IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2008 TERM

PERCY DILLON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Percy Dillon, pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition or Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Petitioner in the United States District Court for the Western District of Pennsylvania and in the United States Court of Appeals for the Third Circuit.

DATED: September 1, 2009

Respectfully submitted,
LISA B. FREELAND
Federal Public Defender

_____
RENEE DOMENIQUE PIETROPAOLO
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Counsel for Petitioner,
Percy Dillon

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.

II. Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Percy Dillon respectfully petitions the Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix 1a) is published at 572 F.3d 146.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 10, 2009.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to issue

all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The Petition for Writ of Certiorari is due September 8, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

18 U.S.C. § 3553(a), provides in part:

> **Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, . . .

(5) any pertinent policy statement—(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, . . .

(6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3582, provides in part:

(b) **Effect of finality of judgment.**—Notwithstanding the fact that a sentence to imprisonment can subsequently be—
(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) **Modification of an imposed term of imprisonment.**—The court may not modify a term of imprisonment once it has been imposed except that— . . .

(2) 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 . . . , 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. . . .

28 U.S.C. § 991(b), provides in part:

> The purposes of the United States Sentencing Commission are to—
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that—
>
> (A) assure the meeting of purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; . . .

28 U.S.C. § 994, provides in part:

> (o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. . . .
>
> (u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced. . . .

U.S.S.G. § 1B1.10 (2007), provides in part:

> Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)
>
> (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines manual listed in

subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Amendments covered by this policy statement are listed in Appendix C as follows: . . . 505 . . . .

Commentary

Application Notes:

1. Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.

2. In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

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). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine

> *whether, and to what extent, to reduced a term of imprisonment under this section. . . . .*
>
> *Background*: . . .
>
> *The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.*

Before Amendment 706, the sentencing guidelines provided that any defendant responsible for 1.5 kilograms or more of crack cocaine would be sentenced under base offense level 38. After Amendment 706, defendants responsible for at least 1.5 kilograms but less than 4.5 kilograms are sentenced under level 36. U.S.S.G. § 2D1.1(c)(2). *See* U.S.S.G. § 2D1.1 (2007); U.S.S.G. Supp. to App'x C, Amend. 706. Amendment 706 was made retroactive, effective March 3, 2008. U.S.S.G. § 1B1.10(c).

STATEMENT OF THE CASE

This case presents a pressing issue concerning the administration of criminal justice across the country, over which the federal courts are openly divided: whether the Federal Sentencing Guidelines are binding when a revised guideline range causes a district court to impose a new sentence pursuant to 18 U.S.C. § 3582. The United States Court of Appeals for the Third Circuit held that they are, in fact, binding.

1. In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the Federal Sentencing Guidelines violate the Sixth Amendment when they require courts to increase defendants' sentences above otherwise binding limits based on facts not proven to a jury beyond a reasonable doubt. The Court rendered the Guidelines advisory to cure this constitutional infirmity.

The Court followed *Booker* with *Kimbrough v. United States*, 128 S. Ct. 558 (2007), which confirmed district courts have discretion to deviate on "policy" grounds from guidelines ranges applicable to crack cocaine offenders. In *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam), this Court reaffirmed *Kimbrough's* holding that the crack guidelines, "'like all other Guidelines, are advisory only.'" *Id.* at 842 (quoting *Kimbrough*, 128 S. Ct. at 560).

2. Part of the original Sentencing Reform Act, 18 U.S.C. § 3582(c)(2), permits a defendant to make a motion for relief when the Sentencing Commission has amended the guidelines range applicable to that defendant's offense and made the amendment retroactive. Some courts call such proceedings "resentencing[s]," *e.g.*, *United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007), and others call them sentence "modification[s]" or "reduction[s]," *e.g.*, *United States v. Rhodes*, 549 F.3d 833, 839-40 (10th Cir. 2008). Regardless of the label applied, Section 3582(c)(2) directs courts to determine whether revisiting a defendant's sentence in light of a revised guidelines range would be consistent with applicable policy statements issued by the Sentencing Commission. Courts that grant a Section 3582 motion recalculate the defendant's guideline range from the ground up using the "retroactive" guidelines. U.S. SENTENCING GUIDELINES MANUAL [hereinafter U.S.S.G.] § 1B1.10(c) & cmt. n.1(B)(i)-(iii) (2008). They then impose a "New Term of Imprisonment," that replaces the old one *nunc pro tunc*.

The day after *Kimbrough* issued, the Sentencing Commission revisited its policies relating to retroactive guidelines. Specifically, it promulgated a new policy statement "clarifying when, and to what extent, a sentencing reduction is considered consistent with the policy statement and

therefore authorized under 18 U.S.C. § 3582(c)(2)."[1] The new policy statement, save for an exception not relevant here, prohibits district court judges from imposing a new sentence in a Section 3582(c)(2) proceeding that is "less than the minimum term of imprisonment provided by the amended guideline range." U.S.S.G § 1B1.10 cmt. n.3.[2]

3. Petitioner Percy Dillon is one of thousands of federal prisoners who has been affected by those amendments to the Guidelines.

When he was just 23 years old and while he himself was suffering from a drug problem and using crack cocaine, Percy Dillon became involved in an ongoing crack cocaine conspiracy. App. 102, 152a, PSR ¶60.[3]

After awarding a 2-level reduction for acceptance of responsibility and determining that Mr. Dillon fell within Criminal History Category II, the district court found the offense level to be 38 and the then mandatory guideline range

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[1]United States Sentencing Commission, Federal Register Notices, http://www.ussc.gov/NOTICE.HTM.

[2]The amended policy statement permits judges to sentence a defendant below the amended guidelines range only if the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing." U.S.S.G. § 1B1.10 cmt. n.3.

[3]"App." refers to Appendix filed in the Third Circuit Court of Appeal. "PSR" refers to Presentence Report.

to be between 262 and 327 months.[4] The court imposed the lowest possible sentence within the range, or 262 months. It also imposed a consecutive 60 month sentence for use of a firearm during and in relation to drug trafficking under §924(c)(1). The total sentence for this, Percy Dillon's first felony offense, was 322 months, or 26 years, 10 months incarceration.

This incredibly harsh range applied despite the fact that Mr. Dillon had a minor criminal history. Percy had *no* juvenile criminal history and two minor *misdemeanor* convictions. PSR ¶¶44-47.

In 2007, the Sentencing Commission revised the guidelines applicable to crack cocaine offenses. Prior to the amendments, the Guidelines treated one gram of crack cocaine as equivalent to 100 grams of powder cocaine in assigning guidelines ranges for cocaine offenses. Recognizing that the

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[4]At age 20, Percy pled guilty to obstructing/resisting arrest in California. PSR ¶47. The Presentence report indicates a **suspended** sentence was imposed, 2 years' probation, credit for 2 days' time served. PSR ¶47. It further indicates Percy was placed in a 6-month diversion program, which he successfully completed on December 20, 1990. PSR ¶47. Yet the probation officer improperly assessed Percy one point. *See* Part II, *infra.*

This incorrectly assessed second criminal history point increased Mr. Dillon's criminal history category from Criminal History Category I to Category II and correspondingly increased the then mandatory guideline range from 235 to 293 months to 262 to 327 months.

100:1 ratio produced an "urgent and compelling problem" that "significantly undermine[d]" Congress's purposes in enacting the Sentencing Reform Act, the Commission reduced the applicable ratio to 20:1, which in turn reduced the base offense level for all crack cocaine offenses by two levels. U.S.S.G. app. C, at 221 (2008). The Commission made this amendment retroactive as of March 3, 2008. See U.S.S.G. § 1B1.10(c); 73 Fed. Reg. 217 (Jan. 2, 2008).

Acting on this amendment, in December, 2007, Mr. Dillon filed a *pro se* Motion for Sentence Reduction under 18 U.S.C. §3582(c)(2), seeking a 2-level reduction under the amendments as well as a sentence reduction greater than two levels based on the sentencing factors found at 18 U.S.C. §3553(a) - - arguing under *Booker* that the district court should treat the revised guidelines range as only advisory. App. 109-115, 131-147, citing among other factors, his education and vocational training, his creation of a Prison Outreach program with the University of California, Berkeley and including supporting documentation. *See also* App. 192-93.

The district court issued a memorandum opinion and order granting in part and denying in part Mr. Dillon's *pro se* motion for sentence reduction. Appendix 2a. The court lowered the offense level by 2 to 36. The new guideline range was 210 to 262 months, plus the mandatory 60-month consecutive

sentence, resulting in a sentence to 270 months. Appendix 2a. But the court determined that it lacked jurisdiction to grant anything beyond the 2-level reduction authorized by the amendment. *Id.* The district court concluded that the revised policy statement of §1B1.10 precluded any additional reduction. *Id.*

4. Mr. Dillon appealed, and the Third Circuit affirmed. The Third Circuit conceded "[i]f *Booker* did apply in proceedings pursuant to § 3582, **Dillon would likely be an ideal candidate for a non-Guidelines sentence**." *Dillon*, 572 F.3d at 147 (bold added). But the Third Circuit held "*Booker* does not apply to the size of a sentence reduction that may be granted under § 3582(c)(2)." *Id.*, 572 F.3d at 147.

The Third Circuit concluded that "[b]ecause § 3582(c)(2) proceedings may only reduce a defendant's sentence and not increase it, the constitutional holding in Booker does not apply to § 3582(c)(2)." *Id.*, 572 F.3d at 149. Further, the Court determined that "*Booker* applies to full sentencing hearings. . . but not to sentence modification proceedings under §3582(c)(2)." *Id.*, 572 F.3d at 149. It found telling that *Booker* did not mention §3582(c)(2) and was therefore not affected by *Booker*. *Id.* "Because U.S.S.G §1B1.10 is binding on the District Court pursuant to §3582(c)(2), the District Court correctly concluded that it lacked the authority to

further reduce the Appellant's sentence." *Id.*, 572 F.3d at 149.

It noted it was following the majority of its sister circuits, while acknowledging the conflicting authority of the Ninth Circuit in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007).

The Third Circuit also rejected Mr. Dillon's argument that the district court had committed procedural error requiring remand by failing to correctly calculate his criminal history score, asserting "the District Court had no authority to reconsider its prior criminal history determination." *Dillon*, 572 F.3d at 150.

REASONS FOR GRANTING THE WRIT

Federal courts across the country are divided over whether federal district courts must treat amended sentencing guidelines ranges as binding when imposing new sentences under 18 U.S.C. § 3582, or whether this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), requires that they be treated as only advisory. This question is important and arises frequently, particularly in the context of the amended guidelines for crack cocaine offenses. This is such a case and is an ideal vehicle for resolving the split of authority.

The Third Circuit's holding that district courts must treat the Guidelines as binding in 18 U.S.C. § 3582 proceedings also is wrong. This Court held in *Booker* that the Guidelines violate the Sixth Amendment when they require a longer sentence than is otherwise allowed based on the elements of the crime of conviction. *Id.* at 244. Such is the case here. Furthermore, treating the Guidelines as binding when constructing a new sentence flouts *Booker's* mandate that binding guidelines are "no longer an open choice." *Booker*, 543 U.S. at 263; *accord Spears v. United States*, 129 S. Ct. 840, 842 (2009) (per curiam) (Guidelines are "advisory only") (quoting *Kimbrough v. United States,* 128 S. Ct. 558, 560 (2007)).

It is no answer to claim, as the Third Circuit does and the Sentencing Commission suggests, that proceedings under Section 3582 do not constitute "full" resentencings. *Dillon*, 572 F.3d at 149. That is just a label. District courts impose new sentences under Section 3582 the same way they conduct other resentencings. And whenever a court reopens a sentence and constructs a new one, it must do so in accordance with the law that exists at the time the new sentence is imposed, not just with (retroactive) sentencing guidelines. *Booker* is the law; this Court should instruct the federal courts of appeals again that they must follow it.

IA. Federal Courts Are Divided Over Whether Sentencing Guidelines Ranges Are Binding In Section 3582 Proceedings.

Recent retroactive amendments to the Federal Sentencing Guidelines, particularly the recent amendment to the crack cocaine guidelines under U.S.S.G. § 1B1.10, have given rise to thousands of new sentences under Section 3582. In the wake of *Booker*, the federal courts have become sharply divided over whether the directives in U.S.S.G. § 1B1.10 validly preclude district court judges from imposing such new sentences below the revised guidelines ranges. This division of authority is ripe for this Court's review.

1. Seven Federal Courts of Appeals Require Courts to Treat Amended Guidelines Ranges as Binding When Imposing New Sentences under Section 3582.

In this case, the Third Circuit held that district courts may not sentence defendants in Section 3582 proceedings below the bottom ends of their applicable guidelines ranges. The Third Circuit asserted that because § 3582(c)(2) proceedings may only reduce and not increase a defendant's sentence, *Booker's* Sixth Amendment holding does not apply to §3582(c)(2). *Dillon*, 572 F.3d at 149. It continued, *Booker's* remedial holding only applies to full sentencing hearings, not sentence modification proceedings under §3582(c)(2). *Id.*

Seven other federal courts of appeals have similarly held that U.S.S.G. § 1B1.10 restricts district courts' discretion to reduce sentences in Section 3582 proceedings. *See United States v. Fanfan*, 558 F.3d 105 (1st Cir. 2009), *petition for certiorari filed* May 15, 2009 (No. 08-10503); *United States v. Savoy*, 567 F.3d 71 (2d Cir. 2009) *(per curiam); United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009), *cert denied*, 129 S.Ct. 2401; *United States v. Cunningham*, 554 F.3d 703 (7th Cir. 2009), *cert denied*, 129 S.Ct. 2826; *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009), *cert. denied*, 129 S.Ct. 2746; *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 2052; *United States v. Melvin*,

556 F.3d 1190 (11th Cir. 2009), *cert. denied*, 129 S.Ct. 2382.

Two of these decisions have triggered judges sitting on subsequent panels to register their disagreement. *See United States v. Harris*, 556 F.3d 887 (8th Cir. 2009) (Bye, J., concurring); *United States v. Pedraza*, 550 F.3d 1218 (10th Cir. 2008) (McKay, J., dissenting).

A district court in the Tenth Circuit also recently expressed disagreement with *Rhodes*: "While I believe the Tenth Circuit's view runs contrary to better reasoned decisions interpreting § 3582(c)(2) in real time to encompass *Booker* and its progeny, resolution of that conflict must wait for another day and a higher court. [T]he analyses set forth in *United States v. Ragland*, 568 F.Supp.2d 19 (D.D.C.2008) and *United States v. Hicks*, 472 F.3d 1167 (9th Cir.2007) remain the better reasoned. . . ." *United States v. Jones*, 606 F.Supp.2d 1293, 1294-95 (D.Colo.2009).

2. The Third Circuit did acknowledge the conflicting authority of the Ninth Circuit. In *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), the Ninth Circuit held that district courts are permitted in Section 3582 proceedings to impose new sentences below amended, retroactive guidelines ranges. The Ninth Circuit concluded that to the extent that the Sentencing Commission's policy statements require district courts to treat amended guidelines ranges as

binding, those statements run afoul of *Booker*, and must therefore "give way." *Id.* at 1173.

Two federal district courts in circuits yet to weigh in on the issue also have concluded that courts must be permitted in Section 3582 proceedings to impose new sentences below the amended guidelines ranges. *See United States v. Blakely*, 2009 WL 174265 (N.D. Tex. 2009); *United States v. Ragland*, 568 F.Supp.2d 19 (D.D.C. 2008).[5] Furthermore, Judge Lynch of the Southern District of New York has observed that "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 guideline under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline." *United States v. Polanco*, No. 02 Cr. 442-02(GEL), 2008 WL 144825, at *2 (S.D.N.Y. Jan. 15, 2008).

Finally, as noted above, judges in the Eighth and Tenth Circuits have noted that they disagree with decisions allowing the Guidelines to be treated as binding in Section 3582 proceedings. In the Eighth Circuit, Judge Bye has argued that "§ 1B1.10 cannot restrict a resentencing court's

[5]The government filed a notice of appeal in *Ragland*, but later moved to dismiss its appeal. *See* Order, *United States v. Ragland*, No. 08-3092 (D.C. Cir. Nov. 7, 2008).

discretion to sentence outside of the amended guidelines range because it is, like all of the Guidelines, advisory under *United States v. Booker*." *Harris*, 2009 WL 465945, at *2 (Bye, J., concurring). In the Tenth Circuit, Judge McKay has contended that, under Booker, trial courts should not "feel constrained to treat the bottom of the amended guidelines range as a mandatory floor." *Pedraza*, 550 F.3d at 1223 (McKay, J., dissenting).

3. This conflict has been well ventilated, and the time has come for this Court to step in. *See Jones,* 606 F.Supp.2d at 1294 (D.Colo.2009) ("While I believe the Tenth Circuit's view runs contrary to better reasoned decisions interpreting § 3582(c)(2) in real time to encompass *Booker* and its progeny, resolution of that conflict must wait for another day and a higher court.").

The split also is causing unwarranted sentencing disparities across the country. While several circuits now forbid below-guidelines sentences in Section 3582 proceedings, district courts throughout the Ninth Circuit – where over 500 crack offenders alone are eligible for resentencing[6] – are following *Hicks* and imposing

[6]Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 15 tbl.3 (Oct 3, 2007) [hereinafter Impact Memorandum].

below-guidelines sentences for some offenders. *See, e.g., Order, United States v. Fox*, No. 3:96-cr-00080 JKS, at 6-8 (D. Alaska Nov. 20, 2008) (giving defendant new sentence more than eleven years lower than revised guidelines range); *see also United States v. Thigpen*, CR 92-749 SVW, 2008 WL 4926965, at *2 (C.D. Cal. Nov. 12, 2008) (noting district courts' authority to impose below-guidelines sentences); *United States v. Mitchell*, No. CR92-1317 FDB (JET), 2008 WL 2489930, at *1 (W.D. Wash. June 19, 2008) (same). The same is true in the District of Columbia and the Northern District of Texas, *see supra*, at 10, where over 600 crack offenders are eligible for resentencing. Impact Memorandum, *supra*, at 14 tbl.2.

B. The Confusion Over The Question Presented Significantly Impacts The Administration Of Criminal Justice.

1. The question presented here affects a large number of individuals. The Sentencing Commission has rendered twenty-seven amendments retroactive, *see* U.S.S.G. § 1B1.10(c), making defendants convicted of a variety of crimes – including drug trafficking, fraud, weapons offenses, and various forms of theft – eligible for modified sentences under Section 3582. *See id.* app. C (describing amendments to the Guidelines).

According to the Sentencing Commission, the retroactive application of Amendment 706 alone made approximately 19,500

offenders eligible for reduced sentences. *See* Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 4-5 (Oct. 3, 2007) [hereinafter Impact Memorandum].

Between March 3, 2008, when Amendment 706 became retroactive, through January 21, 2009, district courts granted 12,723 motions under Section 3582 for new sentences. U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (2009). Given the uncertainty concerning *Booker's* applicability to Section 3582 proceedings, many of these decisions are presumably on appeal right now.

2. It also is important to recognize that the question presented is not a "transitional" issue affecting only defendants who were initially sentenced prior to *Booker*. Section 1B1.10 applies equally to defendants initially sentenced in the post-*Booker* world, creating the perverse effect of binding defendants sentenced today to the amended guidelines ranges established for their offense if they later become eligible for new sentences under Section 3582. For example, according to the Sentencing Commission, 7,187 defendants were sentenced for crack offenses after *Booker* but before Amendment 706 took effect. *See* Impact Memorandum,

supra, at 5. So long as the decisions such as the Third Circuit's remain law, these and other defendants eligible for sentence reductions will be subjected to binding applications of the Guidelines if they seek modifications under Section 3582. See U.S.S.G. § 1B1.10(b)(2)(A).

C. This Case Is An Excellent Vehicle For Considering The Question Presented.

1. The Third Circuit agrees "[i]f Booker did apply in proceedings pursuant to § 3582, **Dillon would likely be an ideal candidate for a non-Guidelines sentence.**" *Dillon*, 572 F.3d at 147 (emphasis added).

When he was just 23 years old and while he himself was suffering from a drug problem and using crack cocaine, Percy Dillon became involved in an ongoing crack cocaine conspiracy. App. 102, 152a, PSR ¶60. He was sentenced to 26 years and 10 months for this, his first felony offense.

At sentencing, the district court expressed distaste for the severe sentence it was required to impose under the then mandatory guidelines system: "Mr. Dillon, the United States Sentencing Guidelines allow me to sentence you to a term imprisonment ranging from 322 to 387 months. I chosen to sentence you to the minimum possible under the range provided by the Guidelines. The crimes you were convicted of are very serious crimes, however, **I personally don't believe that you should be serving 322 months. But I feel I am bound**

by those Guidelines and I don't feel there is any grounds for, which can depart from those Guidelines." App. 98-99. The court believed the sentence was not fair and "entirely too high": "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime." App. 99, 158.

In its statement of reasons, the district court again expressed regret that its hands were tied and it was bound to follow the unfair range: "While the Court considers the defendant's offenses serious, **it also believes that the guidelines range is unfair to the defendant. The Court, however, is bound by the guidelines range**. Therefore, this Court sentenced the defendant to the minimum of the guidelines range." App. 5.

On another occasion, the district court acknowledged that by imposing the 26 year, 10 month sentence, "I was basically taking the rest of his life away." App. 157 (Docket Entry No. 193, Motion under §2255, Exhibit D-1). "I felt terrible about it" but was bound under the federal sentencing guidelines. App. 157. The court added "he believed whatever good prison might have done for Dillon - who he said came from a good family - **could be accomplished in five years**." *Id.*

Further, despite Mr. Dillon's minor criminal history he was placed in Criminal History Category II rather than I because of the parties' error.

At age 20, Percy pled guilty to obstructing/resisting arrest in California. PSR ¶47. The Presentence report indicates a **suspended** sentence was imposed, 2 years' probation, credit for 2 days' time served. PSR ¶47. It further indicates Percy was placed in a 6-month diversion program, which he successfully completed on December 20, 1990.[7] PSR ¶47. Yet the probation officer improperly assessed Percy one point. *See* Part II, *infra*.

This incorrectly assessed second criminal history point increased Mr. Dillon's criminal history category from Criminal History Category I to Category II and correspondingly increased the then mandatory guideline range from 235 to 293 months to 262 to 327 months.

It is not just the law of federal sentencing that has changed since 1993; this man has changed. *See United States v. Shelby*, 2008 WL 2622828, *5 (N.D. Ill. 2008).

The overarching theme of the many letters submitted to

[7]An order was ultimately entered in October 1999 dismissing the complaint: "[D]efendant. . . having been admitted to probation, has fulfilled the conditions of probation. . . [is] permitted to withdraw the plea of guilty [and enter] a plea of not guilty, [and] . . . the accusatory pleading is dismissed". App. 132-33.

the district court was that Percy Dillon was an immature kid (who was himself abusing drugs) when he committed the crime who has since matured into an intelligent and responsible young man. App. 101-08, 151-52, 154-56, 159, 163, 150 (asking court to consider "imperfect spirit of man, that allows us all to grow and appreciate life"). He continues to strive daily to achieve educational goals and to give back to society upon his return. *See, e.g.*, App. 148-50, 150a-b, 154.

Over the past 15 years of incarceration, Percy Dillon has become a leader and organizer and proven himself to be an extraordinary man, working to educate himself, other inmates, and the community.

Incredibly, Mr. Dillon reached out from prison to the University of Berkeley California to instigate the creation of an African American Studies program for prisoners. App. 150a-b, 151-52.

In June 2003, Mr. Dillon contacted the University of California, Berkeley, African American Studies Department, "inquiring about educational programs or resources that the Department may have or be willing to create for African Americans who are incarcerated. He specifically [sought] faculty or staff who would be interested in teaching a class, or lecturing in a class that was of a topic related to

African American Studies, in . . . USP Atwater. He was very thorough in his request and gave suggestions and ideas on how we could collaborate, if we were interested and enclosed a syllabus from a class he completed at USP Atlanta, while incarcerated in [there]. . .” App. 150a.

Mr. Dillon collaborated with Lindsey Herbert, B.A., M.A., Academic Counselor, African American and African Diaspora Studies at Berkeley. “Mr. Dillon was the main connection inside the institution and he work[ed] vehemently to get events organized and classes started so that our program could get off the ground. **Without his insight and advice our program would not have succeeded and grown the way it has**.” App. 150a-b.

He has been the impetus behind other educational programs as well. One of his efforts involves Hunters Point Family, a youth development agency for “high-risk” youth serving over 200 youth living in public housing and 800 community members. App. 148. This organization offers parental support groups, a farmers market, a certified organic farm, youth businesses, food pantries, and summer camps. Id. Over ninety-eight percent of the participants are African American. Id. Mr. Dillon “sought to help the agency to establish quality educational programs, through U.C. Berkeley and San Francisco State’s African American studies

programs. [Again,] Mr Dillon contacted various professors and ascertained their syllabi and other course material in order to assist [the Hunters Point Family] staff to develop an African American studies program within the agency, to educate our youth about their rich heritage and uplift them. The program has been very successful and continues today as part of our Young Men's Leadership Institute." App. 148-50.

The founder and Executive Director of Hunters Point Family sees Mr. Dillon as a mentoring figure who can reach out to young blacks and motivate them by sharing his experiences. App. 149-50. Percy "realized that his true restitution must be made and paid to the African-American community, his community. P.D. has been evolving into a positive example of a strong African American man and as asset to his community." App. 149. *See also* App. 156a (Percy Dillon's nephew explaining that it was his uncle who encouraged him to persevere and to complete college, offering his experience up as a cautionary tale). He encourages juvenile inmates at Pike County Juvenile Detention Center to follow a different path. App. 156. He is eager "to help other young men in the community understand his perils and hopefully reach some before they fall victim." App. 152a-b.

Tracey D. Ramirez, Financial Management Analyst at Stanford University and long time friend opined, "During the

previous fifteen years of incarceration Mr. Dillon has absolutely changed his frame of mind, and continues to strive to improve personally while imprisoned. His aim of encouraging and motivating the generation that precedes him is relentless. . . . He has worked effortlessly to redeem himself, using these years of incarceration as the catapulting force towards his restitution." App. 151.

Amazingly, Mr. Dillon is now a published writer. An interview he conducted and edited was published in the University of California's Department of African American Studies Newsletter, The Diaspora. App. 150a. "Mr. Dillon continues to practice his skills with writing political commentary and creating proposals for both youth and adult classes that would be cultural, spiritual and educations, for community members on the outside." *Id. See also* App. 151-52. He has also helped start a prison newsletter and it currently working on a greeting card line. App. 159.

Not only has Mr. Dillon striven to educate fellow inmates, at risk youth, and the community at large, he has also taken advantage of opportunities to further his own education.

Obtaining a GED was just his first step. He graduated in 2004 from the School of Business, Property Management, through Ashworth University, a nationally accredited member

of The Distance Education and Training Council. App. 134-36, 138.

He has been attempting to learn skills that will help him succeed and earn a living outside of prison. For example, he successfully completed Custodial Maintenance Programs. App. 139-40. He successfully completed training for Carpet and Upholstery Care, Rest Room Care, Floors and Floor Care Equipment, Cleaning Chemicals, Maintaining Floors and Other Surfaces. App. 142-44. He received certificates for successfully completing a course of study in Industrial Safety and Health. App. 141.

Inmate Education Data submitted by Mr. Dillon reflect the numerous classes he has successfully completed in for example, victim awareness, fitness training, and parenting. Further, he has obtained Certificates of Achievement in Cultural Diversity/African American Studies and Nile Valley Civilization, and Empowerment and Economic Justice. App. 145-47.

Despite the passage of 15 years, Percy's family remain firmly at his side. He even has job prospects awaiting him. App. 161, 152b.

Several of those who have collaborated with Mr. Dillon expressed fear that at some point, continued incarceration

would hamper, not further, the goals of rehabilitation:[8] "Living in prison, around criminally-minded people is no longer beneficial to Mr. Dillon, in fact it is detrimental." App. 150b, 150 (expressing fear that additional incarceration will cause him to become institutionalized, bitter and cynical).

D. The Third Circuit's Opinion in Incorrect

1. Treating The Guidelines As Binding In A Section 3582 Proceeding Violates The Sixth Amendment.

A. *United States v. Booker* prohibits treating a sentencing guideline range as binding when it exposes an offender to a longer sentence than is otherwise permissible based on the facts found by the jury. 543 U.S. 220, 232-35 (2005). The Third Circuit's opinion condones just that result.

B. The Third Circuit conceded *Booker* applies to "full

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[8]Rehabilitation was not taken into account in formulating the guidelines, other than requiring judges to assess the need for training and treatment in imposing conditions of probation or supervised release. 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 (hereinafter "Fifteen Year Report") (November 2004) at 13, available at http://www.ussc.gov/15_year/ 15year.htm. The "court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.*" 18 U.S.C. § 3582(a) (emphasis supplied).

sentencing hearings – whether in an initial sentencing or in a resentencing where the original sentence is vacated for error," but asserts it does not apply to "sentence modification proceedings under §3582(c)(2)." *Dillon*, 572 F.3d at 149.

The Third Circuit's holding rests on a "false . . . dichotomy." *See United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007). There is no practical difference between a Section 3582 proceeding and an ordinary resentencing hearing. In either case, a district court calculates a "New Offense Level" and a "New Criminal History Category" to yield a "New Guideline Range." Moreover, pursuant to the Commission's own policy statement, courts in Section 3582 proceedings, just as in any other resentencing proceeding, should craft a new sentence based in part on the factors listed in 18 U.S.C. § 3553(a), public safety implications, and even offenders' conduct in prison after imposition of their original sentences. U.S.S.G. § 1B1.10 cmt. n.1(B)((iii).

Regardless of how a Section 3582 proceeding is characterized, therefore, the effect of such a proceeding is the same as any other resentencing: the offender receives a new term of imprisonment. And when the right to jury trial is at issue, "label[s]" do not control; actual effects do. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 494 (2000); *see*

also Ring v. Arizona, 536 U.S. 584, 602 (2002) ("The dispositive question" in this area of law "'is one not of form, but of effect.'" (quoting *Apprendi*, 530 U.S. at 494)). Indeed, in this case, the only difference between the resentencing under Section 3582 and any other resentencing was that the district court bound itself by the applicable guidelines range. But that is exactly why the proceeding violated the Sixth Amendment.

To be sure, Congress generally is not obligated to require courts to reopen final judgments. But "there can be no expectation of finality in the original sentence" when Congress specifically provides that it is subject to further review, *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980), or replacement, *see United States v. Caraballo*, 552 F.3d 6, 9 (1st Cir. 2008) (Section 3582 trumps finality objections); *United States v. Pedraza*, 550 F.3d 1218, 1220 (10th Cir. 2008) ("§ 3582(c)(2) . . . affords a narrow exception to the usual rule of finality of judgments."). Nor can Congress deny defendants constitutional protections simply because it confers a proceeding as "an act of grace." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973); *see also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (when Congress provides a means for challenging criminal convictions that it need not provide, Congress "must nonetheless act in accord

with the dictates of the Constitution"); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'").

Any holding to the contrary would raise serious separation of powers concerns. Building on the basic tenets of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803), this Court has emphasized that Congress may not confer jurisdiction on a federal court and then "direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them." *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J. dissenting), cited with approval in *United States v. Sioux Nation*, 448 U.S. 371, 392 (1980). "[W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it." *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting); *see also Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987) (Congress may not pass a law and "then avoid judicial review of a broad category of constitutional challenges by individuals injured by the law"; courts "must apply all applicable laws in rendering their

decisions"). *See United States v. Jones*, 606 F.Supp.2d 1293, 1294-95 (D.Colo. 2009) ("Being forced to engage in the legal fiction of going back, in a post-Booker world, to a pre-*Booker* time to "substitute" a new Guideline in a mandatory fashion that has been constitutionally invalidated, reduces me to a ministerial flunky at best and, at worst, intrudes into Article III and violates the separation of powers doctrine.").

There is no law more fundamental than the Constitution. Requiring federal courts to treat the Guidelines as binding because Congress and the Sentencing Commission have labeled certain proceedings in which defendants are given new sentences as less than "full" resentencings infringes on the courts' duty to apply the Constitution in resolving cases and controversies. Indeed, the Second Circuit recognized in a similar context that a statute instructing the Sentencing Commission to specify a guidelines range for an offense cannot restrict the courts' authority to impose lower sentences for that offense. *See, e.g., United States v. Sanchez*, 517 F.3d 651, 663-65 (2d Cir. 2008).

C. Additionally, the Third Circuit reasoned that *Booker* does not apply to Section 3582 proceedings because such proceedings "may only reduce a defendant's sentence and not increase it. . . ." *Dillon*, 572 F.3d at 149. In practice,

however, Section 3582 proceedings operate as new sentencing hearings that recalculate defendants' sentences from scratch. And while such proceedings result in new sentences that "reduce" offenders' terms of imprisonment compared to the terms they originally received, 18 U.S.C. § 3582(c)(2), this does not change the fact that these new sentences are longer than would otherwise be allowed based solely on the elements of the crimes of conviction. Because the Sixth Amendment applies to the finding of any fact that is "legally essential to the punishment to be inflicted," *Harris v. United States*, 536 U.S. 545, 561 (2002), the application of judicially found facts in Section 3582 proceedings violates the Constitution. A previous, unconstitutional sentence cannot be used as a baseline for a new sentence.

2. Treating The Guidelines As Binding In A Section 3582 Proceeding Violates *Booker's* Remedial, Statutory Holding.

The *Booker* decision includes not just a constitutional ruling but also a new construction of the Sentencing Reform Act for all cases going forward. By forbidding district courts from deviating below amended guidelines ranges, U.S.S.G. § 1B1.10 improperly attempts to resurrect the binding guidelines scheme that *Booker* excised from the Sentencing Reform Act.

A. In *Booker*, the government urged this Court to render

the Guidelines advisory in some cases and to leave them binding in others. *Booker*, 543 U.S. at 265-67. This Court rejected that argument, holding that binding guidelines are "no longer an open choice." *Id.* at 263. This Court has specifically reaffirmed this holding twice with respect to crack offense guidelines, making clear that the Guidelines are "advisory only." *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (per curiam) (quoting *Kimbrough*, 128 S. Ct. at 564).

In light of these holdings, the instruction in U.S.S.G. § 1B1.10 to treat amended guideline ranges as binding in Section 3582 proceedings must itself be treated as advisory. As Judge Bye put it, "§ 1B1.10 cannot restrict a resentencing court's discretion to sentence outside of the amended guidelines range because it is, like all of the guidelines [establishing sentencing ranges], advisory under *United States v. Booker*." *United States v. Harris*, 556 F.3d 887, 889 (8th Cir. 2009) (Bye, J., dissenting); *see also Hicks*, 472 F.3d at 1170.

Any other result would render U.S.S.G. § 1B1.10 invalid on its face. As this Court has made clear, directions in the Guidelines Manual are valid only insofar as they are consistent with federal statutory law. *Stinson v. United States*, 508 U.S. 36, 38 (1993). And the Sentencing Reform

Act, as modified by *Booker's* remedial holding, prohibits guidelines sentencing ranges from being treated as mandatory. Accordingly, to the extent there is an unavoidable conflict between the Act as modified and U.S.S.G. § 1B1.10, the latter must give way.

B. The Third Circuit stresses that *Booker* severed only Section 3553(b) and Section 3742 and did not mention Section 3582. *Dillon*, 572 F.3d at 149. But Section 3582 was not at issue in *Booker*. Even if it had been, this Court would not necessarily have had to sever any of it. Section 3582 compels constitutional violations only when combined with U.S.S.G. § 1B1.10. And the language in U.S.S.G. § 1B1.10's current policy statement rendering the Guidelines binding – "the court shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range" – was not enacted until after *Booker* was decided. U.S.S.G. § 1B1.10(b)(2)(A) (emphasis added).[9]

[9]In January 2005, when *Booker* was decided, the applicable policy statement read only: "In determining whether and to what extent a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b) (2004) (emphasis added).

II. BY REFUSING TO REQUIRE THE SENTENCING COURT TO START WITH A CORRECTLY CALCULATED GUIDELINES RANGE, THE THIRD CIRCUIT ISSUED AN OPINION IN CONFLICT WITH THIS COURT'S AS WELL AS ITS OWN PRECEDENT.

This Court has held that in reviewing sentences, appellate courts must first ensure that the district court committed no significant procedural error such as failing to correctly calculate or improperly calculating the guidelines range. *Gall v. United States*, 128 S.Ct. 586, 597 (2007). The Third Circuit agrees that failure to properly calculate the Guidelines is a procedural error that requires remand unless the error is harmless. *Gall*, 128 S.Ct. at 597; *United States v. Langford*, 516 F.3d 205, 215 (3d Cir.2008).

The parties agree that at the original sentencing, the probation officer improperly assessed Mr. Dillon one point. This incorrectly assessed second criminal history point increased Mr. Dillon's criminal history category from Criminal History Category I to Category II and correspondingly increased the then mandatory guideline range from 235 to 293 months to 262 to 327 months.

At the §3582(c)(2) resentencing, this incorrectly assessed second criminal history point increased Mr. Dillon's advisory range from 188 to 235 months to 210 to 262 months.

Here, the court did have jurisdiction to grant the §3582(c)(2) sentencing reduction. And §3582(c)(2), by its express terms, contemplates correct calculation of the

guidelines. When a sentence is modified under 18 U.S.C. § 3582(c)(2), the courts are required by the express terms of §3582(c)(2) to consider the factors set out in 18 U.S.C. § 3553(a). 18 U.S.C. §3582(c)(2). One of those factors is "the applicable sentencing range." 18 U.S.C. §§ 3553(a)(3), (4). Failure to properly calculate the Guidelines, as here, is procedural error requiring remand. *Gall v. United States*, ___ U.S. ____, 128 S.Ct. 586, 597 (2007); *United States v. Langford*, 516 F.3d 205, 215 (3d Cir.2008).

But the district court declined to reconsider whether the prior misdemeanor was properly assessed one point. App. 15-16.[10] See App. 192-93 (where Mr. Dillon suggested the court re-consider its use of that misdemeanor and requested a new presentence report). And the Third Circuit, without citing any pertinent authority, simply asserts, "the District Court had no authority to reconsider its prior criminal history determination." *Dillon*, 572 F.3d at 150. This finding conflicts with this Court's and Third Circuit precedent.

At both sentencings, the district court imposed

[10]Mr. Dillon had previously objected to assessment of a criminal point for this misdemeanor, arguing that because he in fact had not more than one criminal history point, he should have been eligible for safety valve. Neither the district court nor the government in its response discussed whether and how imposition of the suspended sentence affected calculation of criminal history points. Docket Nos. 141-146.

sentence at the very bottom of the range because he did not believe he had authority to go any lower. The court repeatedly stated he believed the range to be unfair and to be entirely too high. App. 98-99, 158. The court went so far as to state, "he believed whatever good prison might have done for Dillon - who he said came from a good family - **could be accomplished in five years**." App. 157.

Because this Court and the Third Circuit require that the advisory guidelines range must first be correctly calculated, the parties agree Dillon's guideline range was not correctly calculated, and the erroneous calculation mattered because the district court repeatedly bemoaned the length of the sentence and expressed regret at being without authority to impose a lesser sentence, this Court should grant the writ of certiorari, vacate the judgment, and remand for resentencing based on a correctly calculated guidelines range.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court should grant the writ of certiorari, vacate the judgment, and remand for resentencing based on a correctly calculated guidelines range.

Respectfully submitted,

_____
RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender
Counsel for Petitioner,
Percy Dillon

CERTIFICATE OF MEMBERSHIP IN BAR

I, RENEE DOMENIQUE PIETROPAOLO, Assistant Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

_____
RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was mailed this 1st day of September, 2009, to the following:

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_____
RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender

No.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2008 TERM

PERCY DILLON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari on behalf of Percy Dillon was mailed to the Clerk's Office of the United States Supreme Court in Washington, D.C., postage and fees paid (USC-426), First Class Mail.

DATE: September 1, 2009

_____
RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender