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IN THE
Supreme Court of the United States

DEREK CUNNINGHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005), which held in the initial sentencing context that the United States Sentencing Guidelines are advisory only, apply with equal force to sentence reductions under 18 U.S.C. § 3582(c)(2) such that a district court has discretion to reduce the defendant's term of imprisonment below the Guideline range?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Derek Cunningham, Norman Thomas and Respondent the United States. Mr. Cunningham is the sole Petitioner here.

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INTRODUCTION

The Seventh Circuit's decision below holding that when reducing a defendant's sentence pursuant to 18 U.S.C. § 3582(c)(2) district courts "do not have the authority to reduce the defendant's sentence beyond the retroactive Guidelines amendment range," *United States v. Cunningham*, 554 F.3d 703, 709 (7th Cir. 2009), is inconsistent with this Court's remedial opinion in *United States v. Booker*, 543 U.S. 220, 245 (2005), which made the United States Sentencing Guidelines "effectively advisory." Joining several other courts of appeals, the Seventh Circuit is in direct conflict with the Ninth Circuit, thereby deepening a circuit divide over an important and recurring issue of federal law. As indicated by the recent flurry of decisions from the courts of appeals on the issue of *Booker's* applicability to resentencing proceedings, the circuits are very much at sea in grappling with the scope of *Booker*; thus, this Court's guidance is needed at this time.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Pet App. 13a, is published as *United States v. Thomas*, 566 F. Supp. 2d 830 (N.D.Ill. 2008). The opinion of the United States Court of Appeals for the Seventh Circuit affirming the district court, Pet. App. 1a, can be found at 554 F.3d 703 (7th Cir. 2009).

JURISDICTION

The Court of Appeals issued its decision on February 4, 2009. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Section 3582(c)(2) of Title 18 of the United States Code provides: "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

Section 1B1.10(b)(1) of the United States Sentencing Guidelines provides: "In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time that defendant was sentenced."

Section 1B1.10(b)(2)(A) of the Guidelines provides: "Except as provided in subdivision (B) [not relevant here], the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection."

STATEMENT

On August 18, 2005, Derek Cunningham ("Petitioner")[1] pleaded guilty in the United States District Court for the Northern District of Illinois to conspiring to possess with intent to distribute in excess of 50 grams of cocaine base ("crack"), a violation of 21 U.S.C. § 846. The district court found Petitioner to have a Base Offense Level of 29 and the lowest Criminal History Category; these factors yielded a United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") range of 87 to 108 months. Pet. App. 2a. The court sentenced Petitioner to 87 months. *Id.* In 2007 the United States Sentencing Commission ("Sentencing Commission" or "Commission") promulgated Amendment 706, U.S. Sentencing Guidelines Manual app. C, at 1156 (2008), which "reduces the base offense level associated with each quantity of crack by two levels." *Kimbrough v. United States*, 128 S. Ct. 558, 569 (2007). The Commission also listed Amendment 706 in U.S.S.G. § 1B1.10(c) as an amendment that could be applied retroactively to previously imposed sentences. On June 27, 2008, Petitioner filed a motion in the district court under 18 U.S.C. § 3582(c)(2) for a resentencing. Pet. App. 2a. Section 3582(c)(2) affords district courts the discretion to resentence prisoners "who [have] been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" and made retroactive. 18 U.S.C. § 3582(c)(2).

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[1] Norman Thomas was Petitioner's codefendant below; the courts below ruled on their separate § 3582(c)(2) motions in the same opinion. Mr. Thomas is not party to this Petition.

On July 17, 2008, pursuant to Amendment 706, the district court agreed to reduce Petitioner's Base Offense Level from 29 to 27. Pet. App. 2a, 15a. Given Petitioner's Criminal History Category I designation, this Base Offense Level yielded a sentencing range of 70 to 87 months; the district court elected to lower Petitioner's sentence to 70 months. Pet. App. 15a. Petitioner, citing this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which "ma[d]e the Guidelines system advisory," *id.* at 247, argued that the district court could further reduce his sentence below the amended Guidelines. However, reading *Booker* to apply only to increases in sentences and not to sentence reductions under § 3582(c)(2), the district court held it could not, consistent with U.S.S.G. § 1B1.10(b)(2)(A), reduce Petitioner's sentence below the range set by the amended Guidelines. Pet. App. 14a, 20a. On July 30, 2008, Petitioner appealed the district court's ruling to the United States Court of Appeals for the Seventh Circuit. Pet. App. 3a.

On appeal, Petitioner argued that the effect of this Court's decision in *Booker* was to render the Guidelines advisory for purposes of a resentencing under § 3582(c)(2) as well as an original sentencing and, therefore, the district court wrongly held it lacked discretion to consider reducing his sentence below the amended Guideline range. Petitioner relied on the Ninth Circuit's decision in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), which held that *Booker* rendered the Guidelines advisory also in a § 3582(c)(2) resentencing. On February 4, 2009, the court of appeals denied Petitioner's appeal in *United States v. Cunningham*, 554 F.3d 703 (7th

Cir. 2009); Pet. App. 1a.[2] The panel ruled that *Booker* does not "render[] the limits set by the Sentencing Commission for § 3582(c)(2) proceedings advisory." 554 F.3d at 707; Pet. App. 9a. The Seventh Circuit indicated it declined to follow *Hicks* and would "side with the majority of courts" rejecting the *Hicks* reading. 554 F.3d at 709; Pet. App. 12a.

The Seventh Circuit's analysis began with an examination of the "substantive" and "remedial" opinions of *Booker*. According to the Seventh Circuit, this Court, in its "substantive opinion," found that the Sentencing Guidelines, as written, violated the Sixth Amendment because "the sentencing court rather than the jury found facts that established the mandatory guideline range." 554 F.3d at 706; Pet. App. 7a. The "remedial opinion" then cured this violation by severing and excising "the provision of the federal sentencing statute that [made] the Guidelines mandatory." *Booker*, 543 U.S. at 245. Neither opinion, according to the appeals court, controlled here. In the case of a § 3582(c)(2) resentencing, the panel reasoned, the "constitutional defect addressed by *Booker* is simply not implicated" because § 3582(c)(2) cannot lead to a higher sentence. Pet. App. 8a.

"Despite th[e] broad language" of *Booker's* remedial opinion, the Seventh Circuit offered four reasons why the remedial opinion did not apply to a § 3582(c)(2) resentencing. 554 F.3d at 707; Pet. App. 9a. First, the Seventh Circuit believed that this Court in *Booker* sought to avoid turning the Guidelines into "a one way lever" giving district

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[2] The panel consisted of Judges Flaum, Posner, and Wood.

courts too little freedom to increase sentences and too much freedom to decrease sentences. 554 F.3d at 707; Pet. App. 9a. This concern was presumably not present in § 3582(c)(2) proceedings because "Congress clearly intended § 3582(c)(2)" to only "reduce" sentences. 554 F.3d at 707; Pet. App. 9a. Second, the panel added, *Booker* sought to avoid the "administrative complexities" that would arise from leaving the Sentencing Guidelines mandatory in some contexts while advisory in others. 554 F.3d at 707; Pet App. 9a. For the Seventh Circuit, this administrative consideration cut the other way: making the Guidelines advisory in a § 3582(c)(2) resentencing would in fact increase administrative complexity because it would allow for "essentially . . . a full resentencing upon a section 3582(c)(2) motion." 554 F.3d at 707; Pet App. 9a.

The third reason the appeals court gave for *Booker*'s inapplicability to § 3582(c)(2) resentencings was that Congress located the district court's resentencing and original sentencing authority in different statutes, 18 U.S.C. § 3582(c) and 18 U.S.C. § 3553, respectively. Section 3582(c) prevents a court from "modify[ing] a term of imprisonment once it has been imposed except" through a § 3582(c)(2) motion that "is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Section 3582(c)'s reference to the Commission's policy statements expressed, in the panel's view, a Congressional intention to treat the policy statements as "part of the statute." 554 F.3d at 708; Pet App. 10a. Therefore, since the Commission, through U.S.S.G. § 1B1.10(b)(2)(A), made the Sentencing Guidelines mandatory in § 3582(c)(2) resentencings, the statute required

mandatory application of the Guidelines in those proceedings.

Finally, the Seventh Circuit cited the argument, made by the Eighth and Tenth Circuits, that the different statutory bases for original sentences, § 3553, and resentencings, § 3582(c), help separate § 3582(c) from *Booker's* remedial opinion. *See* 554 F.3d at 707-08 n.3; Pet. App. 10a n.3; *see also United States v. Starks*, 551 F.3d 839, 842 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833, 840-41 (10th Cir. 2008). It was material to the court below that while § 3553 was "partially excised" in *Booker*, no mention was made of § 3582(c). 554 F.3d at 707; Pet. App. 10a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CLEAR AND DEVELOPED CONFLICT AMONG THE CIRCUITS OVER *BOOKER'S* APPLICABILITY TO § 3582(c)(2) RESENTENCING PROCEEDINGS

The court below, in agreement with the courts of appeals for the First, Fourth, Eighth, Tenth, and Eleventh Circuits, is in explicit and direct conflict with the Ninth Circuit over *Booker's* applicability to § 3582(c) proceedings. *Compare Cunningham*, 554 F.3d 703 (7th Cir. 2009), *United States v. Fanfan*, --- F.3d ---, 2009 WL 531281 (1st Cir. 2009); *United States v. Melvin*, --- F.3d ---, 2009 WL 236053 (11th Cir. 2009); *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009); *United States v. Rhodes*, 549 F.3d

833 (10th Cir. 2008), *with United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007).[3]

In *Hicks*, the Ninth Circuit held that the Sentencing Guidelines are advisory both for a resentencing under § 3582(c)(2) as well as an original sentencing: *Booker* "explicitly stated that, 'as by now should be clear, [a] mandatory system is no longer an open choice.'" 472 F.3d at 1170, *quoting Booker*, 543 U.S. at 263.[4] Accepting many of the same arguments that were found unpersuasive in the decision below, *Hicks* reasoned that this Court had "rejected the argument that the Guidelines might remain mandatory in some cases but not in others." 472 F.3d at 1171-72, *citing Booker*, 543 U.S. at 263-66. Nor could a Sentencing Commission policy statement displace the central tenet of *Booker*: "To the extent that the policy statements would have the effect of

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[3] Not all judges in these Circuits have agreed with these decisions. Judge Bye of the Eighth Circuit noted that the Sentencing Guidelines, specifically § 1B1.10(b)(2)(A), "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*." *United States v. Harris*, --- F.3d ---, 2009 WL 465945, at *2 (8th Cir. 2009) (Bye, J., concurring in judgment). Judge McKay of the Tenth Circuit disagreed with his Circuit's ruling in *Rhodes*. *See United States v. Pedraza*, 550 F.3d 1218, 1222 (10th Cir. 2008) (McKay, J., dissenting).

[4] Although the Fifth and D.C. Circuits have not ruled on this issue, district courts in those circuits have adopted the *Hicks* approach of the Ninth Circuit. *See United States v. Blakely*, 2009 WL 174265, at *6 (N.D. Tex. 2009) ("the Court disagrees with the Government's position and follows the line of reasoning in *Hicks*"); *United States v. Ragland*, 568 F. Supp. 2d 19, 24 (D.D.C. 2008) ("this Court finds the reasoning of *Hicks* persuasive").

making the Guidelines mandatory (even in the restricted context of § 3582(c)(2)), they must be void" after *Booker.* 472 F.3d at 1172.

Given the number of recent appeals court decisions on the issue presented here, this Court should expect to receive numerous petitions presenting either the same or a similar question. Of these petitions, the Court should grant this petition to resolve the question presented because the Seventh Circuit's opinion below offers a comprehensive, cogently reasoned (though ultimately flawed) account of the considerations that have led to this persisting conflict among the courts of appeals over *Booker*'s applicability to resentencing proceedings.

II. THE ISSUE PRESENTED IS A RECURRING ISSUE OF FEDERAL LAW

The question of whether *Booker* renders the Sentencing Guidelines advisory in § 3582(c)(2) resentencings is a recurring one. A federal prisoner can file a § 3582(c)(2) petition when three conditions are met: (1) the Guidelines provisions under which the prisoner was sentenced have "subsequently been lowered"; (2) the amended provisions would produce a lower "term of imprisonment" for the prisoner than the earlier provisions; and (3) the Commission makes the amendment retroactive under § 1B1.10(c) of the Guidelines. 18 U.S.C. § 3582(c)(2). When a future Guidelines amendment meets these three criteria, affected prisoners will file § 3582(c)(2) motions. In each of these § 3582(c)(2) proceedings the district court will have to decide whether it can resentence the prisoner to a range below that of the amended Guidelines.

The Sentencing Commission is likely to continue promulgating amendments to the Guidelines in the future. In the past twenty-one years, the Sentencing Commission has issued twenty-six retroactive amendments that satisfy these three requirements. *See* U.S.S.G. § 1B1.10(c). Eight of these retroactive amendments have resulted in prisoners successfully reducing their sentences under § 3582(c)(2).[5] The question of *Booker*'s applicability

[5] Besides Amendment 706, the other amendments are: (i) Amendment 379 modified the Sentencing Guidelines for the crime of failing to file a currency and monetary instrument report. *See, e.g., United States v. Park*, 951 F.2d 634 (5th Cir. 1992) (holding that Amendment 379 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (ii) "Unlawful possession of a weapon" was removed as a "crime of violence for the purposes" of sentencing enhancements by Amendment 433. *See, e.g., United States v. Beckley*, 30 F.3d 134 (6th Cir. 1994) (holding that Amendment 433 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (iii) Amendment 484 excluded "materials that must be separated from the controlled substance before the controlled substance can be used" from counting towards the weight of the controlled substance. *See, e.g., United States v. Turner*, 59 F.3d 481 (4th Cir. 1995) (holding that Amendment 484 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (iv) With Amendment 488 the Commission cured "unwarranted disparit[ies]," in sentencing for LSD related crimes, caused by wide variations in "the weights of LSD carrier media." *See, e.g., United States v. Kirby*, 34 F.3d 1077 (10th Cir. 1994) (holding that Amendment 488 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (v) The Sentencing Commission, through Amendment 505, lowered the maximum offense level that could be incurred for mere drug possession. *See, e.g., United States v. Bines*, 112 F.3d 517 (9th Cir. 1997) (holding that Amendment 505 entitled the prisoner to a reduced sentence under § 3582(c)(2)). (vi) Amendment 516 lowered from one kilogram to one hundred grams the amount of marijuana to which a marijuana plant was said to be equivalent. *See, e.g., United States v. Mihm*, 134 F.3d 1353 (8th Cir. 1998) (holding that Amendment 516 entitled the prisoner to a reduced sentence

to § 3582(c)(2) resentencing theoretically could have appeared in § 3582(c)(2) proceedings based on any of these amendments. However, since *United States v. Booker* was decided in 2005, the issue has appeared thus far only in litigation surrounding amendments 599 and 706. *See Hicks*, 472 F.3d 1167 (amendment 599); *Starks*, 551 F.3d 839 (amendment 706).

Nor have federal courts seen the last § 3582(c)(2) motion based on Amendment 706. Since its implementation in 2007, Amendment 706 has resulted in significant litigation for the district courts; 12,723 federal prisoners have won sentence reductions in § 3582(c)(2) resentencings.[6] There are likely more to come. According to the Sentencing Commission, "in many districts, contested" § 3582(c)(2) motions "have not been decided by the court."[7] In many of these cases the district judge will be confronted with the question of whether to reduce the sentence below the amended Guideline range. Without guidance from this Court, the answer to this question will turn on which circuit the district court sits in.

(continued...)

under § 3582(c)(2)). (vii)The extent to which a conviction under 18 U.S.C. § 924(c) made the defendant eligible for weapon-base sentence enhancements was reduced by Amendment 599. *See, e.g., United States v. Hayes*, 298 F. App'x 888 (11th Cir. 2008) (holding that Amendment 599 entitled the prisoner to a reduced sentence under § 3582(c)(2)).

[6] United States Sentencing Commission, *Crack Cocaine Retroactivity Data Report*, at 4 (2009), *available at* http://www.ussc.gov/USSC_Crack_Cocaine_Retroactivity_Data_Report_13_February_09.pdf ("Retroactivity Data Report").

[7] Retroactivity Data Report at 3.

III. THE SEVENTH CIRCUIT'S READING IS CONTRARY TO *BOOKER*

A. *Booker* Requires A Unitary Application of the Guidelines

After concluding that the Federal Sentencing Guidelines conflict with the Sixth Amendment's jury trial requirements, *Booker*'s remedial opinion resolved the constitutional conflict by making the Guidelines advisory rather than mandatory. Specifically, by severing and excising the provisions of United States Code, 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e), that made the Guidelines mandatory, *Booker*'s remedial opinion "makes the Guidelines effectively advisory." *Booker*, 543 U.S. at 245. After *Booker*, a sentencing court is still required to "consider Guidelines ranges . . . but is permit[ted] . . . to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." *Id.*[8]

Booker's remedial opinion prohibited mandatory application of the Guidelines without carving out any exceptions, including any based on

[8] This Court has subsequently reaffirmed the general holding of Booker on multiple occasions. *See, e.g.*, *Kimbrough*, 128 S. Ct. at 570 (affirming that "while the statute still requires a court to give respectful consideration to the Guidelines, *Booker* 'permits the court to tailor the sentence in light of other statutory concerns as well'") (internal citations omitted); *Rita v. United States*, 127 S. Ct. 2456, 2470 (2007) ("*Booker* is now settled law and must be accepted as such") (Stevens J., concurring). The Court has also spoken specifically on the advisory nature of the cocaine Guidelines: "under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only." *Kimbrough*, 128 S. Ct. at 564. *See also Spears v. United States*, 129 S. Ct. 840, 843-44 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines").

distinctions the Seventh Circuit attempts to draw below. Nothing in *Booker*'s language left open the possibility that the Guidelines would remain mandatory in some contexts while merely advisory in others. As the remedial opinion states, "we repeat, given today's constitutional holding, [a mandatory Guideline system] is not a choice that remains open." 543 U.S. at 265. Contrary to the Seventh Circuit's position, *Booker* rendered the Guidelines advisory in all contexts; thus, its holding clearly applies to § 3582(c)(2) proceedings.

Booker in fact rejected the bifurcated conception of the Guidelines the Seventh Circuit adopts below. When the Government in *Booker* suggested that courts should regard the Guidelines as advisory in "any case in which the Constitution prohibits" and mandatory in all other situations, the Court held that position to be untenable: "we do not see how it is possible to leave the Guidelines as binding in other cases." 543 U.S. at 266. Among the reasons given for its conclusion was that "the Government's proposal would impose mandatory Guidelines-type limits upon a judge's ability to *reduce* sentences, but it would not impose those limits upon a judge's ability to *increase* sentences." *Id.* (emphasis in original).[9] Presented with the

[9] In an *amicus* brief filed in *Booker*, Senators Orrin Hatch (R-Utah), Edward M. Kennedy (D-Massachusetts) and Dianne Feinstein (D-California) argued that Congress intended a unitary system. *See* Brief for the Honorable Orrin G. Hatch *et al.* as *Amici Curiae* in Support of Petitioner 21-22, *United States v. Booker*, 543 U.S. 220 (2004) (Nos. 04-104 & 04-105) ("Congress intended the federal sentencing guidelines to be applied as a cohesive and integrated whole. . . . Attempting to apply the sentencing guidelines in a piecemeal fashion . . . would be inconsistent with the 'systematized sentencing system'

option of establishing a bifurcated system, the Court made a reasoned decision to adopt a unitary conception of the Guidelines.

B. The Seventh Circuit's Reasoning is Clearly Flawed

The Seventh Circuit's arguments favoring the mandatory application of the Guidelines to § 3582(c)(2) proceedings are well-articulated and comprehensive but ultimately unpersuasive. Accepting its position requires the Court to revisit a central part of *Booker*'s remedial rationale without good reason for doing so. To the extent other courts agree with the Seventh Circuit's reasoning in whole or in part, this reflects the fact that the Circuits are at sea in grappling with the scope of *Booker*'s remedial opinion, reaching to draw distinctions and find exceptions where none exist.

The Seventh Circuit implies that because *Booker* excised only 18 U.S.C. §§ 3553(b)(1) and 3742(e), *Booker* did not reach § 3582(c)(2) proceedings. 554 F.3d at 707-08 n.3; Pet. App. 10a n.3, *citing Starks*, 551 F.3d at 842; *Rhodes*, 549 F.3d at 840-41. This is a red herring because § 3582(c)(2) did not contain language rendering the amended Guidelines mandatory at the time *Booker* was decided. Specifically, U.S.S.G. § 1B1.10(b)(2)(A), providing that "the court shall not reduce defendant's

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that Congress intended to create. . . . Such a one-way lever would be grossly at odds with Congress's intent. In establishing the guidelines system, Congress made clear that a sentencing judge should take into account aggravating *as well as* mitigating factors") (emphasis in original) (internal citations omitted).

term of imprisonment under 18 U.S.C. § 3582(c) . . . to a term that is less than the minimum of the amended guideline range," was not incorporated into § 3582(c)(2) *until* 2008, well after *Booker*.[10] U.S.S.G. § 1B1.10(b)(2)(A) (2008). Therefore, the Court could not have severed and excised the mandatory provisions in § 3582(c)(2).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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[10] In 2004 when *Booker* was argued, U.S.S.G. § 1B1.10(b) contained no language making amended Guidelines mandatory in § 3582(c)(2) proceedings. The relevant text provided: "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)(2)(A) (2004) (emphasis added).

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