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Attorneys for Defendant
[DEFENDANT'S NAME]

UNITED STATES DISTRICT COURT
*** DISTRICT OF ***
*** DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
[DEFENDANT'S NAME],)
Defendant.)
_____)

NO. CR
NOTICE OF MOTION; MOTION FOR
REDUCTION OF SENTENCE
PURSUANT TO 18 U.S.C. § 3582(c)(2);
MEMORANDUM OF POINTS AND
AUTHORITIES
Hearing Date: [INSERT DATE]
Hearing Time: [INSERT TIME]

TO: UNITED STATES ATTORNEY ***, AND ASSISTANT UNITED STATES
ATTORNEY [AUSA'S NAME]:

PLEASE TAKE NOTICE that on [DATE], at [TIME], defendant, [NAME],
through his counsel of record, [ATTORNEY'S NAME], will bring on for hearing the
following motion:

MOTION

Defendant, [NAME], through his counsel of record, [ATTORNEY'S NAME],
hereby moves this Honorable Court for a reduction in the sentence imposed in this
case on [DATE]. This motion is made pursuant to 18 U.S.C. § 3582(c)(2) and is

1 based upon the attached memorandum of points and authorities, all files and records in
2 this case, and such further argument and evidence as may be presented at the hearing
3 on this motion.

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Respectfully submitted,

DATED: February __, 2008

By _____
[ATTORNEY'S NAME]

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 INTRODUCTION

4
5 On [DATE], [NAME] was sentenced for [TYPE OF CRACK OFFENSE, I.E.,
6 DISTRIBUTION, POSSESSION WITH INTENT TO DISTRIBUTE,
7 CONSPIRACY, ETC.], to serve _____ months of imprisonment and _____ years of
8 supervised release. The sentence was imposed under the sentencing guidelines
9 [QUALIFY THIS IF POST-BOOKER], with a base offense level computed under §
10 2D1.1 of the guidelines for a crack cocaine quantity of [INSERT AMOUNT IN
11 YOUR CASE] grams. That base offense level – under the guidelines in effect at the
12 time – was _____. Combined with other guidelines factors, it produced a guideline
13 range of _____. The sentence imposed by the Court was _____ months, [WHICH
14 WAS THE LOW END/WHICH WAS THE HIGH END/WHICH WAS WITHIN
15 THE RANGE/WHICH WAS BELOW THE RANGE/ABOVE THE RANGE,
16 BASED ON A [DESCRIBE DEPARTURE IF ANY]].

17
18 Subsequent to [NAME]’s sentencing – on November 1, 2007 – an amendment
19 to § 2D1.1 of the guidelines took effect, which, generally, reduces base offense levels
20 for most quantities of crack cocaine by two levels and, specifically, reduces the base
21 offense level for the [INSERT AMOUNT IN YOUR CASE] gram quantity of crack
22 cocaine in this case by two levels, to _____. See U.S.S.G. § 2D1.1. This amendment
23 was adopted in response to studies which raise grave doubts about the fairness and
24 rationale of the 100-to-1 crack/powder ratio incorporated into the sentencing
25 guidelines. See generally United States Sentencing Commission, *Report to Congress:
26 Cocaine and Federal Sentencing Policy* (May 2007) (hereinafter “2007 Sentencing
27
28

1 *Gall v. United States*, 128 S. Ct. 586 (2007); and *Kimbrough v. United States*, *supra*,
2 [NAME] brings this motion to reduce his sentence.

3
4 II.
5 ARGUMENT
6

7 A. [NAME]'S OFFENSE LEVEL SHOULD BE REDUCED FROM ____ TO
8 ____, AND THE GUIDELINE RANGE REDUCED FROM ____ TO ____
9 BASED ON THE AMENDMENT TO § 2D1.1.

10
11 18 U.S.C. § 3582(c)(2) provides as follows:

12 [I]n the case of a defendant who has been sentenced to a term of
13 imprisonment based on a sentencing range that has subsequently
14 been lowered by the Sentencing Commission pursuant to 28 U.S.C.
15 994(o), upon motion of the defendant . . . the court may reduce the
16 term of imprisonment, after considering the factors set forth in
17 section 3553(a) to the extent that they are applicable, if such a
18 reduction is consistent with applicable policy statements issued by
19 the Sentencing Commission.
20

21 Section 1B1.10 is the guidelines policy statement which implements 18 U.S.C.
22 § 3582(c)(2). Subsection (c) of that policy statement lists amendments that are
23 covered by the policy statement. And one of the amendments which is listed is
24 amendment 711 to the guidelines.¹ That is the amendment which reduced the base
25

26 ¹ This amendment is not listed in the November 1, 2007 Guidelines Manual
27 because the Sentencing Commission vote making it retroactive was on December 11,
2007. *See* United States Sentencing Commission News Release dated December 11,
28

1 offense level for crack cocaine offenses. *See* U.S.S.G., App. C, § 711.

2
3 Application of this amendment to the crack cocaine guideline in the present
4 case results in a decrease of the base offense level from _____ to _____, a decrease in
5 the total offense level from _____ to _____, and a decrease in the resulting guideline
6 range from _____ to _____. [THEN GO THROUGH CALCULATIONS TO
7 ESTABLISH THIS AND ALSO DISCUSS ANY OTHER ISSUES THAT ARE
8 RELEVANT SUCH AS MANDATORY MINIMUMS THAT LIMIT REDUCTION,
9 WHETHER CAN REOPEN QUESTION OF SAFETY VALVE, ETC.].

10
11 B. THE COURT SHOULD REDUCE [NAME]'S SENTENCE [TO [INSERT
12 SPECIFIC AMOUNT]/A SIGNIFICANT AMOUNT/SOME OTHER
13 CHARACTERIZATION YOU CHOOSE].

14
15 Based on the amendment to § 2D1.1, the Court should significantly reduce
16 [NAME]'s sentence. It follows from the discussion in the preceding section that the
17 amendment alone justifies a reduction of [INSERT DIFFERENCE BETWEEN
18 GUIDELINE RANGES] months.

19
20 [THIS PARAGRAPH ONLY IF ORIGINAL SENTENCING PRE-BOOKER,
21 BUT CONSIDER ADAPTING HICKS AND KIMBROUGH DISCUSSION EVEN
22 IF POST-BOOKER.] The Court should not stop there, however. At the time of
23 [NAME]'s original sentence, the Court was required to treat the guidelines as
24 mandatory, under the controlling law at that time. Since then, the Supreme Court has

25
26 _____
27 2007, available at <http://www.USSG.gov/PRESS/rel121107.htm>. *See also* 73 Fed.
28 Reg. 217-01 (2008).

1 held the guidelines in their mandatory form are unconstitutional and – through
2 severing 18 U.S.C. § 3553(b) – made them “effectively advisory.” *Booker*, 543 U.S.
3 at _____. *Booker* and subsequent Supreme Court cases clarifying it – namely, *Rita v.*
4 *United States, supra*; *Gall v. United States, supra*; and *Kimbrough v. United States,*
5 *supra* – have created a brave new world, in which the guidelines are but one of several
6 factors to be considered under § 3553(a). What the Supreme Court has described as
7 the “overarching provision” in § 3553(a) is the requirement that courts “‘impose a
8 sentence sufficient, but not greater than necessary’ to accomplish the goals of
9 sentencing.” *Kimbrough*, 128 S. Ct. at 570.

10
11 *Booker* and its progeny apply to the imposition of a new sentence under 18
12 U.S.C. § 3582(c)(2), moreover. The Ninth Circuit considered this question in *United*
13 *States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007) and held, put most succinctly, that
14 “*Booker* applies to § 3582(c)(2) proceedings.” *Hicks*, 472 F.3d at 1169. As the court
15 explained in more depth:

16 *Booker* explicitly stated that, “as by now should be clear, [a]
17 mandatory system is no longer an open choice.” Although the
18 Court acknowledged that Congress had intended to create a
19 mandatory guideline system, *Booker* stressed that this was not an
20 option: “[W]e repeat, given today’s constitutional holding, [a
21 mandatory Guideline regime] is not a choice that remains open .
22 . . . [W]e have concluded that today’s holding is fundamentally
23 inconsistent with the judge-based sentencing system that Congress
24 enacted into law.” The Court never qualified this statement, and
25 never suggested, explicitly or implicitly, that the mandatory
26 Guideline regime survived in any context.

1 In fact, the Court emphasized that the guidelines could not
2 be construed as mandatory in one context and advisory in another.
3 When the government suggested, in *Booker*, that the Guidelines be
4 considered advisory in certain, constitutionally-compelled cases,
5 but mandatory in others, the Court quickly dismissed this notion,
6 stating, “we do not see how it is possible to leave the Guidelines as
7 binding in other cases. . . . [W]e believe that Congress would not
8 have authorized a mandatory system in some cases and a non-
9 mandatory system in others, given the administrative complexities
10 that such a system would create.” In short, *Booker* expressly
11 rejected the idea that the Guidelines might be advisory in certain
12 contexts, but not in others, and Congress has done nothing to
13 undermine this conclusion. Because the “mandatory system is no
14 longer an open choice,” district courts are necessarily endowed
15 with the discretion to depart from the Guidelines when issuing new
16 sentences under § 3582(c)(2).

17 *Hicks*, 472 F.3d at 1170 (citations omitted).

18
19 Here, there are a number of non-guidelines factors that justify a sentence below
20 even the new guideline range. [EITHER HERE OR BELOW, INSERT ARGUMENT
21 ABOUT ANY § 3553(a) FACTORS AND *BOOKER/GALL/KIMBROUGH*]
22

23 [EITHER CONTINUATION OF LAST TEXT SENTENCE ABOVE OR NEW
24 PARAGRAPH] One [OR ANOTHER?] consideration to which the Court should give
25 particular weight is a consideration expressly recognized by the Supreme Court in
26 *Kimbrough v. United States, supra* as a ground for not following the guidelines – the
27

1 questionable provenance of the crack/powder ratio. As the Government itself
2 acknowledged in *Kimbrough*, “the Guidelines ‘are now advisory’ and . . . , as a
3 general matter, ‘courts may vary [from Guidelines ranges] based solely on policy
4 considerations, including disagreements with the Guidelines.’” *Kimbrough*, 128 S. Ct.
5 at 570 (quoting Brief for United States 16). While the government then tried to
6 distinguish policy disagreement with the 100-to-1 crack/powder ratio from other
7 policy disagreements, the Supreme Court squarely rejected that argument. *See*
8 *Kimbrough*, 128 S. Ct. at 570-74.

9
10 Indeed, the Court suggested that policy disagreement in this area was even *more*
11 defensible than in other areas. It noted that “in the ordinary case, the Commission’s
12 recommendation of a sentence will ‘reflect a rough approximation of sentences that
13 might achieve § 3553(a)’s objectives,’ *id.* at 574 (quoting *Rita*, 127 S. Ct. at 2465),
14 and so “closer review may be in order when the sentencing judge varies from the
15 Guidelines, based solely on the judge’s view that the Guidelines range ‘fails properly
16 to reflect § 3553(a) considerations’ even in a mine-run case.” *Kimbrough*, 128 S. Ct.
17 at 575. The Court then explained that this was not the case with the crack cocaine
18 guidelines, however.

19 The crack cocaine Guidelines, however, present no occasion
20 for elaborative discussion of this matter because those Guidelines
21 do not exemplify the Commission’s exercise of its characteristic
22 institutional role. In formulating Guidelines ranges for crack
23 cocaine offenses, as we earlier noted, the Commission looked to
24 the mandatory minimum sentences set in the 1986 Act, and did not
25 take account of “empirical data and national experience.” Indeed,
26 the Commission itself has reported that the crack/powder disparity

1 produces disproportionately harsh sanctions, *i.e.*, sentences for
2 crack cocaine offenses “greater than the necessary” in light of the
3 purposes of sentencing set forth in § 3553(a). Given all this, it
4 would not be an abuse of discretion for a district court to conclude
5 when sentencing a particular defendant that the crack/powder
6 disparity yields a sentence “greater than necessary” to achieve §
7 3553(a)’s purposes, *even in a mine-run case*.

8 *Kimbrough*, 128 S. Ct. at 574-75 (emphasis added) (citations omitted).

9
10 These concerns are only partially assuaged by the recent amendment reducing
11 crack cocaine offense levels, moreover. This also was recognized by the Supreme
12 Court in *Kimbrough*:

13 This modest amendment yields sentences for crack offenses
14 between two and five times longer than sentences for equal
15 amounts of powder. (Citation and footnote omitted.) Describing
16 the amendment as “only . . . a partial remedy” for the problems
17 generated by the crack/powder disparity, the Commission noted
18 that “[\a]ny comprehensive solution requires appropriate legislative
19 action by Congress.”

20 *Kimbrough*, 128 S. Ct. at 569 (quoting 2007 Sentencing Commission Report, *supra*
21 pp. 3-4 at 10). *Kimbrough*’s rationale for varying from the crack guidelines therefore
22 remains even after the new guideline is applied.

23
24 [CONSIDER APPLYING THIS *KIMBROUGH* ARGUMENT TO YOUR
25 SPECIFIC CASE IN SOME WAY; FOR EXAMPLE, BY POINTING OUT WHAT
26 SENTENCE WOULD HAVE BEEN IF IT WAS JUST POWDER]

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[INSERT ANY ARGUMENT ABOUT ANY § 3553(a) FACTORS AND
BOOKER/GALL/KIMBROUGH NOT ALREADY INSERTED ABOVE]

III.
CONCLUSION

The Court should adjust [NAME]’s sentencing guideline range downward to _____. It should then [RECOMMEND SPECIFIC SENTENCE AND/OR MORE GENERAL URGING FOR LOWER SENTENCE, IF DON’T WANT TO RECOMMEND SPECIFIC SENTENCE].

Respectfully submitted,

DATED: February __, 2008

By _____
[ATTORNEY’S NAME]