JUSTICE STRATEGIES
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THE IMPORTANCE OF AN INDIVIDUALIZED ASSESSMENT: MAKING THE MOST OF RESENTENCING UNDER THE AMENDED CRACK COCAINE GUIDELINES

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I. Background

On December 10, 2007, the United States Supreme Court issued two critical post-*Apprendi/Booker* decisions – *Kimbrough v. United States*, 128 S.Ct. 558 (2007) and *Gall v. United States*, 128 S.Ct. 586 (2007). Soon after, the Sentencing Commission decided to give retroactive effect to its earlier decision to amend downward the crack cocaine guidelines. *See* U.S.S.C. Press Release, *U.S. Sentencing Commission Votes Unanimously to Apply Amendments Retroactively for Crack Cocaine Offenses*, (Dec. 11, 2007), available at www.ussc.gov/PRESS/rel121107.htm.

Combined, *Gall*, *Kimbrough*, and the Sentencing Commission's decision provide a wonderful opportunity for those convicted of a federal crack cocaine offense to receive significant reductions in their sentences. But the Commission has sought, in several ways, to limit the sentence reductions available to individuals convicted of a crack cocaine offense.

A full understanding of the possibility available to such individuals, and the problems with the Commission's attempted limitations, requires some discussion of *Gall* and *Kimbrough*:

Understanding *Gall v. United States* and *Kimbrough v. United States*:

Gall v. United States:

Gall concerned the sentencing of Brian Gall, who, as a college student, sold ecstasy as a middle-man in a drug-ring. After seven months, Gall voluntarily quit the drug-ring, graduated from college, moved out of state, and found lucrative work as a sub-contractor. About 3 years after withdrawing from the drug-ring, Gall was indicted on federal drug conspiracy charges. Gall turned himself in, cooperated with authorities, and eventually plead guilty. The district court noted that under the Sentencing Guidelines ("Guidelines"), Gall should have received a sentence of 30-37 months imprisonment. However, the court looked to the factors listed in 18 U.S.C. § 3553(a) and concluded that the specific facts of this case called for a significant downward departure. Citing Mr. Gall's youth at the time of the offense, his minor role in the drug ring, his acceptance of responsibility, his exemplary post-crime conduct, and the impact incarceration would have on his family and the community, the court sentenced Gall to 3 years

probation. The government appealed, and the 8th Circuit reversed, holding that the district court's downward departure required "extraordinary circumstances" since it was such an extraordinary departure. Rejecting the factors on which the district court relied, the 8th Circuit concluded that there was insufficient justification for this "extraordinary" downward departure. *Gall*, 128 S.Ct., at 593-94.

The Supreme Court reversed 7-2, relying on its earlier decision in *United States v. Booker*, 543 U.S. 220 (2005) to reiterate that the Guidelines are *advisory* only and that appellate courts review district court sentencing decisions using the *abuse of discretion* standard, even if the sentence under review is outside the Guideline range.

Kimbrough v. United States:

In *Kimbrough*, the defendant was convicted of conspiracy and possession of crack and powder cocaine. As in *Gall*, the district court judge first considered the advisory Guideline range in determining the sentence to impose. The district court then reviewed the factors listed in § 3553(a), and concluded that a downward departure was warranted. In so doing, the district court took into account the "nature of the offense"[1] and Kimbrough's "history and characteristics."[2] The court also noted that the Guideline range was excessive because the Sentencing Commission had repeatedly stated that "crack cocaine has not caused the damage that the Justice Department alleges it has," and that sentencing Kimbrough within the Guidelines would run counter to § 3553(a)'s overarching requirement that the sentenced imposed be "sufficient, but not greater than necessary" to accomplish the sentencing goals listed later in that section. 128 S.Ct. at 575. The district court sentenced Kimbrough to 15 years – 4 ½ years below the Guideline range. The Fourth Circuit reversed, holding that under its precedent, a sentence "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." *Id*. at 565.

In a 7-2 decision, the Supreme Court reversed, holding that the Guidelines are advisory only, even with regard to the crack versus powder cocaine disparity, that a judge is free to determine within a particular case that a sentence within the Guideline range is "greater than necessary," and in so doing, a judge may consider the crack versus powder cocaine disparity in sentencing.

Summarizing Gall and Kimbrough:

Read together, *Gall* and *Kimbrough* stand for the following:

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[1] The court determined that this was not amongst the most egregious drug cases he had seen, stating: "this defendant and another defendant were caught sitting in a car with some crack cocaine and powder by two police officers – that's the sum and substance of it – [and they also had] a firearm." 128 S.Ct. at 575.

[2] This was Kimbrough's first felony conviction, he had received an honorable discharge from the Marines after combat service in Desert Storm, and he had a steady employment history.

• A sentencing court is to follow these 4 steps in sentencing defendants:

> 1) begin by correctly determining the advisory Guideline range;
> 2) provide the prosecution and defense an opportunity to advance their respective arguments for proposed sentences;
> 3) consider the factors listed in § 3553(a), including the overarching principle that a sentence must not be "greater than necessary" to achieve the goals of sentencing; and
> 4) adequately explain any sentencing decision so as to allow for meaningful appellate review.

See Gall, 128 S.Ct. at 596-97.

• The sentencing court need not presume that the Guideline range is reasonable and that a sentence outside the range is not reasonable.

• The sentencing court "must make an individualized assessment based on the facts presented." *Gall*, 128 S.C.t at 597. In making this individualized assessment, the court may consider factors the Commission has previously rejected, including the defendant's age, his health, his character, his post-crime conduct, and any evidence of rehabilitation. A sentencing court may also consider the Guidelines' unjustified disparity between crack and powder cocaine sentences;

• If a district court correctly calculates and carefully reviews the Guideline range, the court will be deemed to have properly considered the need to avoid unwanted disparities in sentencing, (which is one of the § 3553(a) factors);

• On appeal, the appellate court must: 1) ensure that the district court committed no significant procedural error (such as treating the Guidelines as mandatory or failing to consider the factors listed in § 3553(a)); and 2) consider the reasonableness of the sentence under the deferential abuse-of-discretion standard.

• The abuse-of-discretion standard applies to all sentences, whether or not they are within the Guideline range. Thus, while district courts must justify a departure from the Guidelines, the justification need not be "proportional" to the departure (i.e., an "extraordinary" justification is not needed for an "extraordinary" departure);

• On review, an appellate court may presume that a sentence within the Guideline range is reasonable, but an appellate court may <u>not</u> presume that a sentence outside of the range is unreasonable. *See also Rita v. United States*, 127 S.Ct. 2456, 2467 (2007).

The Sentencing Commission's Amendments to Crack Cocaine Guidelines

On November 1, 2007, before *Gall* and *Kimbrough* were decided, the United States Sentencing Commission ("Commission") amended the Guidelines with respect to crack cocaine offenses by promulgating § 1B1.10. This amendment lowered the powder versus crack cocaine

disparity from 100:1 to 20:1, though it did not change the 5 year mandatory minimum for five or more grams of crack or the 10 year mandatory minimum for 50 or more grams of crack cocaine.

Immediately after, the Commission held public hearings to determine whether this amendment should be retroactive. On December 11, 2007, the day after *Gall* and *Kimbrough* were decided, the Commission issued yet another version of § 1B1.10 along with a press release. *See* www.ussc.gov/PRESS/rel121107.htm. This new version of § 1B1.10 was written to apply the new crack cocaine guidelines retroactively and to establish a procedure by which those who were sentenced prior to the November 1, 2007 amendment could have their sentences reduced. This revised § 1B1.10 is to take effect March 3, 2008. According to their press release, the Commission delayed the effect of this newly revised § 1B1.10 to "give the courts sufficient time to prepare for and process" affected cases. *Id.*

II. Impact: The Number of Individuals Affected by § 1B1.10[3]

According to the Commission,1,028 defendants in the Second Circuit will be eligible for a reduced sentence under § 1B1.10. This includes 146 defendants in the EDNY, 295 in the SDNY, 146 in the WDNY, 195 in the WDNY, 217 in Connecticut, and 29 in Vermont. *See* Mark Hamblett, "Local Federal Courts Puzzled by Impact of Retroactive Crack Sentencing Changes," *New York Law Journal*, December 13, 2007.

The Commission's estimates, however, are conservative because, as discussed more below, the Commission has tried to limit resentencing eligibility. Therefore, there should be far more applications for resentencing than the Commission envisions.

III. Procedurally, How Does a Defendant Benefit from § 1B1.10?

Unlike New York's experience with the Drug Law Reform Act, there is no statutorily established procedure for resentencing those convicted of a crack cocaine offense. The goal, of course, is to get the resentencing courts to adopt procedures that allows defendants to benefit not only from the amended crack versus powder cocaine guidelines, but also to fully benefit from *Gall* and *Kimbrough* and to be resentenced accordance with an "individualized assessment based on the facts presented." *Gall*, 128 S.Ct. at 597.

With § 1B1.10, the Commission envisions a limited motion for a reduced sentence under 18 U.S.C. § 3582 (c) that will take into account only the crack cocaine modifications. But many commentators, including judges, see problems with the Commission's approach and understand that after *Booker*, the Commission's recommendations are just "advisory." Thus, the Commission does not (or at least should not) have the last word on crack cocaine resentencing procedures. *See e.g.* Hamblett, "Local Federal Courts Puzzled," (quoting SDNY Judge Kimba Wood as saying there are still "unanswered questions" about § 1B1.10, and Ohio State University College of Law Professor Douglas Berman stating that he expects the issue to be heavily litigated).

[3] Throughout the rest of this memo, references to § 1B1.10 mean the amended section that is to take effect on March 3, 2008, unless stated otherwise.

There are three possible approaches to be considered in seeking resentencing:

1) The Commission's Approach: Limited Motion for a Reduced Sentence

In § 1B1.10, the Commission relies on 18 U.S.C. § 3582 (c)(2), which provides 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 reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Though this section explicitly states that the court must consider the factors listed in § 3553(a), the Commission tries to limit reduced sentence motions (as applied to the modified crack cocaine Guidelines) by setting forth explicit "policy statements" in § 1B1.10. For example, the Commission states that "proceedings under 18 U.S.C. § 3582(c)(2), and this policy statement do not constitute full resentencing of the defendant." See § 1B1.10(a)(3). In addition, the Commission states that:

> 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 section (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

§ 1B1.10(b)(1).

To illustrate this point the Commission set forth two examples in its "Application Notes." These two examples are helpful in better understanding the limitations the Commission envisions:

Example 1: *Reducing Sentence Where Original Sentence Was Within the Guidelines:*

> For example, in a case in which: (1) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (2) the original term of imprisonment imposed was 41 months; (3) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

§1B1.10, Application Notes, Application of Subsection (b)(1).
Example 2: *Reducing Sentence Where Original Sentence Was Below the Guideline Range*:

> For example, in a case in which: (1) the guideline applicable to the defendant at the time of the sentencing was 70 to 87 months; (2) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (3) the amended guideline range determined under section (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline ranger determined under subsection (b)(1)) would amount to a comparable reduction and be appropriate.

Id.

In other words, under the Commission's approach, if a defendant did not get a guideline departure before, he cannot get one now, and if he did get one before, he cannot argue for an even greater one now. The *only* acceptable reduction is that which reflects only the crack cocaine amendments; defendants cannot also benefit from *Gall* and *Kimbrough*.

2) The Sentencing Resource Counsel's Approach: "Modification Plus" Motion

The Sentencing Resource Counsel (SRC) issued a detailed and lengthy memo on January 2, 2008 outlining how to use § 3582(c)(2) to obtain a sentence reduction greater than the two levels the Sentencing Commission suggests. ("SRC memo"). In a nutshell, the SRC offers three reasons to support its assertion that the Commission's position must not be adopted:

> 1) The Commission's advisory approach "limits the sentencing court's ability to consider the § 3553(a) factors in imposing a new sentence in violation of the court's duty under § 3582(c)(2)." SRC memo at 11.
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> > Under the plain-language of § 3582(c)(2), a court, in entertaining a sentence reduction motion, must "consider[] the factors set forth in section 3553(a)." And from *Kimbrough* and *Gall*, we know that the § 3553(a) factors require a court to look beyond the Guidelines. Moreover, in terms of § 3553(a), the crack versus powder cocaine disparity presents several problems (which the *Kimbrough* Court discussed at length). The amendments in § 1B1.10 do not fully rectify these problems – so a strict adherence to these amendments is tantamount to failure to meaningfully consider the § 3553(a) factors.

> The problem with this argument, however, is that it is offset (at least in the Commission's view) by the language in § 3582(c)(2) that immediately follows the mandate to consider § 353(a) factors it – that is, the court can reduce a defendant's sentence only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Thus, embedded within § 3582(c)(2) are competing considerations – the requirement that a court 1) consider and weigh the factors in § 3582(c)(2); and 2) also set a sentence that is consistent with the Commission's policy statements.

2) The Commission "instructs courts to treat § 1B1.10 as mandatory – which in turn makes § 2D1.1[4] mandatory in the context of § 3582(c)(2) re-sentencing – in violation of *Booker* and *Kimbrough.*" SRC memo at 11.

> *Booker* was premised on the notion that the Sixth Amendment right to a jury determination "is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant." *Booker*, 543 U.S. at 232. Many of those to be resentenced were sentenced prior to *Booker* and thus, received sentences based on judicial fact-finding. It would violate *Booker* and the Sixth Amendment to follow a procedure that allows a court to impose yet another sentence based on judicial fact-finding.
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> Moreover, *Booker, Gall, Kimbrough* are clear – the guidelines are advisory only; they are not mandatory, not even in limited circumstances. Neither § 1B1.10 or § 2D1.1, therefore, are mandatory.
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> This argument was recently endorsed by the District Court, Southern District of New York in *United States v. Polanco*, 2008 WL 144825 (S.D.N.Y. Jan. 15, 2008). In *Polanco*, the court noted that the "Sentencing Commission has purported to limit the sentencing court's authority to reduce a sentence, emphasizing that, in its view, the reductions authorized by § 3582(c)(2) and the Commission's policy statement 'do not constitute a full resentencing of the defendant....'" *Id.* at 2. In dicta, the court asserted its disagreement with the Commission's "purported" limitations, stating:
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> > The effectiveness of these limitations is yet to be tested; it would be, to say no more, ironic if the relief available to a defendant who received a sentence that is now recognized to have been unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guidelines under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline.
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> *Id.*[5] *Cf. United States v. Medina-Casteneda*, ___ F.3d ___ (9th Cir. 2008), 2008 WL 126641, at 2 (on direct appeal, the court vacated the defendant's sentence and

[4] § 2D1.1 lays out the sentencing chart for drug offenses.

remanded to the district court "to reconsider the sentence in light of the *Kimbrough* decision;" the court did not mention the Commission's amendments or purported limitations to any such resentencing).

3) The Commission's approach "violates the Commission's own statutory obligations under its enabling statutes, 28 U.S.C. §§ 991 & 994." SRC memo at 11.

> Under 28 U.S.C. § 994(a)(2), the Commission must write policy statements that "further the purposes set forth in section 3553(a)(2)." Yet the Commission has conceded that its modest amendments to the crack cocaine offenses do not go far enough in rectifying the unwarranted crack versus powder cocaine disparity. Thus, as the SRC notes, by insisting on a rigid adherence to these limited amendments, the Commission "has also violated its obligation to establish sentencing policies and practices that assure that the purpose of § 3553(a)(2) are met, avoid unwarranted sentencing disparities, maintain sufficient flexibility to permit individualized sentences, and reflect advancement in the knowledge of human behavior as it relates to the criminal justice process." SRC memo at 15-16.

3) 28 U.S.C. § 2255 Petition to Vacate a Sentence.

Under 28 U.S.C. § 2255, a person in federal custody can petition the court to vacate, set aside, or correct a sentence if, among other things, the sentence violates the Constitution or federal law or the sentence exceeds the statutory maximum.

There are substantive problems with seeking resentencing under § 2255, in that "most courts have held that motions to vacate a sentence on the basis of a subsequent amendment to the guidelines must be brought under § 3582(c)(2)." SRC memo at 9 (*citing United States v. Carter*, 500 F.3d 486, 489-890 (6th Cir. 2007)).

There are also procedural hurdles to overcome with § 2255 petitions. For example, there is a one year statute of limitations for filing such a motion, running from the latest of the date on which the judgment became final; the date that a government impediment to filing the motion was removed; the date the Supreme Court recognized a new right and made it retroactive; and the date on which the facts supporting the motion could have been discovered through due

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[5] Given the facts before it, the *Polanco* court did not need to reach the issue of the Commission's "purported" limitations. With just the two-step decrease the Commission contemplates, Mr. Polanco will be released on March 17, 2008. Of note, however, is the fact that the *Polanco* court did not view itself as limited by the Commission's pronouncement that its amendment was not to become retroactive until March 8, 2008. Well before this pronounced date, the *Polanco* court had announced its intent to reduce Mr. Polanco's sentence and told the government and Mr. Polanco to submit by February 25th papers supporting or opposing this reduced sentence.

diligence. There are strict limitations on second or other subsequent § 2255 petitions. *See* SRC memo at 9.

It seems that, even if a defendant overcomes the procedural bars to a § 2255 petition, the defendant will not be able to overcome the substantive hurdle. By its plain language, § 3582(c)(2) seems to be directly on point. There may be some circumstances in which counsel may want to consider a § 2255 motion, but it is likely that real battle is going to be getting courts to treat § 3582(c)(2) motions as full resentencings, despite the Commission's "purported" limitations.

IV. Other Potential Battles To Be Waged:

1) Right to Counsel

In their January 2, 2008 memo, the SRC stated that they expect the government to oppose the appointment of counsel. Worse, "every circuit to have reached the issue has held that there is no automatic right to counsel in a § 3582(c)(2) proceeding." SRC memo at 19. But as the SRC notes, these cases were all decided prior to *Booker*.

In the January 2, 2008 memo, the SRC sets forth good constitutional and practical arguments for the appointment of counsel notwithstanding these pre-*Booker* cases. The SRC summarizes these arguments as follows:

> In sum, whether required as a matter of right under *Mempa* [*v. Ray*, 389 U.S. 128 (1967)], or merely advisable in the interest of fairness and efficiency, to ensure an accurate basis for the sentence as required by *Townsend* [*v. Burke*, 334 U.S. 736 (1948)], and to ensure that indigent defendants are not otherwise denied due process and equal protection of the laws, counsel should be appointed for every indigent defendant who is arguably eligible for a sentence reduction under § 3582(c)(2).

SRC memo, at 22.

2) Right to a Hearing/Right to Be Present

There is no clear right to a hearing or right to be present at § 3582(c)(2) proceedings, but as with the right to appointed counsel, the SRC lays out some discretionary and constitutional arguments. *See* SRC memo at 22-23. These arguments largely flow from the right to counsel arguments.

3) Eligibility

It is important to understand the overall structure of § 1B1.10 to fully understand the "eligibility" requirements. § 1B1.1.10, which is entitled "Reduction in Terms of Imprisonment as a Result of Amended Guideline Range (Policy Statement) is structured as follows:

• Subsection (a) sets forth the authority for reduction in sentences (i.e., § 3582(c)(2)), exclusions and limitations (discussed more below);
• Subsection (b) discusses how such reductions shall be determined and further prohibitions and limitations (discussed more below); and
• Subsection (c) discusses "covered amendments."

Subsection C: Covered Amendments

Over the years, the Commission has passed well over 700 amendments to the Guidelines. Of these, the Commission has deemed approximately 26 to be retroactive, and thus, subject to a § 3582(c)(2) sentence reduction motion. These 26 amendments are listed by amendment number in subsection (c).

For purposes of resentencing under the crack cocaine amendments, the relevant amendment is 706, which changes the Drug Quantity Table in § 2D1.1 [Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession and Intent to Commit These Offenses)]. When the Commission first developed the Drug Quantity Table, it set guideline ranges above the statutory mandatory minimums for crack cocaine. So, for example, offenses involving 5 grams of crack cocaine were assigned base offense level 26, which corresponded to a sentence range of 63 to 78 months in prison (thereby requiring a sentence at least 3 months above the statutory mandatory minimum of five years). The remainder of the table progressed upward from there, essentially incorporating the 100:1 powder versus crack cocaine sentencing disparity.

The new Drug Quantity Table still takes the statutory mandatory minimum into account, but reduces the base offense level by 2, so the corresponding sentence ranges are no longer above the mandatory minimums. So, for example, the first time offender convicted of selling 5 grams of cocaine will be designated a base level 24, which corresponds to a sentence range of 51 to 63 months – which includes the 5 year statutory mandatory minimum. Crack cocaine offenses for quantities above the mandatory minimum (and below the maximum) are all similarly adjusted downward by two levels. The Commission estimates that this will reduce the average crack cocaine sentence from 121 months to 106 months.

The amendment also includes a mechanism to determine a base level offense for those convicted of a crack cocaine offense *plus* another drug offense.

In sum, the basic eligibility requirement is that the defendant have been convicted of at least one crack cocaine offense, even if also convicted of other offenses. But as discussed below, the Commission has sought to exclude some offenders through "exclusions," "limitations," and "prohibitions."

Subsections A and B: Exclusions, Limitations and Prohibitions

As already discussed above, the most egregious limitation is the Commission's "policy" that crack cocaine § 3582(c)(2) proceedings are not "full blown resentencing" proceedings, and

that the resentencing courts need not engage in the individualized assessment required by § 3553(a). But there are other limitations, exclusions, and prohibitions that the Commission sets forth in § 1B1.10.

1) *Career Offenders, Armed Career Criminals, and Multi-Drug Cases*

Under § 1B1.10(a)(2), a "reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore 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."

Crack offenders who were sentenced under § 4B1.1 (career offenders) and those sentenced under § 4B1.4 (armed career offenders) fit this exclusion. In their January 2, 2008 memo, the SRC argues that this exclusion should not apply. First, it is advisory – not mandatory – under *Booker*, *Kimbrough*, and *Gall*. Second, the statutory language of § 3852(c)(2) itself does not require that before a court considers lowering a defendant's sentence, it first be determined that the guideline amendment actually has the effect of lowering a guideline range. Rather, § 3852(c)(2) requires only that the defendant's sentence range be "based on" a sentence range that has since been lowered. All crack sentence ranges were based on the crack sentence guidelines since this was the starting point for determining a defendant's sentence, even for those sentenced under § 4B1.1 and § 4B1.4. *See* SRC memo at 16-17.

The same logic may apply to some multi-drug cases. In a few such cases, the amended Guidelines will not have the effect of reducing an offender's sentence. For example, as the SRC notes, "an offense involving 12 grams of crack and 6 grams of powder gets a combined base offense level of 26, whereas if the offense had involved 18 grams of crack only, the base offense level would be 24." SRC memo at 17. As with the career crack offenders, such offenders should at least consider moving for a sentence reduction, since the offender's sentence was "based on" a Guideline range that has since been lowered.

2) *Mandatory Minimums*: The Commission did not intend § 1B1.10 to apply to those serving mandatory minimum sentences. The SRC believes that offenders should be able to seek relief from a mandatory minimum through a § 3582(c)(2) motion, relying on the safety valve provisions in §§ 3553(e), (f). *See* SRC memo at 18.

3) *Supervised Releasees*

With § 1B1.10, the Commission tries to limit resentencing in supervised release cases in two ways:

a) *Those whose supervised release was revoked*:

> Application Note 4 of §1B1.10 states as follows: "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 if imprisonment imposed upon a revocation of supervised release."

This limitation is, of course, only advisory. In addition, it "is contrary to an earlier Ninth Circuit case, which interpreted 'term of imprisonment' as used in § 3582(c)(2) to encompass periods of incarceration for supervised release revocations because supervised release term itself is part of the punishment imposed for the defendant's original crime." SRC memo at 18 (citing *United States v. Etherton*, 101 F.3d 80, 81-82 (9th Cir., 1996)).

b) *Non-incarcerated supervised releasees*:

The Commission does not attempt to preclude a defendant who is on supervised release from applying for a § 3582(c)(2) sentence reduction, but takes the position that the fact that a defendant may have served more time in prison than he would have under the amended Guidelines "shall not, without more, provide a basis for early termination of supervised release." Application Note 4 (B). It is unclear what "more" the Commission envisions. Of course, given *Booker*, et al., this limitation is only advisory. Moreover, "the Supreme Court has recognized that 'equitable considerations of great weight exist when an individual is incarcerated beyond the proper expiration of his prison term,' and that those considerations can properly be addressed by modifying release conditions under § 3582(c)(2) or terminating supervised release at any time after the expiration of one year under § 3583(e)(1)." SRC memo, at 19 (quoting *United States v. Johnson*, 529 U.S. 53, 56 (2000).

In any event, the Commission's view is not a limitation to *applying* for relief under § 3582(c)(2), and the Supreme Court's decision in *Johnson*, combined with *Gall* and *Kimbrough* certainly seems to provide the ammunition needed to argue that a person on supervised release should benefit from the crack guideline amendments and be granted early discharge from supervised release.

Summary

The amendments to the crack cocaine guidelines, in conjunction with *Kimbrough* and *Gall*, provide counsel a meaningful opportunity to obtain significantly reduced sentences for their clients convicted of a crack cocaine offense. But to fully take advantage of this opportunity, counsel must be prepared to explain to courts why the Commission's limited view of resentencing should not be followed. Just as importantly, counsel will need to obtain full and complete information about their clients – including life history and post-offense information. After *Gall* and *Kimbrough*, the opportunity to convince a court that a lower sentence is warranted is virtually unlimited – but this opportunity cannot be realized unless counsel is willing to invest the time and energy needed to learn of, develop, and present mitigating information to the resentencing court. To do this effectively, counsel should consider using a mitigation specialist.