.1.¹

As discussed below, based on the changes to U.S.S.G. § 2D1.1, Mr. Rivera is entitled to immediate release. When properly calculated pursuant to the new § 2D1.1, Mr. Rivera pleaded guilty to possessing the equivalent of to 217.91 kg of marijuana. His total offense level is 23 , which equates to a Guidelines range of 92-115 months' imprisonment. He therefore has served well over his new maximum Guidelines range.

¹ The Court subsequently reduced Mr. Rivera's sentence to a term of 156 months' imprisonment in response to a motion by the government under Rule 35(b) of the Federal Rules of Criminal Procedure.

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INTRODUCTION

On December 11, 2007, the United States Sentencing Commission voted to make retroactive its revisions to § 2D1.1 – specifically, its reduction of the offense levels and marijuana equivalencies for crack quantities – thereby reducing the sentencing range on which Mr. Rivera’s original sentence was based. Section 3582(c), Title 18 of the United States Code therefore permits this Court to reduce Mr. Rivera’s sentence to achieve the goals of sentencing articulated by congress in 18 U.S.C. § 3553(a).

Although the Commission has suggested that the changes to U.S.S.G. § 2D1.1 do not become retroactive until March 3, 2008, as a result of the amendments, Mr. Rivera is eligible for a reduction in his sentence that moves his release date to *before* that effective date. Delaying his right to move for a reduction in his sentence until after March 3, 2008, would be inconsistent with § 3553(a)’s requirement that sentencing courts impose a sentence that is “sufficient *but not greater than necessary*,” and therefore would be contrary to § 3582(c)’s requirement to consider the applicable § 3553(a) factors. 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. In this case, giving retroactive effect to the § 2D1.1 amendments is consistent with the Commission’s unanimous vote in favor of retroactivity. Moreover, the Commission cannot, through an advisory policy statement, restrict this Court’s ability to comply with its constitutional and statutory sentencing obligations. *See Stinson v. United States*, 508 U.S. 36, 38 (1993) (“[C]ommentary in the Guidelines Manual that interprets or explains a Guideline is authoritative *unless it violates the Constitution*.”) (emphasis added); *Hicks*, 472 F.3d at 1172-73 (“[T]o the extent that policy statements are inconsistent with *Booker* by requiring that

the Guidelines be treated as mandatory, the policy statements must give way.”).

The Sentencing Commission has also attempted to limit any benefit to Mr. Rivera and others for crack offenses under the career offender guidelines through revisions to § 1B1.10 that purport to render any such sentence reduction “unauthorized” under § 3582(c)(2). The Commission asserts that if the amendment in question “does not have the effect of lowering the defendant’s applicable guideline range,” the defendant is not eligible for a reduction. This guideline, like all the others, *see Kimbrough v. United States*, 128 S. Ct. 558, 563 (2007), is advisory and does not inhibit the Court from granting the relief that Mr. Rivera seeks. Nothing in the language of § 3582(c) 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.

As further discussed below, the Court here apparently considered the difference between Mr. Rivera’s non-career offender Guideline range and his career offender Guideline range when imposing sentence on Mr. Rivera. Its ultimate sentence of Mr. Rivera therefore was “based on” his non-enhanced Guidelines range. Moreover, *all* sentences involving crack offenses – including career offender sentences – 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 for defendants ultimately sentenced under § 4B1.1. And, as the Supreme Court acknowledged in *Gall v. United States*, 128 S. Ct. 588, 591 (2007), “the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant” to any ultimate sentencing decision.

As a result, this Court must reconsider whether, in light of the retroactive crack amendment, it still considers an advisory career offender sentence “sufficient but not greater than necessary to satisfy the purposes of sentencing” in Mr. Rivera’s case – 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. And, given the facts and arguments below, the Court should order Mr. Rivera’s immediate release.

FACTUAL BACKGROUND

A. Mr. Rivera’s Conviction, Original Sentence, and Revised Sentence

On June 6, 1997, Mr. Rivera pleaded guilty to charges of distribution of cocaine base in violation of 18 U.S.C. § 841(a)(1), possession with intent to distribute cocaine base in violation of 18 U.S.C. § 841(a)(1), and possession with intent to distribute cocaine in violation of 18 U.S.C. § 841(a)(1). Pursuant to §§ 2D1.2(a)(1) and 3E1.1 of the then-mandatory 1997 Sentencing Guidelines and the marijuana equivalency tables of § 2D1.1, this Court determined that Mr. Rivera’s total offense level was a 31 (base offense level 34, reduced three levels for his acceptance of responsibility). It further determined that his Criminal History Category was VI. Mr. Rivera did not dispute this initial calculation of his offense level and Criminal History Category. If he had been sentenced pursuant to this non-career offender offense level, Mr. Rivera’s Guidelines range would have been 188-235 months.

Based on his prior convictions, however, Mr. Rivera was subject to the career offender guidelines of U.S.S.G. § 4B1.1. The defense consequently argued that while Mr. Rivera could be treated as a career offender, the Court should negate the career offender enhancements by granting a downward departure because (1) Mr. Rivera had committed all of his career offender

predicate offenses years earlier and (2) all of his qualifying offenses were low-level drug crimes, not the type of serious crimes at which the career offender guidelines were aimed. Counsel for Mr. Rivera further argued, the career offender guidelines overrepresented the seriousness of Mr. Rivera's offense and his criminal history. Finally, the defense argued that this Court should consider the difference between Mr. Rivera's non-enhanced sentence and his career offender-enhanced sentence in deciding the appropriate Guidelines range for Mr. Rivera.

The Court decided, over these objections, that Mr. Rivera's sentence should be enhanced pursuant to the career offender guideline, § 4B1.1. Mr. Rivera's base offense level became 37. The Court reduced his total offense level by three, to 34, for his timely acceptance of responsibility. It then apparently considered the disparity between Mr. Rivera's un-enhanced sentence and his career offender sentence. The Court ultimately sentenced Mr. Rivera at the bottom of his career offender sentencing range: Mr. Rivera received a sentence of 262 months' imprisonment, 8 years supervised release, and a \$300 special assessment.

Just over a year later, the government filed a motion under Rule 35(b), seeking a reduction in Mr. Rivera's sentence. Pursuant to that motion, the Court reduced Mr. Rivera's offense level by six, to 28, and adjusted his sentence downward from 262 months' imprisonment to 156 months' imprisonment. Mr. Rivera is currently serving the remainder of that 156-month sentence.

B. The 2007 Amendments to the Sentencing Guidelines and their Partial Correction of the Crack/Powder Differential

Effective November 1, 2007, the Sentencing Commission reduced the 100-to-1 crack to cocaine ratio because of its "consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act

and elsewhere.” *See* USSG App. C amend. 706 at 229-230 (hereinafter “Amendment 706 Reasons”). Furthermore, the Commission said, “the problems associated with the 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of those problems.” *Id.* at 230. As with the career offender guidelines, discussed *infra*, the Commission identified as the source of the problems with the 100-to-1 ratio the creation of guideline ranges by reference only to the statutory minimum and maximum, rather than through empirical research:

The Commission has concluded that the manner in which the Drug Quantity Table in § 2D1.1 . . . was constructed to incorporate the statutory minimum penalties for crack cocaine offenses is an area in which the Federal sentencing guidelines contribute to the problems associated with the 100-to-1 drug quantity ratio.

When Congress passed the 1986 Act, the Commission responded by generally incorporating the statutory mandatory minimum sentences into the guidelines and extrapolating upward and downward to set guideline sentences for all drug quantities.

Amendment 706 Reasons at 230. The Commission consequently revised § 2D1.1 as an interim – and partial – fix to these problems. It decreased by two levels the corresponding offense levels for each quantum of crack. *See* USSG App. C amend. 706. Now, depending on the quantity of crack that the defendant is found guilty of possessing, the crack/powder differential ranges from 25:1 to 80:1. *See Kimbrough*, 128 S. Ct. at 573.

At the same time, the Commission revised the marijuana equivalency tables for crack used to calculate the Guidelines range in cases in which multiple substances are involved. Prior to the crack amendments of November 1, 2007, the ratio of crack cocaine to marijuana was 1:20,000 (1 gram of crack cocaine = 20 kg of marijuana). This ratio was based on the ratios found within the Base Offense Levels in the Drug Quantity Table of U.S.S.G §2D1.1(c). In the

crack amendments of November 1, 2007, however, the Commission amended the Drug Quantity Table of U.S.S.G. §2D1.1 by reducing the Base Offense Level for the same crack cocaine ranges by two levels. Therefore, although the crack ranges were uniformly lowered by two levels, the Commission kept the same marijuana ranges for each Base Offense Level. *See* USSG App. C amends. 706, 711. This fractured the previous consistency of the crack-to-marijuana equivalency. Now, instead of a 1-to-20,000 ratio, the marijuana equivalency differs for each base offense level:

Base Offense Level	Conversion Factor (per gram of crack)
38	6.7 kg of marihuana
36	6.7 kg of marihuana
34	6 kg of marihuana
32	6.7 kg of marihuana
30	14 kg of marihuana
28	11.4 kg of marihuana
26	5 kg of marihuana
24	16 kg of marihuana
22	15 kg of marihuana
20	13.3 kg of marihuana
18	10 kg of marihuana
16	10 kg of marihuana
14	10 kg of marihuana
12	10 kg of marihuana

§ 2D1.1 (n.10). The Sentencing Commission then voted unanimously on December 11, 2007, to make these changes retroactive effective March 3, 2008.

The Commission also issued an advisory policy statement advising that “[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 . . . an amendment listed in subsection (c) does not have the effect of lowering the defendant’s applicable guideline range.” As noted below, the legality of this change to § 1B1.10 is in serious dispute, particularly because it is inconsistent with § 3582(c)(2) (permitting review of sentences “based on” a now-reduced sentencing range).

C. Mr. Rivera’s Offense Level Under the Amended Crack Guidelines

Absent the application of the career offender guidelines, Mr. Rivera’s sentence under the amended § 2D1.1 would be significantly lower than what was originally imposed. He pleaded guilty to possession of 56.161 grams of crack and 11.052 grams of cocaine, which converts to 217.91 kg of marijuana (using the crack-to-marijuana equivalency of 1 gram to 5 kg). His base offense level therefore is 26, which drops to 23 because of his acceptance of responsibility. That equates to a Guidelines range of 97-115 months’ imprisonment – a difference of at least 12 ½ years from his original sentence, and at least 41 months from his post-Rule 35(b) motion sentence.

In light of the amendments to §2D1.1 and the reasons that underlie them, Mr. Rivera moves this Court for an appropriate reduction in his term of imprisonment and his term of supervised release.

D. The Supreme Court's Pertinent Rulings in *Kimbrough* and *Gall*

Shortly before the Sentencing Commission made the amended U.S.S.G. § 2D1.1 retroactive, the Supreme Court issued its decisions in *Kimbrough v. United States* and *Gall v. United States*. Both *Kimbrough* and *Gall* reaffirm the Supreme Court's decision in *Booker v. United States*, 543 U.S. 220 (2005), that the Sentencing Guidelines are merely advisory. Perhaps more importantly for this case, each decision offers crucial guidance on the extent of sentencing courts' discretion to deviate from the advisory Sentencing Guidelines.

In *Kimbrough*, the Supreme Court made clear that the 100-to-1 crack/cocaine ratio was, like the rest of the Guidelines, purely advisory. *See* 128 S. Ct. at 564. The Court then went on to point out that the crack guidelines were less deserving of district court deference because the Commission did not formulate the crack/powder differential through its usual mechanism of conducting empirical research into sentencing outcomes and then calibrating offense levels and criminal history categories to best serve the goals articulated in 18 U.S.C. § 3553(a):

The crack cocaine Guidelines . . . do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, as we earlier noted, the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of empirical data and national experience. Indeed, the Commission itself has reported that the crack/powder disparity produces disproportionately harsh sanctions, *i.e.*, sentences for crack cocaine offenses "greater than necessary" in light of the purposes of sentencing set forth in § 3553(a). Given all this, it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence "greater than necessary" to achieve § 3553(a)'s purposes, even in a mine-run case.

Id. at 575 (internal citations and quotation marks omitted). And, as the Supreme Court noted, the creation of the crack guidelines in this manner resulted in Sentencing Guidelines that ultimately

harm the goals of sentencing. *See id.* at 568 (approving the Commission’s analysis that the crack/powder differential “overstates both the relative harmfulness of crack cocaine and the seriousness of most crack offenses . . . is inconsistent with the 1986 Act’s goal of punishing major drug traffickers more severely than low level dealers . . . [and] fosters disrespect for and lack of confidence in the criminal justice system.”) (internal quotation marks omitted).

The Supreme Court grounded this ruling in the research and recommendations of the United States Sentencing Commission itself, which has acknowledged repeatedly that the crack/powder disparity in the Guidelines is flawed. *Id.* at 568 (citing Commission’s conclusion in its 2002 report to Congress that the disparity “fails to meet the sentencing objectives set forth by congress in both the Sentencing Reform Act and the 1986 [Anti-Drug Abuse] Act.”).² Indeed, based on its research, the Commission has recommended at different times that Congress reduce the disparity to 20 to 1, 5 to 1, and as low as 1 to 1. *Id.* at 569 (citing Commission’s 1995, 1997 and 2002 reports). Most recently, when it submitted its proposed two-level reduction in the crack Guideline, it recommended that Congress further “substantially” reduce the ratio. *Id.* at 569 (citing Commission’s 2007 report).

Kimbrough also characterizes this amendment to § 2D1.1 as “modest,” noting that it “now advances a crack/powder ratio that varies (at different offense levels) between 25 to 1 and 80 to 1” – well above the Commission’s recommended ratios. *Id.* at 573. It is, the Court said,

² Among the flaws identified by the Commission are: (1) “the assumptions about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution;” “the ‘anomalous’ result that ‘retail crack dealers get longer sentences than the wholesale drug distributors who supply them the powder cocaine from which their crack is produced;” and “the severe sentences . . . imposed ‘primarily upon black offenders.’” *Id.* at 568.

“‘only . . . a partial remedy’ for the problems generated by the crack/powder disparity.” *Id.* at 569 (citing Commission’s 2007 report). Thus, the Court found, “[t]he amended Guidelines still produce sentencing ranges keyed to the mandatory minimums in the 1986 Act,” which it identified as the source of the unwarranted disparity between the crack and powder cocaine Guidelines to begin with. *Id.* at 569 n.10.

The Supreme Court consequently ruled that sentencing courts not only *may* deviate from the crack/powder differential for policy reasons alone, *see id.* at 570 (endorsing the government’s concession that “courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.”) (insertion in original) (internal quotation marks and citations omitted), but *must* deviate from the Guidelines where the Guidelines disserve the goals of sentencing. The Court emphasized that the parsimony provision of § 3553(a) – its requirement that sentences be “sufficient, but not greater than necessary” to achieve the goals of sentencing – is the “overarching instruction” of the sentencing statute, and that sentencing courts must vary from the advisory Guidelines as they believe is necessary to follow its ultimate command. *See id.* at 576. *Accord Gall* at 596-97 (reiterating that the district courts may not apply a presumption of reasonableness to the Guidelines, but instead “must make an individualized assessment based on the facts presented.”).

E. The Sentencing Commission’s Criticism of the Career Offender Guidelines for Non-Violent Offenders

The Commission’s critiques of injustices in the Sentencing Guidelines have not been limited to the crack/powder differential. In 2004, the United States Sentencing Commission released its report, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform*. In it, the

Commission sharply criticized the Career Offender guidelines as disserving the goals of sentencing where, as here, the defendant's career offender status is based solely on convictions as a low-level drug dealer:

Unlike repeat violent offenders, whose incapacitation may protect the public from additional crimes by the offender, criminologists and law enforcement officials testifying before the Commission have noted that retail-level drug traffickers are readily replaced by new drug sellers so long as the demand for a drug remains high. Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.

United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* at 134 (2004), http://www.ussc.gov/15_year/15year.htm (hereinafter "Fifteen Year Report"). In fact, the Commission noted, its analysis of outcomes for individuals who qualified for career offender treatment based only on prior drug trafficking crimes showed that low-level drug dealers sentenced as career offenders had rates of recidivism closely similar to those of drug trafficking defendants sentenced without the career offender enhancement. *See id.* In other words, the non-career offender sentences and the career offender sentences achieved the same corrections goals. Career offender sentences for such defendants are, as a result, "greater than necessary."

As with the 100:1 differential, the Commission pinpointed the way that § 4B1.1 was created as the source of this disconnect between the punishments prescribed thereby and the goals of sentencing. The Commission did not formulate the Career Offender guidelines through its usual mechanism of conducting empirical research into sentencing outcomes and then calibrating offense levels and criminal history categories to best serve the goals articulated in 18

U.S.C. § 3553(a). Instead, it simply set the guideline ranges as close as was possible to the statutory maximum:

The SRA directs the Commission to “assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized by statute” for offenders who are at least 18 years old and who have been convicted of a crime of violence or a drug trafficking offense, and who previously have been convicted of two or more such offenses. The Commission implemented this directive by creating USSG § 4B1.1, the “career offender guideline.”

Id. As a result, the Commission determined that the career offender guidelines were counterproductive in sentencing where a defendant’s predicate offenses are for drug trafficking crimes. *See id.*

ARGUMENT

This Court should exercise its discretion to grant Mr. Rivera's § 3582(c) motion because the enormous disparity between Mr. Rivera's unenhanced, amended Guidelines range and his original, Career Offender-enhanced sentence counsels a reduction in his sentence. This is especially true in light of the Sentencing Commission's own analysis that the Career Offender provisions under which Mr. Rivera was sentenced should not have applied to him, a low-level drug dealer, for whom the goals of sentencing could have been fulfilled with a lower sentence.

Furthermore, the Court should grant Mr. Rivera's motion now, rather than after Amendment 706's effective retroactive date of March 3, 2008, because if his motion is granted, Mr. Rivera's release date may well be earlier than March 3, 2008. It would work a significant injustice, and harm Mr. Rivera's and the government's joint interest in his orderly transition back into society, to hold him in custody past his rightful release date.

A. The Court has Authority to Re-Sentence Mr. Rivera under Section 3582(c).

1. This Court may reduce Mr. Rivera's sentence pursuant to its § 3582(c) re-sentencing authority despite his previous sentencing as a career offender.

The Commission has revised § 1B1.10 to purportedly render a sentence reduction "unauthorized" under § 3582(c) if an amendment listed in § 1B1.10(c) "does not have the effect of lowering the defendant's applicable guideline range." For the reasons set forth in detail above, this revision to § 1B1.10(c) is not only advisory, it is inconsistent with the Supreme Court's decisions in *Kimbrough* and *Gall*. Moreover, the Court must disregard the advice of the revised § 1B1.10(c) because, as applied to this case, § 1B1.10 runs afoul of both §§ 3582(c) and 3553(a).

The revised § 1B1.10 violates § 3582(c) because when it first sentenced Mr. Rivera, the Court apparently considered the difference between his non-enhanced Guidelines range and his career offender Guidelines range. It then imposed a bottom-of-the-Guidelines. The Court therefore “sentenced [Mr. Rivera] to a term of imprisonment based on a sentencing range” – Mr. Rivera’s initial Guidelines calculation under § 2D1.1 – “that has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. § 3582(c). And § 1B1.10 violates § 3553(a) because it purportedly requires sentencing courts to ignore an applicable § 3553(a) factor, namely, “the extent of the difference between a particular sentence and the recommended Guidelines range.” *Gall*, 128 S. Ct. at 591. As the Supreme Court said in *Gall*, that difference is “surely relevant” to a sentencing decision. *Id.*

Now that the difference between Mr. Rivera’s original sentence and his recommended Guidelines range is even greater than before, this Court must be free under § 3582(c)(2) to conduct a full *Booker* resentencing that, in particular, addresses whether the sentence under the career offender guideline is “sufficient but not greater than necessary” § 3553(a) in light of the crack amendment.

2. *The changes to § 2D1.1 and the drug equivalency tables trigger this Court’s full authority under § 3582(c), no matter the Commission’s statements to the contrary.*

As noted above, this Court’s authority to reopen and reduce a sentence under 18 U.S.C. § 3582(c) is triggered when the original sentence was “based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to” its power to “review and revise . . . the guidelines.” The amendments to § 2D1.1 clearly fit within that description. Effective November 1, 2007, the Commission lowered sentencing ranges for crack offenses by

two levels because, as set forth above, it found that the crack guideline over-punished crack offenders and created unwarranted disparity between them and other drug offenders. On December 11, 2007, the Commission voted to make that amended guideline retroactive. Its vote was all that is necessary to trigger this Court's authority to revisit a sentence under § 3582(c).

Now that this Court has the authority to revisit Mr. Rivera's sentence, it must ensure that the new sentence he receives is consistent with the § 3553(a) factors and, to the extent that they are consistent with the § 3553(a) factors, the Commission's policy statements. *See* 18 U.S.C. § 3582(c); *Kimbrough*, 128 S. Ct. at 575. But those policy statements – including any suggestion that retroactivity must be delayed till March 3, 2008, or that (1) the relief that Courts may grant is limited to a two-level reduction and (2) defendants sentenced as career offenders cannot seek relief – are merely advisory. *See, e.g., United States v. Hicks*, 472 F.3d 1167, 1170 (9th Cir. 2007) (“Because 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)”) (citing *Booker v. United States*, 543 U.S. at 263) (internal quotation marks omitted); *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). The Court must ignore them where, as here, abiding by them would frustrate the sentencing goals of § 3553(a). *See* § 3582(c).

This is especially true in light of the Commission's own recognition that the revisions to the crack guidelines only partially address the fact that the crack guidelines frustrate the goals of sentencing. *Accord Kimbrough*, 128 S. Ct. at 569 (quoting favorably the Commission's analysis that crack amendment is “only . . . a partial remedy”). Any attempt by the Commission to limit

the courts' ability to achieve a full correction of crack guidelines' flaws therefore must fail.

Furthermore, treating the amended §§ 1B1.10 and 2D1.1 as setting the mandatory lower limits of this court's re-sentencing discretion violates both *Booker* and *Kimbrough*. *Booker* made clear that the guidelines cannot be applied as mandatory in some circumstances, and not others. *See Booker*, 543 U.S. at 266 (“[W]e do not see how it is possible to leave the Guidelines as binding in other cases. For one thing, the 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.”) (internal punctuation marks and citation omitted) (emphasis in original). And again in *Kimbrough*, the Court rejected any argument that § 2D1.1, and, more specifically, the crack guideline, can be interpreted in any way that renders it effectively mandatory: “[U]nlike *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only.” *Id.* at 564. Thus, § 1B1.10, too, is purely advisory.

B. Based on the Amendment to § 2D1.1 Mr. Rivera’s Offense Level should be Reduced from 34 to 23, and his base Guidelines Range Reduced from 262-327 Months to 92-115 Months.

As described above, application of the amendments to the crack cocaine guidelines in this case, including the 1g crack-to-5kg marijuana equivalency, results in a decrease of the total offense level from 34 to 23, and a decrease in the resulting guideline range from 262-327 months to 92-115 months. Furthermore, the Court should now reduce Mr. Rivera’s sentence so as to account for both his lower advisory Guidelines range *and* the reduction later made pursuant to the government’s Rule 35(b) motion, refuse to enhance his sentence pursuant to the career offender guideline, § 4B1.1, and order his immediate release.

1. *Mr. Rivera's base sentence should be re-calculated without the career offender enhancement.*

All of the facts of this case, viewed in light of the Sentencing Commission's criticisms of the career offender guidelines and the 100-to-1 crack/powder differential, as well as the sentencing factors of § 3553(a), militate in favor of granting the relief that Mr. Rivera seeks. Mr. Rivera was a low-level drug dealer. His prior convictions were for small-time, non-violent crimes, primarily drug offenses. As the Sentencing Commission itself has said, the career offender guidelines do not achieve the goals of sentencing for defendants like Mr. Rivera. *See Fifteen Year Report* at 133-134. To the contrary: for Mr. Rivera and those in his position, career offender treatment succeeds only in creating punishments that are not only "greater than necessary" to achieve the goals of sentencing, but which frustrate the goals articulated in § 3553(a) and diminish confidence in the corrections system. *See id.* Moreover, even assuming that the Commission itself had not condemned the use of the career offender guidelines in cases like this one, the career offender guidelines would command no deference from this court. They were created through the same misguided process as the 100-to-1 crack/powder differential, and, pursuant to *Kimbrough* and *Gall*, this court need not accord them any weight.

At the time of Mr. Rivera's original sentence, this Court was required to treat the Guidelines as mandatory. It consequently treated him as a career offender and imposed a sentence that was, as the Commission said in 2004 and the Supreme Court said in December 2007, greater than necessary to achieve the goals of sentencing. As the guidelines are now advisory, this Court therefore has the authority, while resentencing Mr. Rivera pursuant to the retroactive crack amendment, to re-sentence Mr. Rivera to a term of imprisonment that is "sufficient but not greater than necessary" to achieve the goals of sentencing; that is, which

excludes the career offender enhancement. 18 U.S.C. § 3553(a). A pre-Rule 35(b) reduction sentence of 92 months achieves that end.³ Pursuant to the government’s Rule 35(b) motion, his sentence should then be further reduced to 51 months’ imprisonment.

2. *Mr. Rivera’s base sentence should be re-calculated with a 5 kg marijuana equivalency or less, and not the 11.4 kg marijuana equivalency.*

Mr. Rivera pleaded guilty to offenses involving two substances, crack and cocaine. His offense level therefore is calculated based on the marijuana equivalency tables of § 2D1.1. On the face of the revised conversion tables, Mr. Rivera’s crack quantity corresponds to a marijuana equivalency rate of 11.4 kg of marijuana to 1 gram of crack. The Court should, however, apply the lowest rate – 1g:5kg – to best achieve the goals of sentencing. As discussed above, both the Sentencing Commission and the Supreme Court have recognized that the continuing disparities in the treatment of crack and cocaine are baseless and counterproductive to the goals of sentencing. *See* Fifteen Year Report at 133-134; Amendment 706 Reasons at 229-230. Even the amended guideline still results in sentences based on an unwarranted disparity, which fail to serve the purposes of sentencing. *See Kimbrough* at 576 (“the District Court properly . . . accord[s] weight to the Sentencing Commission’s consistent and emphatic position that the crack/powder disparity is at odds with § 3553(a).”).

For the foregoing reasons, and especially given that Mr. Rivera was a low-level offender, whose offense involved none of the aggravating conduct that Congress believed justified the 100-to-1 ratio, and who fell victim to the racially disparate effects of the then-mandatory crack/powder differential, the 5 kg equivalency rate comes closest to achieving the goals of

³ Mr. Rivera should then receive the full benefit of the Rule 35(b) reduction, as the reasons that underlie the government’s motion are not affected by any of the changes in § 2D1.1.

sentencing articulated in § 3553(a). *See* Fifteen Year Report at 113-114; Amendment 706 Reasons at 229-230. This Court therefore should reduce Mr. Rivera's sentence to a 51-month term of imprisonment, and order both Mr. Rivera's immediate release from incarceration and a reduction in his term of supervised release.

REQUEST FOR HEARING

Under the Guidelines, a defendant has a right to a hearing whenever any factor important to the sentencing determination is "reasonably in dispute." U.S.S.G. § 6A1.3. Even under old § 1B1.10, if a court intended to rely upon facts not found at the initial sentencing in deciding a § 3582(c)(2) motion, the defendant was entitled to notice and a hearing. *See e.g., United States v. Byfield*, 391 F.3d 277, 280-81 (finding abuse of discretion in failing to order evidentiary hearing where defendant's assertions in § 3582(c)(2) motion raised "enough of a smidgeon to put the matter 'reasonably in dispute.'"); *Quesada Mosquera v. United States*, 243 F.3d 685, 686 (2d Cir. 2001); *United States v. Allison*, 63 F.3d 350, 351 (5th Cir. 1995). Now that revised § 1B1.10 advises that courts consider such facts in every case, there must also be a hearing at which the defendant can challenge the government's evidence and present his or her own. *Cf. United States v. DeMott*, ___ F.3d ___, 2008 WL 124188 (2d Cir. Jan. 15, 2008). Mr. Rivera therefore requests a hearing in this matter.

He further requests that he be present for any hearing on this motion. Although a defendant's presence at a § 3582(c)(2) hearing is not required, the defendant should be allowed to attend, particularly if the Court will need to resolve factual disputes. *See United States v. Forty Estremera*, 498 F.Supp.2d 468, 472 (D. P.R. 2007) (ordering defendant's transfer to jurisdiction for hearing on § 3582(c)(2) after determining defendant's eligibility and that *Booker*

advisory regime will apply to the resentencing). *Cf. DeMott*, 2008 WL 124188 (“[D]istrict court violated Day’s right to be present at resentencing, his right to counsel at resentencing, and his right to notice that the court intended to impose an adverse non-Guidelines sentence.”).

Indeed, the government has conceded, at least in cases in which it contends that the reduction should be less than two levels, that the defendant should be present. *See* Letter from Assistant U.S. Attorney Jonathon Chapman to J. Martin Wahrer, U.S. Probation Officer (Jan. 18, 2008) at 5 n.3 (“If the government were intending to present evidence suggesting that the defendant was not entitled to the full benefit of the available reduction, then the Court might have reason to order the defendant’s appearance in order that he or she could refute the government’s evidence.”), redacted letter on file with Sentencing Resource Counsel to the Federal Public & Community Defenders.

CONCLUSION

The Court should adjust Mr. Rivera's sentencing guideline range downward to 115 months' imprisonment. It should then hold a hearing at which Mr. Rivera is present to consider whether to further reduce Mr. Rivera's sentence for the reasons set forth herein.

Respectfully submitted,

Michael D. Raffaele
Research and Writing Attorney

Counsel for Mr. Edward Rivera

CERTIFICATE OF SERVICE

I, Michael D. Raffaele, Research & Writing Attorney, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have served a copy of the attached Defendant's Motion for Reduction of Sentence Pursuant to 18 U.S.C. § 3582(c) and accompanying Memorandum of Law, by hand delivery, upon [x], to his office located at 615 Chestnut Street, Suite 1250, Philadelphia, PA 19106.

MICHAEL D. RAFFAELE

DATE: 1/31/2008