No. 08-___ 081185 MAR 20 2009

IN THE

Supreme Court of the United States

GENA MARIE DUNPHY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gena Marie Dunphy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a) is published at 551 F.3d 247. The district court's opinion (Pet. App. 22a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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."

The relevant sections of the Sentencing Reform Act and the United States Sentencing Guidelines are reproduced at Pet. App. 32a-44a.

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 Fourth 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 *United States v. Kimbrough*, 128 S. Ct. 558 (2007), which confirmed that district courts have discretion to deviate on "policy" grounds from guidelines ranges applicable to crack cocaine offenders. The Court's recent opinion in *United States v. Spears*, 129 S. Ct. 840 (2009) (per curiam), 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); Pet. App. 9a. But regardless of what label

is 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," Pet. App. 31a, that replaces the old one *nunc pro tunc*.

The day after this Court's decision in *Kimbrough*, 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]

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[1] United States Sentencing Commission, Federal Register Notices, http://www.ussc.gov/NOTICE.HTM (last visited March 20, 2009).

[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

3. Petitioner Gena Marie Dunphy is one of the thousands of federal prisoners who has been affected by recent amendments to the Guidelines. In August of 2002, an undercover police officer telephoned petitioner's mother to arrange the purchase of a small amount of crack cocaine. Petitioner transported the drugs to the agreed-upon meeting spot, and the officer arrested her upon arrival. Petitioner cooperated with the police and ultimately pleaded guilty to a single count of aiding and abetting the possession of at least five grams of crack cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B).

Petitioner's offense of conviction carried a base offense level of 26. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7) (2002). This offense level, combined with her lack of any criminal history, yielded a sentencing guidelines range of 63-78 months. *See id.* ch. 5, pt. A, sentencing tbl. The district court, however, increased Dunphy's base offense level to 36 based on its findings that she possessed a firearm during the offense of conviction and was responsible for at least 150 grams of crack cocaine. After granting petitioner a three-offense-level acceptance of responsibility reduction, these adjustments yielded an offense level of 33 and an applicable guidelines range of 135-168 months. Pet. App. 24a. The district judge sentenced petitioner to 135 months – the lowest possible sentence within

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applicable to the defendant at the time of sentencing." U.S.S.G. § 1B1.10 cmt. n.3.

that range. Pet. App. 24a. Petitioner did not appeal, and her sentence became final in 2003.

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 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).

Based on these amendments, petitioner moved under Section 3582(c)(2) for resentencing. Petitioner requested a new sentence below her amended guideline range, arguing under *Booker* that the district court should treat the revised guidelines range as only advisory. Pet. App. 25a. The district court determined that petitioner was eligible for a new sentence based on the crack guideline amendments. Pet. App. 22a-23a. The court recalculated her base offense level at 31 (two levels lower than before), carrying forward its earlier findings and calculations. Pet. App. 24a. This resulted in a new guidelines range of 108-135 months. Pet App. 24a. The district court, however, denied petitioner's request that it impose a sentence below 108 months, concluding that U.S.S.G. § 1B1.10 precluded it from imposing any sentence below the applicable guideline range. Pet

App. 25a. Accordingly, the district court entered a "New Term of Imprisonment" of 108 months. Pet. App. 31a.

4. Petitioner appealed the district court's refusal to consider imposing a below-guideline sentence, and the Fourth Circuit affirmed. The Fourth Circuit acknowledged that *Booker*'s advisory regime applies to "full sentencing hearings." Pet. App. 11a. But the Fourth Circuit reasoned that Section 3582 proceedings "do not constitute a full resentencing of the defendant." Pet. App. 8a-9a. Consequently, the Fourth Circuit held that the requirement in U.S.S.G. § 1B1.10 that amended guideline ranges be treated as binding does not run afoul of the Sixth Amendment. Pet. App. 8a-10a (quoting U.S.S.G. § 1B1.10(a)(3)). The court also concluded that *Booker*'s remedial, statutory holding rendering the Guidelines advisory across the board is "inapplicable" in Section 3582 proceedings. Pet. App. 11a. In the Fourth Circuit's view, such proceedings do not implicate the administrability concerns that led this Court in *Booker* to conclude that the Guidelines should not be kept binding insofar as they do not violate the Sixth Amendment. Pet. App. 9a-17a.[3] In reaching both of these holdings, the court acknowledged that its conclusions conflicted with the

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[3] The Fourth Circuit also rejected petitioner's argument that "the express limitation on the extent of her sentence reduction established by U.S.S.G. § 1B1.10(b) should be disregarded as a matter of statutory interpretation," wholly apart from *Booker*'s remedial holding. Pet. App. 17a. Petitioner does not renew that argument here.

Ninth Circuit's decision in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007). Pet. App. 14a-15a.

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 Fourth 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 United States v. Spears*, 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 Fourth Circuit does and the Sentencing Commission suggests, that proceedings under Section 3582 do not constitute "full" resentencings. Pet. App. 8a-9a, 11a, 15a. 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.

I. 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. Six federal courts of appeals require courts to treat amended guidelines ranges as binding when imposing new sentences under Section 3582.

In this case, the Fourth Circuit held that district courts may not sentence defendants in Section 3582 proceedings below the bottom ends of their applicable guidelines ranges. Pet. App. 8a-9a. The Fourth Circuit first ruled that imposing a binding guideline sentence in a Section 3582 proceeding does not violate the Sixth Amendment as construed in *Booker*.

The court asserted that the Sixth Amendment does not apply because Section 3582 proceedings are not "full" resentencings and because the new sentences that are imposed do not, in any event, use factual findings to expose defendants to higher sentences than otherwise are permissible. Pet. App. 10a-11a.

Second, the Fourth Circuit asserted that treating the Guidelines as binding in Section 3582 proceedings does not violate *Booker*'s remedial holding that the Guidelines may not be treated as binding. The court of appeals concluded that the Sentencing Commission had the power to mandate that the Guidelines be binding in this context because Section 3582 proceedings do not implicate the concerns that led this Court to reject a mixed mandatory-advisory scheme. Pet. App. 11a-12a.

Five other federal courts of appeals have similarly held that U.S.S.G. § 1B1.10 legitimately restricts district courts' discretion to reduce sentences in Section 3582 proceedings. *See United States v. Fanfan*, __ F.3d __, No. 08-2062, 2009 WL 531281 (1st Cir. Mar. 4, 2009); *United States v. Cunningham*, 554 F.3d 703 (7th Cir. 2009); *United States v. Melvin*, __ F.3d __, No. 08-13497, 2009 WL 236053 (11th Cir. Feb. 3, 2009); *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008), *petition for cert. filed* (U.S. Jan. 21, 2009) (No. 08-8318). Two of these decisions have triggered judges sitting on subsequent panels to register their disagreement. *See United States v. Harris*, __ F.3d __, No. 08-2774, 2009 WL 465945 (8th Cir. Feb. 26, 2009) (Bye, J., concurring); *United States v. Pedraza*, 550 F.3d 1218 (10th Cir. 2008) (McKay, J., dissenting).

2. As the Fourth Circuit acknowledged, Pet App. 14a-15a & n.4, federal courts are divided on this issue. In particular, the Fourth Circuit's decision squarely conflicts with decisions of three other federal courts, including the Ninth Circuit, holding that *Booker* precludes courts in Section 3582 proceedings from treating amended guidelines ranges as binding.

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*, No. 3:02-CR-209-K, 2009 WL 174265 (N.D. Tex. Jan. 23, 2009); *United States v. Ragland*, 568 F. Supp. 2d 19 (D.D.C. 2008).[4] 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

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[4] 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).

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 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. Federal courts have had ample time to digest both *Booker* and *Kimbrough* and have continued to reach conflicting decisions. Recent courts to address the issue have just chosen sides in the circuit split without extensive analysis. *See, e.g.*, *Fanfan*, 2009 WL 531281; *Melvin*, 2009 WL 236053; *Starks*, 551 F.3d at 839. Moreover, given the thoroughness of the opinions already issued, it is unlikely that future opinions will shed further light on the debate.

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[5] – are following *Hicks* and imposing 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.

II. 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

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[5] 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].

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].

From March 3, 2008, when Amendment 706 became retroactive, through January 21, 2009, district courts have 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 Fourth 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).

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

1. Petitioner is a prime candidate for a sentence below the amended crack cocaine guidelines range. Petitioner was not a major player in a drug distribution ring. Instead, petitioner acted simply as a courier, delivering drugs purchased from her mother. Petitioner sold drugs only to support her drug habit. She had no criminal record prior to her offense, and her offense was nonviolent. She has accepted full responsibility for her actions and apologized to her family, friends, and community for her wrongdoing.

2. The district court sentenced petitioner to the minimum possible guidelines sentence in both the initial and later sentencing proceedings. In her initial sentencing proceeding, petitioner's offense level yielded a guidelines range of 135-168 months; the judge sentenced her to 135 months. Pet. App. 24a. At resentencing, the amended guidelines yielded a guidelines range of 108-135 months; the judge sentenced her to 108 months. Pet App. 24a. Nothing in the record suggests that the district court would

not have given her a lower sentence if it had understood that it could.

3. The Fourth Circuit extensively analyzed both the statutory and constitutional arguments involved. *See* Pet. App. 9a-20a. Indeed, the Fourth Circuit's opinion has become a polestar for other courts on its side of the split. *See United States v. Fanfan*, __ F.3d __, No. 08-2062, 2009 WL 531281, at *4 (1st Cir. Mar. 4, 2009); *United States v. Cunningham*, 554 F.3d 703, 706-08 (7th Cir. 2009); *United States v. Melvin*, No. 08-13497, 2009 WL 236053, at *3-*4 (11th Cir. Feb. 3, 2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir. 2009).

IV. The Fourth Circuit's Decision Is Incorrect.

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

1. *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 Fourth Circuit's opinion condones just that result.

Petitioner pleaded guilty to a charge of possession of at least five grams of crack cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B). At her new sentencing, the elements of that offense, in light of her lack of any criminal history, would have yielded a guidelines

range of 60-63 months.[6] However, the district court sentenced petitioner within a guidelines range of 108-135 months, based upon its factual findings that she possessed a firearm and at least 150 grams of crack cocaine.[7]

Petitioner's 108-month sentence thus violated the Sixth Amendment because it was 45 months longer than the sentence allowed by her conviction alone. The imposed sentence was based upon facts neither found by a jury nor admitted pursuant to a waiver of the *Booker* right to have a jury find sentence-enhancing facts.

2. None of the Fourth Circuit's reasons for refusing to follow this straightforward Sixth Amendment analysis withstands scrutiny.

a. The Fourth Circuit conceded that *Booker* applies to "*full sentencing hearings* – whether in an initial sentencing or in a resentencing where the

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[6] The applicable guidelines range was actually 51-63 months, but 21 U.S.C. § 841(b)(1)(B) carries a five-year mandatory minimum for possession of more than five grams of crack cocaine.

[7] Petitioner stipulated to these facts at her initial, pre-*Booker* sentencing hearing. That stipulation, however, did not constitute a waiver or otherwise entitle the district court to rely on those purported facts in the post-*Booker* sentencing. A court "cannot presume a waiver of [the right to jury trial] from a silent record" – that is, a record that lacks evidence of a knowing and voluntary waiver of the right to have a jury find the specific facts at issue. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *see also United States v. Gonzalez-Flores*, 418 F.3d 1093, 1103 (9th Cir. 2005) (enforcing this rule in context of pre-*Booker* stipulation).

original sentence is vacated for error." Pet. App. 11a; *see also United States v. Nolley*, 27 F.3d 80, 82 (4th Cir. 1994) (holding that constitutional rights, such as the right to counsel, apply "where the purpose of the hearing is to impose a new sentence after the original sentence has been set aside"). Yet the Fourth Circuit held that the Sixth Amendment does not apply in Section 3582 proceedings because, in the words of Section 1B1.10, such proceedings are not "full" resentencing hearings. *See* Pet. App. 8a-9a (quoting U.S.S.G. § 1B1.10(a)(3)).

The Fourth 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." Pet. App. 31a. 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)(i)-(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. Pet. App. 31a. 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").

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).

b. The Fourth Circuit also reasoned that *Booker*'s holding does not apply because district courts need not initiate Section 3582 proceedings at all. Pet. App. 10a. While true, this fact is irrelevant. Though district courts have discretion in determining whether to commence a new sentencing proceeding under Section 3582, they must comply with the Constitution when they choose to do so.

Indeed, this Court has made clear that *Booker* and its Sixth Amendment predecessors are not limited to situations in which the court is *required* to alter a defendant's sentence; rather, the doctrine applies whenever a court is *authorized* to impose a prison term based on facts not found by a jury. *See Apprendi*, 530 U.S. at 483 (doctrine applies where "the determination of a fact, . . . if found, *exposes* the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis added); *see also Ring*, 536 U.S. at 602 (*Apprendi* applies when a fact "authorize[s]" the death penalty). Where, as here, a district judge uses facts not found by a jury to determine a defendant's sentence, that judge violates *Booker* notwithstanding his initial discretion concerning whether to reopen the sentence.

c. Finally, the Fourth Circuit reasoned that *Booker* does not apply to Section 3582 proceedings because such proceedings "can only decrease – not increase – the defendant's sentence." Pet. App. 11a. 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.[8]

B. 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

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[8] To the extent that the district court's decision to carry forward the unconstitutional elements of petitioner's prior sentence can be read to rely upon the law of the case doctrine, the intervening decision in *Booker* would render that reliance inappropriate. Even the law of the case doctrine contains an exception for intervening changes in law. *See, e.g., Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008); *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000); *Hull v. Freeman*, 991 F.2d 86, 90 (3d Cir. 1993); *United States v. Monsisvais*, 946 F.2d 114, 117 (10th Cir. 1991); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1441 (11th Cir. 1984).

guidelines scheme that *Booker* excised from the Sentencing Reform Act.

1. 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 *United States v. Kimbrough*, 128 S. Ct. 558, 564 (2007)).

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*, __ F.3d __, No. 08-2774, 2009 WL 465945, at *2 (8th Cir. Feb. 26, 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.

2. Nevertheless, the Fourth Circuit concluded that there is no need to apply *Booker*'s remedial holding in Section 3582 proceedings because the concerns about a mixed mandatory-advisory guidelines system are not present in that context. Each of the Fourth Circuit's arguments lacks merit.

a. The Fourth Circuit asserted that because *Booker* severed only Section 3553(b) and Section 3742, and not Section 3582, the latter provision was "not affected by *Booker*." Pet. App. 11a. This conclusion ignores the fact that 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]

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[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).

b. The Fourth Circuit also noted *Booker*'s conclusion that Congress would not have wanted a system of "one-way levers" that circumscribes judges' ability to depart in one direction while leaving their departure discretion unfettered in the other direction. Pet. App. 12a; *see Booker*, 543 U.S. at 257-58. Since Section 3582 is a "one-way lever," allowing only new sentences that are lower than previous ones, the Court of Appeals concluded that *Booker*'s rationale must not apply. Pet. App. 12a.

The Fourth Circuit's reasoning turns *Booker* on its head. This Court rejected the "one-way lever" scenario in *Booker* in order to require courts *always* to treat the Guidelines as advisory, not to allow for exceptions. Courts must treat the Guidelines in Section 3582 proceedings as advisory as well.

c. The *Booker* Court also noted that a mixed mandatory-advisory system would create "administrative complexities." 543 U.S. at 266-68. Concluding that there are no "administrative complexities" in having binding guidelines in the Section 3582 context and advisory guidelines everywhere else, the Fourth Circuit reasoned that the Guidelines could be binding in Section 3582 proceedings. Pet. App. 12a.

This argument misses the forest for the trees. *Booker*'s remedial holding is explicitly premised on the assumption that a uniformly advisory guidelines system will prove more administrable for lower courts. *Booker,* 543 U.S. at 266-68. In any event, *Booker* rejected the argument that its remedial holding should be limited only to situations where advisory guidelines would be convenient; "such a two-system proposal seems unlikely to further Congress'

basic objective of promoting uniformity in sentencing." *Id.* at 267.

d. Finally, the Fourth Circuit contended that it would create "patent inequity among convicted defendants" to give defendants eligible for resentencing the benefit of "further reduction" under advisory guidelines since ineligible defendants cannot avail themselves of the *Booker* remedy. Pet. App. 15a-16a. This inequity, however, is nothing more than the product of the normal application of resentencing procedures. As the Fourth Circuit itself recognized in another case in which an offender gained the right to a resentencing under *Booker* only because his original sentence was vacated on non-*Booker* grounds:

> It could certainly be said that Butler was fortunate that the district court twice sentenced him incorrectly, thus continuing his case long enough for *Booker* to be decided before the latest sentence was imposed. But, it is not unusual for temporal happenstance to control whether a criminal defendant receives the benefit of a Supreme Court decision. And, Butler is no less "deserving" of benefitting from *Booker* than are any of the other defendants who happened to have been sentenced after *Booker* was decided. The fact is that when Butler was sentenced, *Booker* had already been decided, and that is all that matters.

United States v. Butler, 139 Fed. Appx. 510, 512 (4th Cir. 2005).

Moreover, the "anomaly" of carving out crack offenders for resentencing was created only by the Sentencing Commission's decision to make the new crack guidelines retroactive. The true "patent inequity" would be to subject the subset of crack offenders eligible for resentencing to a mandatory sentencing system ruled unconstitutional four years ago. This injustice would be compounded by the fact that this subset of offenders is eligible for resentencing precisely because both the Sentencing Commission and this Court deemed their prior sentences inequitable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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